



The future regulation of phone-paid services

Consultation response

23 January 2024

Executive summary

The BBC welcomes the opportunity to respond to Ofcom's consultation on its proposals regarding the future regulation of phone-paid services.

BBC utilises few premium rate services ("PRS") but they serve as valuable audience engagement when we do, enhancing their experience whether a vote as part of our programming or making a charity donation.

Our mission is to act in the public interest, serving all audiences through the provision of impartial, high-quality and distinctive output and services which inform, educate and entertain. Audiences are at the heart of everything we do and trust is the foundation of the BBC. Further, trust is at the root of everything we do with PRS: we lost the audience trust following the broadcast events of 2006 and 2007. With the creation of ITACU, BBC has worked hard to regain and maintain that trust with its audiences. Getting the regulatory framework right is in our interests to ensure we continue that trust exercise, continue to act in the public interest, and continue to serve and engage with all our audiences.

Future of phone-paid services

All of our responses are non-confidential. Where we have not expressly commented on a question, we have no comments or feedback to make on that specific question.

Overarching comments

Industry engagement

We are aware of the consumer insight Ofcom intends to retain but we hope that the industry insight PSA has built and maintains will also be kept. For us, as a broadcaster / merchant, we hope that includes the industry liaison panel or equivalent. We have found that invaluable, along with the routine meetings such as the annual PSA meeting (which Ofcom has attended). We hope forms of these continue. As referenced in 1.12.2 below, these have aided cross-industry communications, aiding innovations in the sector.

We know AIMM intent to maintain their working groups and we support their comment on a feedback loop.

Scope

We hope that the new regulatory framework, with its changes in approach, scope and actions, will continue to enable industry creativity in new ways of using PRS. For example text to wins were a process driven by AIMM with PSA input and support. The charities we partner with currently like to use them as part of the overall audience engagement. With the scope changes as described there is a lack of clarity as to how these service will be regulated going forwards and as such, there is a question mark over their future use as we move towards our November charity telethon.

We will be working with AIMM and the charities over the summer on text to wins, reviewing the mechanism and how it fits into the new regulatory framework. Future informal Ofcom input in that would be welcome, as was PSA input originally.

Question 1: Do you agree with our assessment that our proposals will not affect any specific groups of persons

BBC utilises few premium rate services (“PRS”) but they serve as valuable audience engagement when we do, enhancing their experience whether a vote as part of our programming or making a charity donation. We have a commitment in our use of audience engagements to be inclusive and to ensure we do not disenfranchise our audiences. BBC Editorial Guidelines and related guidance state that our use of audience interactivity must be accessible to the target audience.¹

Anecdotally we see the older and lower socio-economic groups use PRS to engage with us proportionately more than other audience groups, particularly where we see a greater proportion of our audience watching and listening from these groups (for example BBC One Saturday nights). We know that when we offer alternate routes to vote if we looked at the outcomes of each entry route separately they would be different. Usually we keep PRS with online voting to ensure we cover all sectors of our audience. We note other broadcasters have been removing PRS from their voting programmes, who may not have the same commitment to plurality of entry and inclusion that we have.

The industry and Phone-paid Services Authority (“PSA”) have acknowledged declining PRS vote volumes, reducing the revenue share and increasing the cost of providing PRS to our audiences. We

¹ For example 17.3.62 – “They must ... be appropriate for the audience of any associated television programme.” <https://www.bbc.com/editorialguidelines/guidelines/competitions-votes-interactivity/guidelines>

choose the lowest viable tariff as we are a public service, we are not in PRS for commercial gain². The consultation document notes at several points the new regulatory approach will increase the burden upon merchants (in both terms of costs and time). Whilst reasonable, taken together this will increase pressure on our productions – with squeezed licence fee and rising production costs generally there will come a point when we may have to consider removing PRS, particularly from voting programmes.

We are a public service broadcaster and push to serve all our audiences. We believe these changes could negatively impact the older and lower socio-economic groups who enjoy engaging with our programmes that include PRS due to these overall increased costs impacting our decision to use.

Question 3: Do you have any comments about our proposed definitions in articles 3 to 8 of Part 1 of the draft PRS Order for key service concepts that are used throughout the Order?

Threshold Services

We note the order as drafted does not expressly define PRS and where possible doesn't differentiate between telephony calls or mobile messaging (for example SMS).

Article 3 of the order defines 'Threshold Services' as including PRS that doesn't utilise a PRS number and there is a single charge of 10p or more (including VAT).

Taking a reasonable interpretive approach, using the PRS definition from the Communication Act 2003 ("the Act") would exclude standard rate text messages from being a threshold service. – it is not PRS as defined by the Act. In the past PSA has informally confirmed this for us, but we (as do other broadcasters) rely heavily on standard network rate SMS messaging to engage our audience, particularly radio, and would welcome confirmation of that interpretation.

PRS numbers

We understand the requirement to include 098 in the definition of PRS number. This is good housekeeping, following on from the definition included in the condition set under section 120 of the Act ("PRS Condition") and matches our understanding of in-scope numbers under PSA.

Question 4: Do you have any comments about our proposed definition for PRS regulated providers and regulated activity in article 9 in Part 1 of the draft PRS Order?

PRS Providers – exercising editorial control over the contents

We note the order as drafted does not carry across all elements of the PRS definition from the Act. Section 120(9)(b) is not seen expressly in any part of the order, despite being in the Act and repeated in the PRS Condition (section 2(g)(ii)). The consultation document maps the three defined PRS providers back to sections of the Act but does not include s.120(9)(b) (consultation sections 4.22 to 4.26).

Relationship with independent production companies and charity telethons

BBC has relied on s.120(9)(b) in the past when we work with commissioned indies (including BBC Studios Productions Ltd) to make content for UK public service broadcast. We have taken the role of merchant (in PSA Codes of Practice definitions) as we have editorial control over the content of PRS used in the programme as part of the commission. The consultation document highlights a narrow

² Editorial Guidelines 17.3.25 - <https://www.bbc.com/editorialguidelines/guidelines/competitions-votes-interactivity/guidelines>

construction approach— the order can only be made in relation to providers (consultation section 4.22). We hope to maintain our role as a merchant under the proposed regulatory framework.

This would also impact how we would undertake our charity telethons with our partners, including BBC Children in Need and Comic Relief. We work closely, in partnership with them and have considerable editorial input to those services including the BBC-promoted PRS, as required by Editorial Guidelines³. Article 9(9) of the order as drafted indicates the charity is the merchant and we are employed or engaged under their direction (so not a merchant). This does not reflect the manner in which we currently work and we fear would push BBC out of the regulatory regime and potentially at conflict with our Editorial Guidelines⁴. We would like to continue to work broadly in the manner we have to date and be able to fully support all the charity services we promote, including DEC broadcasts.

We note in the consultation document that one of the desired outcomes is to regulate offensive or inappropriate content (consultation section 2.6(c)) and retaining the editorial control element of the ‘provides’ definition from the Act would help in this outcome.

We seek clarity on the definition of “provides” to ensure we are caught by the definition of merchant. We provide a suggested redraft below.

Proposed revision – “provides” definition

We suggest the following revision to ensure BBC remains a provider of PRS under the proposed regulatory framework. This reflects the PRS Condition and the Act and is consistent with PSA current Code of Practice (“Code 15”) and ties to our Editorial Guidelines.

9(10) “**Provides**”, in relation to a premium rate service, is to be construed as meaning (and only so far as)—

- a. in the case of an intermediary, the person provides the service described in paragraph (2),
- b. in the case of a merchant, **the person has editorial control over the content of the controlled PRS** or who provides the controlled PRS as described in paragraph (4), and
- c. in the case of a network operator, the person provides the service or network for use as described in paragraph (6)(a) or (7)(a) (as the case may be),

and cognate expressions are to be construed accordingly.

[bold and underline are the additions]

Question 6: Do you have any comments on our proposed requirements relating to due diligence and risk assessment in Part 4 of the draft PRS Order?

Risk assessment research requirements

As noted above the order as drafted places an increased burden upon merchants. Section 4.67 of the consultation document acknowledges the risk assessments as proposed may overall cost more. Generally we agree with Ofcom these individual steps are reasonable and proportionate but with regards to our response to Question 1 above (1.4.1) we believe the requirement under article 17(3)(c) of the order as drafted steps beyond that. As an organisation that will be subject to such risk

³ <https://www.bbc.com/editorialguidelines/guidance/charitable-appeals>

⁴ Section 3.1 of the Royal Charter – BBC must be independent in all matters.... Including editorial and creative decisions”. Paragraph 2, Schedule 3 of The Agreement (as amended) in setting appropriate standard to secure... editorial integrity...” <https://www.bbc.com/aboutthebbc/governance/charter>

assessments, from time to time we are involved in a number of different legal proceedings (whether around newsgathering or clarification on our pension trust wording taking a recent example) and this burden may be increased on any of those parties we work with in addition to the burden upon us.

Proposed revision -risk assessment research

We propose the following revision restricting “any” involvement in any legal proceedings in a reasonable and proportionate way:

17(3)(c)

"... in any legal proceedings **relevant to regulated activities**, including any previous or ongoing legal proceedings....."

[bold and underline are the additions]

Deemed compliance – start of the clock

We note the deemed compliance under article 20 and seek clarity on when the clock would begin on that – we assume from the date of the order coming into force and confirmation is welcome.

Question 9: Do you have any comments about our proposed approach to pre-contract information and express consent for imposing certain charges in Part 6, Chapter 3 of the draft PRS Order?

Pre-contract information and the use of web pages

The order as drafted requires pre-contract information to be clear, comprehensible and prominent and provided in a way appropriate to the means of communication. (article 26(1)). We believe our current approach as a broadcaster meets these requirements and seek clarity that the use of web pages and promotion of URLs would be sufficient to meet these requirements under the order.

Question 10: Do you have any comments about our proposed approach to provision of CPRS in Part 6, Chapter 4 of the draft PRS Order?

Merchant record-keeping

As above, we would like to continue as a merchant within the regulatory framework. Article 36 of the order as drafted requires merchants who provide controlled PRS (“CPRS”) to a consumer to hold records evidencing their consent to enter into a CPRS contract.

When working with charities such as Comic Relief or BBC Children in Need we will use their text to donate services in our programming. They are the merchant construed as the counterparty to the consumer in the controlled PRS contract. They should make and hold those records, not BBC.

Proposed revision – merchant records

For clarity, as to ensure there is no duplication or unnecessary holding of data we propose the following addition to article 36.

(4) Paragraph (1) applies only to the merchant which is the counterparty to the consumer in the controlled PRS contract.

Question 13: Do you have any comments about our proposed approach to competition and voting services in chapter 6 of Part 6 the draft PRS Order?

Different routes of engagement

We are aware of AIMM's response on article 43 (and the commentary in the consultation document at 4.204) and echo their point that references to a URL in a graphic, QR code on screen or a verbal throw to our website for "terms, privacy notice and how to enter for free go to bbc.co.uk/xxxx" is sufficient for this, particularly as QR codes have proven useful to our audiences. We believe our current approach would not be something that would cause a consumer to make a transactional decision they would not otherwise make (covered by Part 6 of the order). We seek clarity on this with the hope of broadly continuing our current approach to multi-route promotions.

Valid ticket of entry

Valid ticket of entry is a new concept, detailed in article 44 and explained in section 4.206 of the consultation. We understand the reasoning for this but we believe it does not take into account all the entry methods caught, as was expressed when similar wording was proposed by PSA under Code 15 consultation. The key point here is receipt not sending when considering the entry window for the valid ticket of entry.

Proposed revision - Valid ticket of entry

Throughout the consultation there is a theme of unification of methods - whether a call, text or other PRS communication. However here there is an explicit differentiation made by the draft order - referring to the National Telephone Numbering Plan (which does not include PRS SMS short codes).

For simplicity and with the minimum number of suggested redrafts we propose the following -

Article 44 (3)

For the purposes of paragraph (2), where—

- a. **(i)** a consumer uses a relevant telephone number (within the meaning given in article 3(8)(c)) to establish a connection in order to make use of a facility comprised in a competition and voting service, **or**

(ii) a consumer uses a relevant SMS number in order to make use of a facility comprised in a competition and voting service, and

2. such connection has been established before the time limit has expired,

the facility is deemed as being used by the consumer before the time limit has expired, notwithstanding the fact that the consumer is still in the process of using the facility after the time limit has expired.

(4) for the purposes of paragraph (3) connection being established for SMS services - that is deemed to have been established if the relevant inbound message has been received by the PRS provider.

[bold and underline are the additions]

This should not be a surprise to Ofcom, there was a separate consultation by PSA with regards to additional changes requested to Code 15 on this point ('sent vs received') and broadly our feedback was accepted and Code 15 amended accordingly. The wording above represents this and, we hope, remains within scope for Ofcom.

Written confirmation

Article 44(2)(b) of the order as drafted requires confirmation in writing of the entitlement to a valid ticket of entry. We cannot see how this would work for broadcast televoting – we could not provide the audience who engaged in Eurovision via telephone numbers such confirmation in writing. If the requirement is a form of confirmation then we give that via a prerecorded playback message

informing the audience member who they have voted for. If the requirement is a form of durable or lasting evidence then their provider will offer that in the form of the bill which would include the premium rate services used and cover the dialled Eurovision numbers. If this is to cover all forms of interactivity associated to a televote (such as the online option for Strictly) then we do not currently offer any durable record of voting to our users, beyond their ability to take screen shots – we do this as it gives the audience confidence we are not logging or tracking their voting habits in our programming.

Proposed revision - Written confirmation

As such we seek clarity on the written confirmation point by proposing the following redraft:

Article 44(2)(b)

...(b) give a confirmation ~~in writing~~ of that entitlement (“valid ticket of entry”) to the consumer without undue delay after the consumer has used the facility **and in writing if possible.**

[bold and underline are the additions, bold and strikethrough is a deletion]

Post-close charge and time frame

We note section 4.215 of the consultation document covering post-close charges, where post close entry attempts are covered in article 47. We are concerned as mobile-originated SMS message charging is outside of the merchant’s control. We suggest a revision below.

Further with article 47 – we seek clarity on how long would suppliers need to keep numbers closed. Often they are repurposed for other services or re-used the following year for the same service. Additional number ranges would impose additional costs.

Proposed revision - Post-close charge

We support AIMM’s proposed redraft:

47(4) A merchant must also provide, **or already have provided,** to the consumer without undue delay after the merchant becomes aware of the consumer’s attempt to use the facility—

- (a) a confirmation of the fact that the attempt to use the facility **will be /** was unsuccessful, and
- (b) either—
 - (i) a confirmation of the fact that no **service** charge **will be /** has been imposed in relation to that attempt, or
 - (ii) information that the merchant **will have /** has imposed a charge (contrary to paragraph (2)) in relation to the consumer’s attempt and that the consumer will be paid a refund of that **service** charge,

whichever is applicable in the consumer’s case.

[bold and underline are the additions]

We believe this involves the minimum redrafting and is proportionate to our concerns.

Question 21: Do you agree with our implementation period? Please state your reasons and provide evidence to support your view?

Implementation period

We believe three months is shorter than is needed. Six months or longer would have been preferred. This is more than a PSA code iteration and we would need time to prepare ahead of our busy PRS period – September to December (including several voting programmes and BBC Children in Need). Further we understand there is an issue around new tariff provision, as highlighted by AIMM, which contributes to our view the implementation window is not long enough.