

**THE REGULATION OF PHONE-PAID SERVICES
CONSULTATION ON OFCOM PROPOSED ORDER UNDER S122 OF THE COMMUNICATIONS ACT 2003
RESPONSE OF ITV PLC**

We welcome the opportunity to respond to this consultation and support the transfer of regulatory responsibility for PRS to Ofcom. ITV is the UK's leading commercial broadcaster, reaching over 30m UK viewers each week. ITV uses premium rate services (PRS) for voting and competitions that run in our shows on live broadcast TV and streamed on ITVX and in our standalone competitions portal, ITV Win at www.itv.com/win. These competitions are both fun for those viewers who choose to participate but also form an integral and important part of the way that ITV pays for its programmes in viewing and advertising markets that are now intensely competitive.

ITV had a good working relationship with the PSA and has been satisfied with how the team has implemented regulation in a way that is sympathetic to the needs of broadcasters and TV audiences. We participated in the review that led to the most recent edition of the PSA Code of Practice and are very happy that those rules provide an appropriate structure and framework for the regulation of PRS. ITV has a good working relationship with Ofcom in other areas of regulation and we have faith that Ofcom will carry out its new functions in the overall public interest, overseeing PRS, with the same level of skill, professionalism and understanding of our sector.

It is important that in the transfer of responsibility, the objectives and spirit of the regulatory regime are maintained. For ITV, that means rules are implemented flexibly so that the system recognises the specific needs of broadcasters and for users of PRS in a broadcast context.

Against this background, we have reviewed Ofcom's proposed section 122 Order (the "**Order**"). We largely support Ofcom's proposals which seek to replicate the operation of the 15th edition of the PSA Code of Practice 2021 ("**Code 15**") in the context of Ofcom oversight. However, we have a number of comments and observations where we believe Ofcom's proposals may deviate from the current approach in a way that we feel could be detrimental to the interests of the industry and, ultimately, viewers and the proper functioning of the regime. We set out our concerns below with suggestions for how these may be resolved in the present proposals. We look forward to discussing these comments with Ofcom.

Definition of "Controlled PRS" should not introduce regulation of standard network rates

Article 3 of the Order provides a definition of "controlled PRS". Pursuant to Article 3(2), a premium rate services falls within these provisions if:

- (a) The use of a premium rate number is required to use the service, AND*
- (b) The charge for the provision of the service is -*
 - (i) A single charge of 5.833 pence or more, or*
 - (ii) Calculated by reference to a rate of 5.833 pence or more for each minute of the duration of the electronic communication*

The equivalent provision in the current regulations is set out in the Condition issued by Ofcom under section 120 of the Communications Act 2003 and reproduced in Code 15. The Condition defines a Controlled PRS as a Premium Rate service falling within one of a number of categories including where:

“the service is obtained through a PRS Number and the Service Charge for the call by means of which the service is obtained is a rate which exceeds 5.833 pence per minute or 5.833 pence per call, exclusive of value added tax”

The current definition makes specific reference to a “Service Charge”, i.e. the premium element applied on top of any standard network charge. This important distinction appears to be missing from Ofcom’s Order. The effect of this change is potentially to widen the definition of “Controlled PRS” to include services that are offered without a premium element but where the standard network charge exceeds 5.833 pence per minute. At present ITV is aware of a number of network operators whose standard network rates currently exceed 5.833 per minute,¹ meaning that any calls/texts on those networks would be considered “Controlled PRS” irrespective of whether any Service Charge or premium element is applied to the service. Indeed, as network charges vary considerably between providers and between different users depending on tariffs and discounts, it would be difficult for PRS operators to clearly identify which services fell within the definition.

ITV understands that AIMM (the interactive media industry body) has confirmed that it is not Ofcom’s intention to regulate standard network charges. We therefore hope that Ofcom would be amenable to introducing drafting changes to this provision to make clear that the 5.833 threshold applies only to the premium element of any charge. ITV therefore proposes the following drafting amendment to Article 3(2):

- (a) The use of a premium rate number is required to use the service, AND*
- (b) The **[service][premium]** charge for the provision of the service is -*
 - (i) A single charge of 5.833 pence or more, or*
 - (ii) Calculated by reference to a rate of 5.833 pence or more for each minute of the duration of the electronic communication*

Pre-Contract Information

[CONFIDENTIAL]

¹ As an illustration, Vodafone’s [Your Charges Guide](#) states that the standard UK charge for calls to a standard UK landline (starting 01, 02, 03) is 55 pence per minute; calls to non-geographic numbers (starting 084, 087, 09, 118) is 65 pence per minute.

Operators should have flexibility to promote particular routes of entry

Article 43 of the Order provides that:

“Where a merchant offers consumers different ways of making use of a competition and voting service, the merchant must take steps to ensure that, so far as possible, consumers are not encouraged to choose one particular such way over others”

The equivalent provision in Code 15 provides that *“where a service contains multiple routes of entry, all routes of entry must be presented and displayed with equal prominence”* (para 3.13.8).

Ofcom’s proposal, therefore, appears to represent a departure from the current approach and would prevent operators from incentivising consumers to choose a particular route of entry. This is important for operators like ITV who offer bundled options and additional benefits via particular routes (e.g consumers entering a competition or prize draw online may be entered into an additional weekly ‘Winsday’ prize draw). Under the current proposals, it is not clear that ITV would be able to explain the benefits of specific routes of entry.

Having the ability to incentivise certain routes of entry is important to reduce the overall costs of running competitions. Some routes are most costly and less efficient for operators. So long as these options are available to consumers and presented with equal prominence, operators should be able to encourage more efficient routes without falling foul of the regulations.

Changes such as the one proposed by Ofcom in this section may appear to be minor but, as we have explained, have the potential to significantly impact the way ITV operates its business. As such, it is important that Ofcom has clear rationale for and proposals that deviate from legislation and established practice:

- Para 8(c) of Schedule 2 of The Gambling Act 2005 addresses free route of entry including requirements to distinguish a prize draw from a lottery, including *(c) the choice is publicised in such a way as to be likely to come to the attention of each individual who proposes to participate*
- Gambling Commission guidance goes on to say: *“the free entry route must be promoted and displayed at the same level as the paid for routes”* and *“the choice between the free entry route and the paid entry route must be promoted so that people who want to participate can see it”*
- CAP code rule 8.17.2 states: *“Any free-entry route should be explained clearly and prominently”*.

ITV has established practices that conform to this position. Any change could result in significant disruption to ITV and audiences. Indeed, absolute equal prominence is almost impossible to achieve (even in a simple list, items must necessarily be placed at the top / bottom). Ideally, ITV would prefer wording that enables some latitude: *“displayed at the same level”* is more flexible in a live TV environment than *“equally prominent”*.

In any event, Ofcom's Order introduces a new requirement not to encourage one choice vs another. This represents a material change to established practice, that should be supported by impact analysis. Ofcom provides no such analysis in its consultation or any rationale that justifies placing additional burdens on operators like ITV. ITV would welcome the opportunity to discuss any concerns Ofcom has with the use of so-called 'dark patterns'. But, absent evidence and analysis of the risks to consumers, we do not believe this current consultation is the appropriate forum for this discussion.

For this reason, ITV proposes the following amendment to Article 43:

*"Where a merchant offers consumers different ways of making use of a competition and voting service, the merchant must take steps to ensure that, so far as possible, **each choice is publicised in such a way as to be likely to come to the attention of each person who proposes to participate.** ~~consumers are not encouraged to choose one particular such way over others~~"*

Valid 'Ticket to Enter'

Article 44 of the Order provides that tickets to enter a competition or vote should be considered valid (i.e. that they give the consumer specific entitlements) where *"a consumer **uses** the facility before [the time limit for that facility] has expired and meets any conditions applicable to the competition and voting service"* (emphasis added).

The equivalent provision in Code 15 states:

*"All valid responses for entry into a competition or vote that are sent in by consumers within the timeframe set out in the promotional material must be entered and afforded sufficient time to be given full and equal consideration, except where such responses are **received** by the merchant provider (or a third party on its behalf) outside of the timeframe set out in the promotional material"* (para 3.13.3, emphasis added)

The distinction between when entries are *sent* and when they are *received* is significant and was a matter of discussion during the consultation process that preceded Code 15. Operators like ITV, and its PRS service providers, require certainty that at the specific date/time published, we are able to count and verify entries. This is especially important in relation to programme-based voting and fast turnaround competitions where outcomes need to be determined under tight timeframes.

It can be the case that entries sent close to the end of the time limit are delayed by factors outside ITV's control, e.g. network latency or technical faults. It would be unreasonable to expect operators to monitor and collate all entries sent by consumers and operators should be able to exclude or ignore entries that arrive after the closing date/time or never arrive at all. We make clear in our T&Cs that consumers are responsible for ensuring their entries are received before the cut off and we have procedures in place to ensure consumers are not charged if their entry does not count. But for certainty, it is important that we are able to only count entries as valid when they are received.

We raised these issues with the PSA in the context of their Code 15 consultation and believed the matter to have been resolved by the inclusion of an additional phrase (“*except where such responses are received....*”) in the final text of Code 15.

The wording proposed by Ofcom’s Order potentially reopens this issue. Under Ofcom’s proposal, validity turns on when a consumer “*uses the [PRS] facility*” which could reasonably be construed as the point when the consumer engages with the facility, i.e. when an entry is *sent*. We presume that this is an unintended oversight and that Ofcom does not intend to overrule the approach taken in Code 15.

We therefore propose the following amendment to Article 44:

*(2) Where a consumer uses the facility before that time limit has expired and meets any conditions applicable to the competition and voting service, **so long as the entry has been received by the Provider**, the merchant must—*

Entries received after PRS has closed

Article 47 of the Order provides that where a consumer attempts to enter a competition/voting service after the time limit has expired, the merchant must (amongst other things):

provide 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 was unsuccessful, and*
- (b) either—*
 - (i) a confirmation of the fact that no charge has been imposed in relation to that attempt, or*
 - (ii) information that the merchant 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 charge,*

ITV takes great care to ensure viewers are aware of time limits for competition entries and the consequences for entering a competition after the time limit has expired. However, as explained in detail above, ITV has no control over the charges imposed by network operators and is therefore unable to action a refund of the standard network charge. For this reason, we trust that Ofcom intends this provision relates to the premium element of any charge. We therefore suggest the following amendment to this provision:

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

The obligation to conduct risk assessments must be proportionate

It is important that operators are able to assess and evaluate potential consumer harm and have appropriate discretion to mitigate or accept any risks in line with consumer expectation. For this reason, ITV proposes the following small changes to Article 17 of the Order to ensure the provisions are proportionate:

- Article 17(3): *the PRS provider must take account of ... (c) details of the party's involvement in any **relevant** legal proceedings, including any previous or ongoing legal proceedings and judgments or any other decisions made by a court, tribunal or other body in respect of the counterparty,*
- Article 17(5): *Where the [risk] assessment identifies **material** risks to consumers for the purposes of paragraph (2), the PRS provider must go on to take such measures as are appropriate and proportionate for the purpose of preventing adverse effects arising from such risks"*
- ITV also suggests deleting Article 17(6) which is unnecessary given that material risks are required to be mitigated and goes beyond what is needed to meet the objectives of the regulation.

Registration Information

Schedule 2 sets out registration requirements including a requirement (at para 9) that merchants provide *"the name of any other person contracted for the provision of that service, including for promotion and marketing of that service"*.

Given that the Order requires PRS providers to conduct risk assessments, we believe Schedule 2 paragraph 9 represents an unnecessary and disproportionate administrative burden. Moreover, these details may be confidential with PRS required under contract and data protection rules to not share details externally. If it is deemed necessary to provide this information (e.g. within a risk assessment) we trust that such material would be treated in confidence.

Ofcom's role in overseeing PRS Regulation

In general, ITV supports the transfer of responsibility for overseeing PRS regulation to Ofcom. ITV has long had a good relationship with Ofcom in relation to other areas of regulation and is confident that they will bring the same level of skill, professionalism and sectoral knowledge to their regulation of PRS. Indeed, ITV hopes that bringing these functions into Ofcom will result in certain efficiencies (e.g. shared overheads) that may result in the cost of regulation coming down. With this in mind, ITV makes the following suggestions that would help ensure the smooth transfer of power.

Ofcom should maintain the same level of stakeholder engagement

Stakeholder engagement is a key feature of the PSA regulatory regime. It helps ensure industry players are aware of the rules and that they are enforced in a way that recognises the unique needs of different operators in the PRS value chain. The PSA maintains good relationships with the industry

both bilaterally and via its Industry Liaison Panel. The Panel in particular is an important way to ensure the whole industry is up-to-date on emerging trends and regulatory issues.

Ofcom makes no mention of stakeholder engagement in its consultation. We believe this is an oversight. It's important that Ofcom continues to engage with industry on a formal basis. Ofcom should have certain discretion to engage with the industry in a way that works for them, but it is important that stakeholder engagement meet specific minimum standards including:

- Via a panel drawn from industry players, appointed periodically and listed publicly
- Membership to be drawn from all areas of the PRS value chain
- Meeting no less than 4 times per year with minutes circulated to the membership
- Terms of reference to be consulted on and published

Insufficient information to comment on Ofcom's funding model

Although the cost of regulation primarily falls to network operators, these costs are invariably passed on to operators like ITV through network service charges. ITV therefore has an interest in ensuring the costs of regulation are reasonable and that these are apportioned between network operators in a way that is fair, reasonable and proportionate.

Ofcom is proposing to maintain the PSA's approach to cost recovery. That is (as set out in Chapter 3 of the Order), via a levy imposed on network operators with the size of the total levy to be calculated by reference to the cost incurred by Ofcom, and individual levies calculated by reference to the relative size of each operator's share of the total PRS market.

Ofcom states in its consultation that it will be able to align the approach and procedures for enforcement of the PRS market with other sectors that Ofcom is responsible for and this should enable it to take advantage of operational efficiencies. As a result, the transfer of responsibility from the PSA to Ofcom is likely to result in a reduction in the overall cost of regulation.

The amount of any efficiency will have a direct impact on the size of the whole levy and, therefore, the share of this borne by individual network operators. For this reason, it is not possible to assess whether retaining the PSA's approach to cost recovery is appropriate without first knowing what the costs of regulation are likely to be. ITV therefore suggests that Ofcom postpone its consultation on questions relating to cost recovery until such time as it is able to provide an account of its anticipated costs of regulation.