

## INTRODUCTION

1. SBS Broadcasting Networks Limited (SBS) operates eight channels which are licensed by Ofcom. We have reviewed Ofcom's proposals to regulate the participation television genre and wish to make certain submissions in relation to them.
  - 1.1 We accept that participation television (especially Quiz TV) has become a 'tarnished' genre due to the almost inexplicable behaviour of several major UK licensed broadcasters which has been uncovered over the last twelve months. We note that those broadcasters have been fined by Ofcom. In addition, several PRS telecoms operators have also been fined heavily by ICTSIS where their operational performance has breached ICTSIS rules.
  - 1.2 Against this background, there has been an increasing clamour on the part of a number of interested organisations (including Ofcom's own commissioned report – by Richard Ayre) to increase regulation of this genre of programming. In particular there has been a call to include a licence condition in all Ofcom licensees. We will comment on the nature of the proposed licence condition later in this submission.
  - 1.3 Our concern is that all broadcasters have been tarred with the same brush – in effect guilty of misleading their viewers whether this is proven or otherwise. The innocent are being made to pay for the crimes of the guilty. We question whether this is fair, in accordance with best regulatory practice and consistent with Ofcom's statutory duties. For example, Section 3(3) of the Communications Act 2003 provides that in performing its statutory duties Ofcom in all cases must ensure that its regulatory activities are transparent, accountable, proportionate, consistent and targeted only in cases in which action is needed. As Richard Ayre concluded "All in all there is strong reason to expect that instances of future non-compliance will be substantially fewer than in the past" (see para1.33 of the Ayre Report).

- 1.4 Clearly, Ofcom's proposals meet these statutory criteria where broadcasters' prior conduct shows that they have engaged in misleading and deceptive conduct in operating Quiz TV programs. It is difficult to understand let alone explain their actions.
- 1.5 However, there should not be a "one size fits all" approach adopted by Ofcom to regulation of this program genre. In our view, the variation of all Ofcom licences to insert the proposed condition should be used only as a last resort. The principles laid down in the proposed condition should be regarded as best practice for all broadcasters who operate PTV services. Where, it is demonstrated that the broadcaster has failed to meet those standards, then Ofcom should impose the licence condition. In such circumstances, the broadcaster should be required to produce third party verification annually to Ofcom that its systems meet the requirements of the proposed licence condition.
- 1.6 We disagree with the conclusion of the Ayre Inquiry that complaint based regulation is no longer an appropriate regulatory mechanism for broadcasters who operate PTV Services. What is apparent from the Ayre report and Ofcom's own consultation paper, is the concern that the broadcasters who have cavalierly and cynically exploited their viewers in respect of such services are the cornerstone of the UK broadcasting industry – the BBC, ITV, GMTV, Channel 4 and Channel 5. Therefore, the conclusion is that if these broadcasters have behaved in such an irresponsible way, so must everyone else who run PTV services. Action must be taken to ensure all broadcasters are aware of their responsibilities if they schedule such programming. To quote from Richard Ayre's report, it satisfies general public clamour that 'something should be done'. We agree, take such action against them – they warrant it. But to apply this regulatory response across the board is equally unwarranted. For example the Ayre Report says that there have been very few complaints about services other than viewer competitions and quizzes (see para 6.16 of the Ayre Report).
- 1.7 The perceived weakness with complaint led investigation in relation to PTV services apparently is that the viewer will not know if he is being "ripped off" because his call

has been discarded. Complaints about such services have relied on whistle blowers to make the broadcasters come clean. In relation to the chat tv services, we believe that the viewers would know if they are receiving the service they were contracted to receive. The fact that there have been few complaints is because those broadcasters have treated their viewers fairly and honestly. Therefore our concern is that the decision to regulate all PTV services in the proposed manner is based on the inadequate performance of a few broadcasters who chose to mislead or deceive their viewers in how they operate their tv quizzes or competitions. Their failings are deemed to be universal. In our view, this is not the basis upon which an evidence based regulator should be proposing to act. It is neither fair nor warranted, even on Ofcom's own investigations.

1.8 To a certain extent this response also ignores that broadcasters continue to be subject to the Broadcasting Code in ensuring that competitions and quizzes etc. that they run are fair and that any promotion of PRS numbers within programming is justified. The Broadcasting Code requires compliance with the ICTSIS Code as well. As the response of both Ofcom and ICTSIS to the past indiscretions of certain broadcasters has shown, breach of the Code in this area will not be tolerated and will be punished.

1.9 In short, we believe that the proposed licence condition should be used as a back stop power which would become operative where there has been proven failure by the broadcaster to meet the best practice in terms of the provision of its PTV Services. In this way, those licensees who broadcast PTV Services that have been shown in the past or subsequently fail to adhere to best regulatory practice for this programming genre are put under direct regulatory scrutiny by Ofcom and with the consequences of a potential licence breach if there is further repeated breach of the licence condition which applies to PTV Services. On the other hand, broadcasters who continue to operate such PTV Services in accordance with best regulatory practice are able to operate without the direct sanction of a licence breach for so long as their PTV Services meet best practice for the industry. However such broadcasters must be ever

mindful that failure to meet the best practice will mean that the licence condition will be imposed upon them as part of their licence. A limited degree of self regulation is allowed for such broadcasters but with an immediate regulatory sanction thereafter if there is a failure to meet best practice. The imposition of the licence condition would depend upon a complaint being made and that complaint being upheld by Ofcom. However no broadcaster can in future be under any illusion that this is an area of regulation where Ofcom intends to operate anything other than a zero tolerance policy. Our proposal does not allow a broadcaster to excuse its conduct by saying "but we ticked all the boxes specified; surely that is enough?". Nonetheless until it is proven that their conduct fails to meet best practice, a broadcaster should not be subject to the sanction of potential loss of licence. This was not felt the appropriate sanction for the publicly identified guilty miscreants to date and it is unfair that all broadcasters are not treated in the same way. What our proposal does is to treat all broadcasters in the same way – there is an assumption that broadcasters operate in accordance with best practice in the provision of PTV services unless and until it is shown otherwise. But once such a failure is detected, thereafter the regulatory regime applies directly to that broadcaster.

## **Protection of viewers and consumers in all PTV**

2. Question 1. *Do you agree that television broadcasters should be directly responsible for PRS in programmes and also for other forms of communication where viewers seek to interact with programmes. Please explain why.*
- 2.1 We accept that broadcasters should be responsible for PRS in their programmes. Given what has transpired in the UK, certain broadcasters have cynically exploited their viewers.
- 2.2 However, we are concerned that this responsibility extends to all forms of communication. As we understand it, on this basis, the broadcaster would be responsible for the internet and the mail delivery system. For example where a "free

web entry" is offered as an alternative to a PRS call, is the broadcaster responsible for delays in the delivery of the entry because of "shortcomings" in the network (i.e. the Internet).

- 2.3 Alternatively, if the alternative "free entry route" is ordinary mail delivery and there is a mail strike threatened, is the broadcaster responsible if it goes ahead with its PTV programming and the reason for the delay is the deficiencies in the mail system?

Surely Ofcom is not requiring that any third party audit of the compliance arrangements be extended to such communications networks.

- 2.4 In our view, these examples are only illustrative of a basic point. The regulatory response should be designed to cure the perceived regulatory failing. Especially in a situation where the proposed regulatory action is to insert a licence condition. In summary, we do not believe that it is appropriate to extend the scope of the licence condition to extend to all other forms of "communication" beyond PRS telephony.

3. *Question 2 – If so, do you agree that a variation to television licences would be the most appropriate way of ensuring that broadcasters are responsible for such PRS compliance?*

- 3.1 We have already expressed our views on whether this is an appropriate regulatory response. In summary, the licence condition should be used as a back stop or reserve power to be imposed where a broadcaster has been found by Ofcom to have failed to have met the requirements of the licence condition by following best regulatory practice.

4. *Question 3 – 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.*

- 4.1 In our view, until the licence condition is operative, there should be no compulsion on the part of the broadcaster to have its systems independently verified. We prefer a system that such verification be on a voluntary "best practice" basis unless and until it is found by Ofcom that the broadcaster's operation of its PTV Services breaches the licence condition. At that point verification of the PRS systems for that broadcaster together with the requirement to submit the results of such audit to Ofcom annually, would become mandatory. Until that occurs, Ofcom may require the broadcaster to certify that it believes that its PTV systems meet "best practice". A broadcaster could self certify that it believes that its PTV systems are compliant. Nonetheless, best regulatory practice would demand that the broadcaster should be able to demonstrate that its PTV systems meet the requirements of the licence condition. If this is not done by producing independent verification, the onus is upon the broadcaster to satisfy Ofcom as to how its compliance regime meets the required regulatory standard. For example, the broadcaster could have access to the requisite technical expertise 'in house' to conduct such a verification of the PTV communication chain.
- 4.2 If our preferred proposal is not to be implemented then we believe that Option A should be implemented. This gives the viewer the certainty that the broadcasters compliance procedures for its PTV services are independently verified on a regular basis. However it is a matter for the broadcaster how often this is done. In such circumstances where there is a requirement for Ofcom to become involved, Ofcom should only make such a request for the verification in response to a viewer complaint and where Ofcom decides to investigate the PTV compliance systems of the broadcaster under complaint.
- 4.3 Where upon investigation the broadcaster's compliance procedures are found to be defective then the licence condition should enable Ofcom to specify:
- (a) the detailed nature of the compliance audit to be followed;
  - (b) the third parties who are qualified to validate compliance;

(c) that the audit be required to be undertaken annually and the results submitted to Ofcom together with any remedial actions taken by the broadcaster to remedy any deficiencies uncovered by the audit.

4.4 If Ofcom believes that the results of such audit show deficiencies in the broadcaster's compliance procedures so that it is in breach of this condition, Ofcom may order the broadcaster to refrain from broadcasting any programmes which may breach the proposed licence condition, until it has been shown to Ofcom's reasonable satisfaction that the deficiencies have been rectified.

4.5 In summary, we believe our suggested approach accords with best regulatory practice and it is also fair and transparent. It incentivises a broadcaster to ensure its compliance systems are "fit for purpose" but allows a measure of discretion as to how it achieves this objective. However, failure to meet best practice results in Ofcom exercising direct supervisory control thereafter, as to how the broadcaster should operate its compliance program for PTV Services. In our view, adopting this course of action will allow Ofcom to meet the key regulatory objective to ensure that those who enjoy and participate in PTV programs do so in an environment which is fair, transparent and technically suitable and sustainable but at the same time allows those broadcasters who have done nothing wrong, to be allowed to operate with a degree of self regulation.

5. Question 4 – *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.*

5.1 We have certain reservations about the wording of the proposed licence condition. We understand that it is intended to be drafted widely and so rectify by regulation the obvious weaknesses of many PTV Services, which have been offered by UK broadcasters and in particular, the UK public service broadcasters.

5.2 However, the imposition of a licence condition carries with it legal consequences for the broadcaster. In such circumstances, clarity and certainty are also required.

### **Condition 1**

5.3 Condition 1 requires the broadcaster in effect to retain responsibility for 'all communication arrangements' between the members of the public and the broadcaster. As Ofcom is aware, the chain of participants in the provision of a PTV Service can be extensive – on this wording, it would extend to the arrangements between the participant and its originating telephony provider, ISP or even mail delivery service.

5.4 Condition 1 also refers to methods of communication in which 'consideration' is passed. Again, consideration has a technical legal meaning and can extend beyond situations where the viewer is making a payment to participate in a PTV program. As the primary failing which has been identified with PTV programs, is that viewers are sometimes charged by their mobile or fixed line telephone operator, to enter a quiz or competition, in situations where their entry is discounted for a variety of reasons, then we believe the reference to consideration should be changed to "payment made at the PRS rate". This change makes it clear that it is the act of payment at the increased PRS rate (over standard network call charges) which changes the viewer's status to a 'customer' and so increases the responsibility of the broadcaster to ensure that the customer receives what he has paid for.

### **Condition 2(a)**

5.5 In both conditions 2(a) (i) and (ii) the required test is to ensure that reasonably foreseeable disadvantage is minimised in either network "shortcomings" or inadequate arrangements to process votes etc. 'Disadvantage' is defined non exhaustively. For example in condition 2(a) (i), disadvantage is defined to include but is not limited to detriment arising from shortcomings in 'other technical processes'. Our concern is two-fold with these licence conditions. How will Ofcom apply the test of reasonable

foreseeability? Under the law of negligence the foreseeability test only requires that a particular category of risk may materialise for someone to be culpable. If such a widely drawn test was applied, it may always be reasonably foreseeable that there could be shortcomings in the network etc. and so the broadcaster may be culpable. Secondly the fact that types of 'disadvantage' that can arise are not closed means that in effect the broadcaster can never be sure as to whether these actions will cause disadvantage. For example in condition 2(a) (ii) what happens if there is no inbuilt redundancy in the processing systems to tabulate votes. If that system suffers a malfunction and votes are not counted is that a reasonably foreseeable disadvantage? In such circumstances is the broadcaster in breach of the licence condition? This is a breach of a condition, which in effect constitutes a betrayal of viewers' trust. To paraphrase Ed Richards where this occurs the penalties must be the most severe the law allows. As such a failure would constitute a breach of licence, the most severe penalty would be loss of their licence. Therefore we are concerned that breach of this condition in effect is a strict liability offence.

5.6 Condition 2(a) (ii) refers to 'disadvantage' resulting in votes and entries being rendered ineligible 'by time or other reason'. Our concern is that the reference to 'other reason' is too vague. Having reviewed this sector extensively, Ofcom should be in a position to elaborate on the type of circumstances (other than time) which it believes will give rise to such disadvantage to the public.

5.7 In relation to Condition 2(a) (iv), the reference is to ensure the publicity in programmes is not 'materially misleading'. Again, it seems to us there needs to be some threshold against which this condition will be judged. For example, we accept that in the past there has been a deliberate effort or at least recklessness on the part of certain broadcasters to mislead viewers, and future repetition of such conduct would breach the licence condition – viewers are being materially misled.

5.8 On the other hand, what if the wrong information is innocently publicised. For the viewers who participate in the PTV program, based on this misinformation, they have been misled and perhaps materially? They may not have participated in the quiz or competition otherwise. But is such conduct deserving of regulatory sanction? It seems to us that this condition also needs to be reconsidered.

### **Condition 2(b)**

5.9 The other issue we have is regarding Condition 2(b) is the requirement for the broadcaster in effect, to ensure compliance with the ICTSIS PRS Code or any replacement for such a code. For broadcasters licensed in the UK but operating services available in other territories, this will require them to ensure that the PRS communication operators comply with obligations which may, at best, be inconsistent with and at worst, illegal under the regulatory system which applies to such operators in other territories. In such circumstances, we fail to see how this potential contradiction can be resolved. More importantly, we do not believe that it is within Ofcom's competence to give the ICTSIS Code (or any replacement) extra territorial effect.

### **Separation of editorial and advertising in dedicated PTV**

6. Question 6 – *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?*

6.1 In our view, the correct classification for PTV programming is editorial and therefore, we believe that option 4 is not appropriate at all.

6.2 Of the other options proposed, we believe that option 2 should be preferred. However, for the reasons set out in paragraph 5.9 above, we would ask that paragraph 10.11 should be reviewed to ensure that the Code does not need to be followed where it is inconsistent with local regulations.

6.3 We also believe that the caller's number should be able to be used to generate further contact where there is express opt in by the caller. It seems too restrictive to ban such contact outright. This may be unnecessarily removing services from the caller which the broadcaster may wish to provide and the caller wishes to receive for no compelling regulatory reason. The viewer should be able to opt in to receive such further services provided it is very clear which information they are agreeing to receive.

7. *Question 7- 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.*

Our comments are set out in answer to question 6.

8. *Question 8 – 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.*

8.1 As mentioned in paragraph 6.2 above, we accept that option 2 contains, for the most part, useful clarification of the existing rules.

8.2 In our view, the rules should be limited to dedicated PTV Services only. Ofcom's proposal is a response to a particular problem which has been identified in relation to tv quizzes and competitions. In regards to other interactive services, it may be that option 2 is the appropriate way by which such services should be regulated. On the other hand, it may be inappropriate. For example, telephony is the preferred method of communication by which the viewer engages with PTV Services. We believe that at this stage, it is not appropriate to apply rules developed specifically for one programming genre across the board.

9. *Question 9 – 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.*

9.1 We believe that Ofcom has seriously underestimated the compliance costs of its proposals. Ofcom makes several assumptions about the compliance costs involved in its Impact Study (IA).

9.2 First, in paragraph A7.11, it is stated that because broadcasters are responsible for PRS applications and competitions through the requirement to comply with the Broadcasting Code, there is no significant incremental costs. With due respect, this ignores the wide ranging nature of the proposed condition. Whilst it is true that the Broadcasting Code makes the broadcaster responsible for ensuring quizzes are conducted fairly etc., the proposed condition is more widely drafted. As noted earlier, it places responsibility for all arrangements for the management of communications etc. directly on the broadcaster.

9.3 The assumption made in A.7.12 of the IA is that most broadcasters have recently gone through lengthy audit processes in response to the concerns raised around the conduct of phone-in competitions etc. and also Ofcom expects that all the broadcasters will start any requirement to put in place an on-going verification process with a 'clean slate' i.e. any existing compliance issues should have been identified and addressed through these prior audit processes. With due respect, we consider this an unwarranted assumption. Of course, broadcasters such as GMTV and ITV etc. have done this. But why would the operator of a chat service do so. There is no complaint made or reason to suggest that the provision of their service is equally at fault. Nor can we agree with the further assertion that having audited once, this should reduce the ongoing cost of compliance in the future. This will be compliance with a licence condition that is being imposed and failure to meet the requirements of the licence condition could mean loss of licence. In such circumstances, ongoing compliance may need to be more rigorous (and more costly) than Ofcom's working assumption.

9.4 Finally, Ofcom dismisses the cost of the audit process as being limited to 'tens of thousands' of pounds. First, Ofcom ignores the fact that this is a recurring cost for broadcasters. It may be that the costs are greater than just the audit. Given that the verification will need to be carried out by all broadcasters who run PTV Services to comply with the licence condition, it may be that new communications providers will have to be engaged because the existing provider's systems do not adequately meet the standards required. This may result in additional compensation having to be paid to such suppliers. As noted earlier, the licence condition requires compliance with the ICTSIS Code. However, for some broadcasters, their chosen communications suppliers are not (and should not be) subject to that code as they are operating outside of the UK. In this type of situation, it is unlikely that there will be a right to terminate the existing contract without liability and as a result adequate compensation to such a supplier will have to be paid.

In our view, the IA seriously understates the likely additional compliance costs.

### **Additional Revenue**

9.5 In A7.9 of the IA, Ofcom assesses that increased revenues from adopting the licence condition is potentially up to £17m p.a. for broadcasters. This analysis is based solely on ITV's published loss of revenues. Our understanding is that ITV Play was broadcast at least part of the time on ITV1 during this time. Therefore, its loss of revenues is exaggerated vis-à-vis other cable and satellite broadcasters who do not operate with the benefit of a 100% terrestrial coverage. Consequently, we cannot accept that the increase in revenue will be around £17m p.a. We feel this is an over optimistic, narrow and unjustified assessment.

9.6 In summary, we believe that the cost of implementing the new regulations has been understated and the perceived benefits overstated.