

# **Participation TV: protecting viewers and consumers, and keeping advertising separate from editorial**

A response to Ofcom published by PhonepayPlus on 16<sup>th</sup> October 2007

# Section One

## Background

PhonepayPlus (which until 15<sup>th</sup> October 2007 was known as ICSTIS) welcomes the opportunity to respond to Ofcom's consultation paper examining how Participation TV should be regulated. We have worked closely with Ofcom over many months to ensure a consistent regulatory approach to the emerging issues involving the use of premium rate services (PRS) in TV programmes. This covers both mainstream programming and dedicated channels such as Call TV Quiz Services (referred to by Ofcom as "dedicated PTV"). Our work with Ofcom in this area started in September 2005 when we issued our first consultation about enhanced rules for Call TV Quiz Services.

In the middle of February 2007 we and Ofcom became aware of a number of apparent problems relating to premium rate and/or production compliance when used for voting and competition entry on mainstream TV channels and, to a much lesser extent, on radio. The allegations, many of which were reported extensively in the media, suggested that the PhonepayPlus Code of Practice and/or the Ofcom Broadcasting Code had not been complied with and that consumer trust in premium rate services had, as a consequence, been eroded.

Given the growing media reports of problems with premium rate usage in broadcasts, we held an industry meeting on 8 March 2007. It was the view of the wide range of industry practitioners present, and Ofcom, that there was a need for short and medium-term action to address the issues of compliance and trust.

In the short term, all broadcasters agreed to audit their current and forthcoming services to ensure Code compliance and to report to us on their findings within two weeks of our requesting this. The exercise added to our understanding of the different risks associated with services of varying size or nature and the different mechanisms for entry, most obviously red button, text and call-in participation.

In the medium term there was support at the same meeting for our proposal for the introduction of a prior permission (licensing) regime for premium rate services when used in broadcasts.

On 22 March Ofcom announced an inquiry into the use of premium rate services in television programmes. This was led by Richard Ayre, a member of the Ofcom Content Board, and we were on the inquiry steering group. We welcomed Ofcom's decision to launch the Inquiry and we equally welcomed the publication of the report and its findings.

In respect of mainstream broadcasting, we understand why the Inquiry concluded that broadcasters need to take more responsibility for what is broadcast in their name, hence the proposal to modify the broadcasters' licence to deliver this change. In respect of dedicated PTV, we understand Ofcom's concern about the need to ensure that "the separation principle" is maintained and why further steps may be required to deliver clarity of separation in this area.

In respect of mainstream broadcasters' use of PRS, the proposal to modify the broadcasters' licence in order to ensure compliance is an alternative route to securing compliance than that initially proposed by us in our consultation issued on 15<sup>th</sup> May 2007. However, we were always clear that no final decision would be taken on our approach until Richard Ayre's inquiry had reported and consequent decisions were taken. We remain committed to that approach and to working with Ofcom to assess the responses to this consultation. In doing this we will work with Ofcom to:

- introduce a clear and effective regulatory framework – whilst some of this consultation document describes “participation” very much in tandem with PRS, other payment methods are possible and may emerge over time. Any regulatory framework will need to be consistent in dealing with alternative methods of payment;
- protect consumers by ensuring that the regulatory framework, as a package, should ensure that consumers are fully protected and have the ability to secure refunds if they suffer a financial loss;
- provide clarity and certainty to all stakeholders. Any new generic requirements may need to be supported by some supporting sub-structure especially for those who are providing telephony services to broadcasters;
- future proof any framework against changes in a dynamic market – the market for Participation TV is nascent and will change in ways that regulators may least expect. Various forms of payment are becoming integral to business models and the fragmentation in the market and explosion in dedicated PTV channels seems certain to continue. Ofcom should therefore keep their approach to PTV under review as the market changes;
- provide a proportionate approach to the issues at hand having regard to steps taken by industry to correct some of the compliance failings which Richard Ayre so importantly identified in his report. Consumers appear to enjoy taking part in programmes and this should not be undermined by regulatory requirements which are unnecessarily onerous;
- ensure that the approach is streamlined with all the regulators who may have an interest here beyond PhonepayPlus and Ofcom. This includes the ASA and the Gambling Commission. Whilst the relevant regulators are communicating more on these issues, Ofcom should continue to take the strategic lead in ensuring that regulation is consistent between the various regulatory parties with responsibilities in this area.

## Section Two

### Response to specific consultation questions

Q1. 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.

PRS in programmes have clearly been the subject of compliance failings and the reasons for this are multiple and examined by Richard Ayre as part of his Inquiry. A minority of opinion formers have also blamed the regulations or regulators for these failings. There is, however, no immediate lack of rules – only of compliance.

Since many of the initial allegations were made in the spring of this year about a number of programme formats that used PRS, there has been a swathe of activity by broadcasters, production companies and telephony intermediary providers to rectify shortcomings which were exposed. This activity also challenged a number of accepted practices that have grown up in this nascent industry and encouraged a number of broadcasters to completely overhaul their internal systems and compliance functions. As a result of this, the failings which we have seen are unlikely to be repeated again on the same scale. This could be an argument for “do nothing” which Richard Ayre makes quite powerfully in his own Report to Ofcom. However, Richard Ayre rightly sets out, however, why doing nothing is not a real option and contains the seeds of destruction if it were followed and further issues still emerged. For these reason we agrees that further regulatory action is required. One way forward is to place greater responsibility on broadcasters for the delivery of PRS in programmes. Insofar as they have led much of the change which has emerged recently and have been at the forefront of the media and political concern about this issue, it is hard to see how broadcasters could not remain engaged in the regulatory actions necessary to ensure compliance.

On this basis we support this proposal and will work with Ofcom to harmonise regulatory proposals to ensure as far as we can that the principles we identify in Section One of our response are met.

Q2. 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?

Yes, we agree that a variation of the television licence is the most appropriate way to ensure that broadcasters understand fully their responsibilities for compliance. However, this leaves open issues about how in practice they then manage this internally with both independent production companies and any outsourced providers of PRS telephony. Clearly, placing the regulatory responsibilities squarely upon broadcasters is likely to make them review their compliance and risk assessment procedures (indeed, many are doing this already) to minimise the risk of further failings in compliance in this area. However, it must be noted that an amendment to the broadcasters’ licence will never in itself guarantee full compliance, but it should greatly improve incentives and performance. The key to further compliance failings will be to understand the root cause. If it is clear that the source of the problem lies with the telephony provider of the PRS then PhonepayPlus will be well placed to help Ofcom deal with non-compliance by the party recognised as a “service provider” under our Code of Practice. The precise detail of such an arrangement should be clarified with Ofcom and made transparent to regulated parties.

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.

Experience of the last few months suggests that trust in broadcasters' use of PRS has been eroded as a consequence of events that have unfolded. It must be in broadcasters' interests to ensure that the compliance failings which have emerged no longer appear to be systemic. We also note that as part of addressing these systemic failings many broadcasters are reviewing their systems, procedures and internal controls to minimise non-compliance. However, some independent third party verification that any draft licence conditions are being met is almost certainly necessary to restore public trust. We form no particular views about which of the three options proposed is the most appropriate but do note that Option 1 appears to be the most targeted from an enforcement perspective.

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.

We have no specific comments on the draft licence variation. We note, however, that in section 2(a) (iii) Ofcom may, from time to time, issue guidance about the display of prominent and clear pricing information. We trust that in the drafting of any such guidance the views of PhonepayPlus will be sought to ensure a contextual consistency with guidance we issue for PRS generally.

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.

On the basis that the risks associated with Broadcast PRS can, in our view, equally apply to radio as they can to TV, we would generally support a move to extending the proposed obligations to radio broadcasters.

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.

On balance we take the view that Option 2 presents the clearest articulation of the means of separation being sought in a way that offers clarity to providers and consumers alike.

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.

We have no specific comments on the new rules at this time.

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 your reasons.

Yes, we agree that Option 2 should not be limited to dedicated PTV channels but be capable of application to all editorial content on TV and radio.

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.

As a regulator we are not best positioned to comment on this impact assessment, especially in respect of business costs.