

RadioCentre response to Ofcom's Participation TV Consultation

Background

1. RadioCentre formed in July 2006 from the merger of the Radio Advertising Bureau (RAB) and the Commercial Radio Companies Association (CRCA). Its members consist of the overwhelming majority of UK Commercial Radio stations, who fund the organisation.
2. The role of RadioCentre is to maintain and build a strong and successful Commercial Radio industry - in terms of both listening hours and revenues. As such, RadioCentre operates in a number of areas including working with advertisers and their agencies, representing Commercial Radio companies to Government, Ofcom, copyright societies and other organisations concerned with radio, and working with stations themselves. RadioCentre also provides a forum for industry discussion, is a source of advice to members on all aspects of radio, jointly owns Radio Joint Audience Research Ltd (RAJAR) with the BBC, and includes copy clearance services for the industry through the Radio Advertising Clearance Centre (RACC).
3. RadioCentre also responded to Icstis's consultation on a prior permission regime for PRS used in TV and radio programmes. A copy of that response is attached for ease of reference. We have largely avoided duplicating material from the Icstis response in making this submission, noting Ofcom's statement that Ofcom and Icstis will assess responses to both consultations concurrently. The triple regulatory intervention in this area (with involvement from Ofcom, Icstis and the Gambling Commission) has not always worked in the interests of broadcasters and listeners. Consequently, we welcome the implication that the regulators will take a more joined-up approach in the future.
4. In our response to this earlier Icstis consultation we accepted the extension of the prior permission regime into radio. In this response we agree that broadcasters should be made responsible for ensuring compliance in their use of PRS. Taken together, these proposals appear likely to secure regulatory objectives in relation to PRS.

Overview

5. Over the last year, concerns have been raised about the way in which broadcasters provide opportunities for viewers and listeners to participate in programming. The most high profile problems have been confined to television, but we accept that there have also been a small number of compliance issues in radio.
6. The Commercial Radio industry is acutely aware of the importance of ensuring that listeners can trust their radio stations, given the specific role of listener participation in radio programming. Yet radio has been subject to the same fragmentation of the media market and competition for advertising revenue that have put pressure on broadcasters' finances. This has inevitably led our sector to explore new ways of meeting the high fixed costs of running radio services, including use of PRS.
7. It is against this economic background that errors have occurred in the way that PRS – still a relatively new phenomenon – is used in television, and to a lesser extent, radio. Inevitably these mistakes have been grouped together in the public eye. Yet it would be simplistic to suggest that one failure of compliance by a TV or radio broadcaster or PRS service provider is necessarily the same as another. For instance, some were the result of broadcasters failing to provide sufficient transparency about the nature of the proposed interaction being offered, whilst others were the consequence of operational mistakes. Some have concerned programming content or Broadcasting Code issues rather than the way in which communication was handled. Each has also varied in scope and severity, based on the public's expectations of that broadcaster or programme. The most serious failings have occurred on television.
8. We would suggest that there are further differences, derived from the intrinsic differences between radio and television as media. These are discussed below. It is our perception that

this consultation devotes insufficient attention to these specific nuances, with the result that the provisional conclusions reached by Ofcom are not necessarily those which would have been suggested by a detailed exploration of the market for participation on radio. In particular, we believe that Ofcom should reconsider whether its proposals are properly targeted towards areas in which there have been multiple reoccurrences of a specific compliance problem.

9. We also note a further anomaly, namely that television and radio are not the only media in which operators encourage participation through PRS services. We wonder, for instance, whether the newspaper industry would have been associated with the public scrutiny of competitions to which the television industry has been exposed, if it shared a similar regulatory regime in the way that radio does. For instance, if Ofcom's proposed requirement for third party verification were to go ahead, our members would be subject to a cost burden whilst newspapers could continue to run sudoku and crossword competitions requiring entry through PRS, without any form of paid-for external scrutiny. Although this is outside of Ofcom's jurisdiction we believe that Icastis, now PhonepayPlus, may be in a position to consider whether Ofcom's proposed regulatory intervention is likely to have a disproportionate impact in one part of the market for gaming which appears in mainstream media and requires payment for entry via telephony.

Participation on Radio

10. Radio has a much longer-established tradition of participation than television, to the extent that radio broadcasters have extensive experience in handling their listeners' interest in interacting with programmes. Its 'liveness' and reliance on audio rather than pictures mean that radio engenders a much closer bond between a presenter and listener than television. In fact research amongst radio listeners conducted in June 2007 revealed that 73% would describe radio as a "trustworthy" medium, compared to 36% for TV and 16% for newspapers¹. This gives radio a particular imperative to ensure that it treats its listeners with honesty and respect.
11. In recent years, the development of PRS has offered radio broadcasters a practical means of facilitating listener interaction. Not every radio station employs PRS, but those which do primarily use them to manage listener texts, with the cost of a text message often being around 25-35p. This charge pays for the third party telephony service which delivers the listeners request to the studio presenter electronically, and generally there is little or no leftover profit from this process for the radio station. For stations with a higher volume of requests this has emerged as the most reliable and cost-effective way of managing the quantity of requests that the introduction of text messaging has created. Listeners have engaged with this approach, suggesting that they see text messaging as the modern day equivalent of sending a letter, with a single text costing no more than the price of a stamp.
12. Clearly, it makes a substantial difference whether the broadcaster profits substantially from the charge imposed on a listener by use of PRS, or whether they primarily use it to cover the cost of the relevant feature or promotion. In the case of the latter, the charging level is naturally regulated by listener expectations, with stations choosing to run their studio text lines on a not-for-profit basis because they recognise the importance of participation to their programming.
13. This means that if there was a substantial increase in the cost of employing PRS, for instance due to the introduction of a third-party verification requirement, there would be a strong incentive to discontinue its use in these not-for-profit areas. Such a decision would be made on business grounds, given that PRS would no longer be able to provide the desired service at a price which listeners were happy to pay. This would ultimately be to the detriment of all parties and the benefit of none. Consequently we suggest that the proposed regulation around third party verification risks having serious and unforeseen consequences for a significant and legitimate area of our operations, a view which we discuss in greater detail later.

¹ 'The Big Listen' Phase 3 (administered by YouGov): Results of an online survey of 10736 commercial radio listeners completed between 8th - 19th June 2007

14. A secondary area of PRS usage by radio stations is in promotions and competitions where the broadcaster does intend to turn a profit (such as reverse auctions and dedicated quiz programming). In these cases the cost of participation is often higher, although radio broadcasters are naturally obliged to comply with the existing Broadcasting Code and Icstis Code of Practice around issues such as fairness and transparency. There has been one failure of compliance of a more serious kind in this area by a radio broadcaster, which has been reported in the press and which has prompted that operator to scale back its use of PRS, suggesting that the existing regulation is sufficient to resolve such issues.
15. However, a number of our members do continue to operate competitions and promotions on a profit making basis through use of PRS, and RadioCentre strongly supports all of its members having the right to make this decision on business grounds. Companies operating across a range of media have discovered that although this type of content can polarise opinion, there is a significant group of listeners, readers and viewers who enjoy paying in order to participate in promotions. In fact radio programmes of this type generally obtain similar reach and higher listening hours than the programmes which they replaced.
16. Amidst heightened public concern surrounding use of PRS in general, radio broadcasters have responded by reviewing their internal processes and making changes where necessary. Some have scaled back their activity altogether, others have reviewed their relationships with their premium rate service providers, while others have made additional training available for presenters to ensure future compliance. In other words, each has targeted their individual response based on the specific needs of their business, and in recognition of the burden of responsibility which they have towards their listeners.
17. Throughout this process, the radio industry has engaged with both Icstis and Ofcom, stressing the differences that exist between radio and television in terms of how listeners and viewers interact with each medium. At the same time, we have sought to highlight the extent to which the problems in television are of a different order to any in radio, pointing out that our industry is keen to minimise compliance problems as far as possible. This is obviously not to understate the severity of instances in which broadcasters have indeed contravened existing regulation.
18. We believe that the industry's willingness to respond in the face of public concern provides evidence that there is not an urgent need to introduce significant quantities of new regulation. There is a commercial and business imperative towards responsible behaviour which naturally minimises the number of compliance failings. Indeed this has been reinforced by recent events, which have boosted the industry's understanding of what remains a relatively new area of commercial activity. As Ofcom has said itself publicly, the last year has witnessed failures of compliance rather than regulation, suggesting that the bulk of the existing regulation around competitions and use of PRS is fit for purpose.
19. It is against this background that we have supported some but not all of Ofcom's proposals in our answers to the consultation questions (below). There is a strong perception amongst our members that this consultation does not draw a sufficient distinction between television and radio, devoting little attention to the shape of the radio market and the nature of PRS usage within it. Indeed given the title of this consultation, a number of our members were unaware that it had any implications for radio licensees until alerted to this by others within the industry. As such, we do not believe that Ofcom has based its third-party verification proposals upon a sufficient understanding of their potential cost for the Commercial Radio sector. This is particularly evident in the impact assessment, which refers almost exclusively to PTV.

Responses to the Consultation Questions

20. In answering Ofcom's questions we have restricted our comments to issues affecting the radio sector.

Protection of viewers and consumers in all PTV

Q5. Do you agree that the draft licence obligations should not be limited to television but should also apply to radio broadcasters? Please provide reasons.

21. We agree that broadcasters should be made responsible for all arrangements for the management of communication, including telephony, between members of the public and the Licensee or the Licensee's contractors or agents where such communication is publicised programmes. This seems a sensible way to proceed, given radio broadcasters' existing propensity towards safeguarding the relationship which they have their listeners. In practice we believe that this approach is also likely to reduce ambiguity in the supply chain with regards to PRS.

Q3. Do you agree that there is a need for broadcasters to obtain independent, third party verification that they are in fact complying with the draft licence obligations set out in Paragraph 2 of the draft licence variation? If so, which of the options for verification discussed in Section 4 do you think is most appropriate? Are there other appropriate options? Again, please provide reasons.

22. We believe that this requirement is neither proportionate nor targeted to the specific regulatory problems which Ofcom wishes to address. In fact it risks having substantial unintended consequences, constituting both a cost to our industry in terms of time and resources, and a restriction on creativity and innovation. There are around 70 different owners of Commercial Radio licences in the UK, each of which expects to incorporate some element of interaction into its programming. The impact assessment lacks any significant detail on the potential cost of this regulation for these radio businesses, although it does suggest that the cost would be "limited to being in the tens of thousands pounds per broadcaster"². It is not clear from this whether the cost of auditing would be incurred on an individual station basis, or at a broader group level, or indeed whether every broadcaster would be liable. Even assuming that the individual cost for each of the UK's 320 analogue licences and 30 digital services would be at the lower end of the scale, the total cost to our industry would be substantial. A mean cost of £3000 per station would incur a total industry cost of £1million for just one round of audits.

23. Commercial Radio has encouraged listeners to interact with its programmes since long before the wide-spread introduction of PRS, yet the draft licence variation proposed by Ofcom appears to require that a licensee audit its arrangements for the management of all communication publicised in programmes, including that which does not use PRS. The consultation document itself suggests that Ofcom's intention is to only require auditing for PRS activity, but if this is the case, we suggest that this needs to be made more explicit in the final agreed licence variation.

24. Even if this regulation were to apply only to communication via PRS telephony, we do not believe that it would constitute a proportionate or targeted response to a specific regulatory problem. This is partly because the radio industry's use of PRS is of a fundamentally different order to that of television. Firstly, we estimate total Commercial Radio PRS revenue at [redacted]³. As a point of comparison, Mediatique found that the market for Participation TV services in 2007 will generate gross revenues of approximately £118million⁴. Secondly, as already outlined, PRS is mainly used as a cost neutral way of managing interaction such as music track requests and phone-in contributions. A number of our members have indicated that they would be likely to suspend all use of PRS for such activities if they were required to subject it to auditing, even on a one-off basis. Given that these largely consist of companies with no record of compliance problems in this area, and given that the result would be a loss

² Ofcom, 'Participation TV: protecting viewers and consumers, and keeping advertising separate from editorial', July 2007, p. 51

³ This figure is informed by discussions with RadioCentre members about their individual PRS usage

⁴ Mediatique, 'Participation TV: market overview', March 2007

of elements of programming which is valued by listeners, such an approach would appear to be counter-productive.

25. We do recognise that in some instances, there may be potential value in undertaking third party auditing of PRS usage. At least one of our larger members has suggested to us that there are sometimes sensible business reasons for obtaining proper verification in order to ensure that internal procedures are suited to ensuring compliance. Yet this does not mean that there should be a regulatory requirement for each of them to undertake such audits, and certainly not on a regular basis. Unlike television, the Commercial Radio industry consists of small and medium sized businesses for which this requirement would tie up time and resources, and perhaps more crucially, stifle their ability to innovate and develop new programming ideas.
26. We believe that Ofcom needs to do further work to understand the role of participation in radio and the role of PRS within this. The regulator has a responsibility to interrogate the perception that there is a general problem with viewer/listener trust to discover the specific compliance problems that lie behind that. Any regulatory action which follows can then be targeted at the individual issues which Ofcom wishes to address, rather than introducing a layer of onerous scrutiny to an area of activity in which there is no evidence on an endemic problem. We would of course be willing to assist Ofcom as it builds its understanding in this regard.
27. The consultation invites respondents to make other suggestions about how to secure future compliance. We believe that the most appropriate framework would be self-regulatory, prompted by the new licence variation which places the burden of responsibility squarely on broadcasters' shoulders, and the proposed Icstis regulation around prior permission.
28. At the very least, we suggest that Ofcom does additional work to ensure that its third-party verification proposals are proportionate. One way of tailoring such a requirement to reflect the extent of a broadcaster's PRS activity might be through careful use of thresholds. In the current market, it seems to us that broadcasters for whom PRS brings in 50% of their income (such as dedicated PTV operators) might be reasonably expected to carry out regular auditing. This would allow compliance to be secured in smaller companies through the existing regulation and a new licence amendment enshrining the principle of broadcaster responsibility.
29. In practice, we envisage that imposing this requirement on those broadcasters with the heaviest reliance on PRS would create a benchmark for best practice which would filter down throughout the rest of the industry, setting expectations for broadcasters and viewers/listeners alike.

Q4. Do you have any comments on the draft licence variation set out in Annex 5? Please support your comments with adequate explanation and provide drafting proposals as appropriate.

30. The text proposed in paragraphs 1, 2(a) and 2(b) strikes us as appropriate, in line with our response to question 5. We agree that broadcasters should take formal responsibility in this way, and believe that the requirements in paragraph 2 largely bring together existing rules and approaches. We do not support the introduction of options A, B or C in relation to paragraph 3.
31. If Ofcom was to come up with a verification requirement which we could support, the resulting licence variation would have to explicitly state that it related only to communications involving PRS.

Separation of editorial and advertising in dedicated PTV

Q6. Which of the options proposed in Section 6 do you believe is most appropriate to ensure separation of advertising from editorial content? Please explain why.

32. RadioCentre does not have a strong preference for any of the options proposed by Ofcom in this area. This is because only Option 2 extends to radio and it largely reflects a clarification of existing rules and practices. Nevertheless we do have a stake in efforts to ensure that trust for broadcasters remains high, given that our services are increasingly available side by side

as platforms converge. For this reason we support the regulator's efforts to restrict any dishonest or fraudulent activity on the part of dedicated PTV operators.

Q7. Do you have any comments on the draft new rules and guidance in respect of Options 2, 3 and 4 set out in Annex 6? Please support your comments with adequate explanation and provide drafting proposals as appropriate.

33. We have two observations. The first relates to the new guidance that "Payment by cash, cheque, credit card or money transfer is not permitted"⁵. It strikes us that this regulation has the potential to restrict methods of paid-for participation which might develop in the future, for instance by making use of web-based applications. We are aware of at least one PRS operator which is able to process payments for online gaming via Paypal. This operator also works with broadcasters on on-air promotions so it is possible to envisage greater convergence between these activities in the future. We note the observation in paragraph 6.23 that "Whilst most PTV involves PRS, as technology develops, similar forms of communication, where the charging mechanism is intrinsic, may develop in the future"⁶. We agree, and encourage Ofcom to ensure that new regulation cannot have any unforeseen consequences at a later stage – for radio as well as PTV.

34. Secondly, we note the guidance that "Dedicated participation programmes must not use a caller's number to generate further contact by voice service, SMS, MMS or other means."⁷ We agree that a caller's number should not be used for any unrelated marketing or promotional purpose. However we note that in many instances it may be appropriate for a listener to receive a text message to confirm receipt of, for instance, a competition entry made via PRS telephony. With this in mind, we suggest that this restriction should be amended to exclude further contact which is related to the listener's initial response.

Q8. Do you agree that Option 2 clarifies the existing provisions of the Broadcasting Code and therefore should not be limited to dedicated PTV only, but should apply to all editorial content (on both television and radio) which invites viewers to pay to take part? Please give reasons.

35. We agree that Option 2 does indeed clarify the existing provisions of the Broadcasting Code. For this reason we are satisfied that it could apply to radio, subject to the amendments suggested above.

Q9. Has Ofcom correctly identified, in Section 6 and the Impact Assessment in Annex 7, the various impacts arising from each option for dedicated PTV? Again, please give reasons.

36. As previously stated, our concern with the impact assessment in Annex 7 is that it lacks any significant analysis of the radio market and PRS usage within it. The presence of reports by Mediatique, The Communications Research Group and Essential suggests that the scope of Ofcom's work on participation in broadcasting was widened to include radio comparatively late in the day – presumably prompted by the Ayre Inquiry. We believe that Ofcom needs to undertake further impact assessments in relation to radio before finalising its proposals.

RadioCentre, October 2007

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⁵ Ofcom, 'Participation TV: protecting viewers and consumers, and keeping advertising separate from editorial', July 2007, p. 47

⁶ Ofcom, 'Participation TV: protecting viewers and consumers, and keeping advertising separate from editorial', July 2007, p. 30

⁷ Ofcom, 'Participation TV: protecting viewers and consumers, and keeping advertising separate from editorial', July 2007, p. 47