

19 December 2007

The Rt Hon James Purnell MP  
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### **Trust in Broadcasting and use of PRS**

Thank you for your letter reflecting the wide public concern about major failures in the operation of premium rate services ("PRS") by Public Service Broadcasters.

As you note, this issue has been at the forefront of Ofcom's activity over the last six months. As soon as evidence of a systemic problem, rather than unrelated individual failures, became apparent, we commissioned a thorough and searching inquiry from Richard Ayre (currently a non-executive member of the Ofcom Content Board and formerly Deputy Chief Executive of BBC News). Quite apart from the compliance failures that resulted in individual Broadcasting Code breaches, his inquiry detected a systemic culture of denial among the main broadcasters about their responsibility to ensure that the programmes that they devise, commission or produce fully deliver on the transactions they offer to viewers.

This has been confirmed by our own subsequent investigations. We have taken and will continue to take strong action in relation to individual cases. For example, we have already sanctioned the BBC with a fine, and imposed a fine of £2 million - the largest Ofcom has yet imposed - on GMTV. Today we announced fines totalling £1.5 million on Channel 4 for breaches of the Code in relation to the programmes 'Richard and Judy' and 'Deal or No Deal'.

In some cases, broadcasters have commissioned their own reviews. While this is helpful, it is of course necessary for Ofcom to conduct its own full investigation. ITV for example commissioned a review by Deloitte of some 60 programmes or series shown on ITV which used PRS.

The Deloitte Review publicly identified 7 programmes or series where failures occurred ('Soapstar Superstar', 'Ant & Dec's Saturday Night Takeaway', 'Ant & Dec's Gameshow Marathon', 'I'm a Celebrity ... get me out of here', 'X-Factor', 'Dancing on Ice' and 'The British Comedy Awards'). We have therefore asked ITV for the full findings by Deloitte on each of these programmes and for all other relevant information on all of these programmes (including of course information necessary for us to be able to assess the most recent set of complaints received over the past few days). This should assist us to complete our thorough investigation into these programmes.

In addition we have sought explicit assurance from ITV that Deloitte were able to undertake an exhaustive review of all ITV's programmes which used PRS and that all

issues of concern have now been identified. ITV has admitted serious cultural and editorial failures; part of our investigation will focus on how the current compliance arrangements work within the family of Channel 3 licensees.

Individually and cumulatively, our judgements and the sanctions that accompany them are designed to leave broadcasters, producers and the public alike in no doubt about where the lines are drawn, and what the consequences are of overstepping them.

To reflect the seriousness of the issue, we have proposed to amend the licences of all commercial broadcasters to require an appropriate protection for those who interact with their programmes. Our consultation has closed, and we will be announcing our decision in a statement in the New Year. We consulted on a number of practical options for achieving an appropriate level of external scrutiny. The outcome will ensure that all broadcasters will have to be able to demonstrate that their internal compliance procedures meet the standards expected and that viewers and listeners are adequately protected.

That outlines the action that we, as regulators using our existing powers, currently have in hand. Two key issues remain.

The first is the extent to which broadcasters and producers will themselves go beyond the provisions of the Broadcasting Code with a framework of good practice that can reassure audiences and restore their trust. This is essential because, as we all recognise, regulatory action alone cannot achieve this. Regulators can deal with the consequences of failure; but the necessary culture of straight-dealing and integrity can only be engendered from within the organisations themselves.

The issue was addressed at a seminar which Ofcom and the BBC Trust jointly hosted at the end of last month. This involved leading representatives from the main broadcasters, the cable and satellite group and the Radio Centre who committed to working together across a range of training, best practice, editorial and compliance measures to help rebuild audience confidence and trust. Participants agreed to meet again next summer to review progress against these commitments.

The second issue is the extent to which the current legislative and regulatory framework gives Ofcom sufficient powers to deal with these issues. This breaks down into three essential questions that you asked in your letter.

### **Are the powers at our disposal sufficient?**

Broadcasters must ensure that they comply with Ofcom's statutory codes and the conditions of their licence. Under the Communications Act of 2003, Ofcom can impose sanctions, for failure to comply with the code or licence, including fines of up to 5% of a broadcaster's qualifying revenue. For Public Service Broadcasters (excluding the BBC) this could run into millions of pounds. In certain extreme cases we have the power to shorten or revoke the licence.

### **Are there implications for the policy framework?**

The Communications Act 2003 envisages two broad kinds of broadcast standards regulation: The first is the regulation of **editorial** content which is concerned with balancing broadcasters' freedom of expression with measures which provide adequate protection to prevent the audience as a whole being exposed to harmful or offensive material. It deals with the material that is actually broadcast rather than the processes that brought it to air. The second is the regulation of **advertising** content, which deals with

harm and offence but is also explicitly concerned with *consumer protection*, with an emphasis on consumers not being subjected to misleading material.

Transactional PRS services in Participation TV on the scale we have seen in recent years were not envisaged when the Act was drafted. They do not fit comfortably within the existing frameworks. They arise in the main within programmes rather than as advertising, but call for the sort of consumer protection philosophy and measures that our statutory advertising powers envisage.

So far, a purposive construction of existing Codes and powers has enabled us to deal with problems as they arise. But we are concerned that, at some point, technology or service innovation in Participation TV will reach the point where even the most creative interpretation of our editorial regulatory powers could not be brought to bear. To that end, we propose to work with your officials over the coming months to develop proposals which can address the issues more directly, though their implementation would probably need to await a suitable legislative opportunity.

### **Is the enforcement regime suitable for the task?**

As you are aware, there are two regulators who have been directly involved in the regulation of this programme content – PhonepayPlus, formerly Icstis, and Ofcom (although the Gambling Commission is responsible, in relevant cases, for interpreting and enforcing the Gambling Act 2005). While Ofcom regulates broadcasters, PhonepayPlus regulates the telephone operators providing the PRS service.

In their report earlier this year, the CMS Select Committee noted the potential for confusion where two regulators have duties that involve the same content and very similar issues, and called on Ofcom more openly and transparently to take the lead. In our response to their report, we agreed that it was appropriate for Ofcom to take the lead role, in setting the regulatory framework and ensuring close co-ordination of approach and investigation. This has been demonstrated, over the summer, with an increasing degree of co-ordination, for instance in the GMTV case, where PhonepayPlus dealt with the service provider and we investigated the broadcaster on all accounts.

However, we concluded that this process had not gone far enough and that a clearer relationship with more direct accountabilities is needed. So we have established a new relationship, whereby PhonepayPlus will become an Agency of Ofcom to whom we can give direction, together with the new formal Framework Agreement that will codify the necessary changes. We welcome the positive spirit with which the Board of PhonepayPlus has approached this change to the relationship. And I am confident that, should PRS issues overlap between Ofcom and PhonepayPlus in future, we now have the mechanisms in place to enable Ofcom demonstrably and effectively to take the clear lead from the outset wherever this is appropriate.

**Ed Richards**