

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title: **Broadcasting Code Review**
To (Ofcom contact): **Sara Winter**
Name of respondent: **Channel 5 Broadcasting Ltd**

CONFIDENTIALITY

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Name **Chris Loweth**
Head of Content Legal Advice

Ofcom Broadcasting Code Review

Response of Channel 5 Broadcasting Ltd (Five) to Ofcom's proposals on revising the Broadcasting Code

Introduction

1. Channel 5 Broadcasting was involved in Ofcom's pre-consultation stakeholder meetings regarding Ofcom's targeted review of the Broadcasting Code and is pleased to see many of the points raised during pre-consultation have been considered as part of the review.
2. We broadly support Ofcom's desire to clarify the rule in relation to 'adult-sex' material although we are not clear how Ofcom will decide what the purpose of material is.
3. We would welcome the introduction of rules to clarify broadcasters' obligations in respect of competitions and voting although we believe the proposed rules risk duplication and confusion and have suggested some amendments to them.
4. We agree with the proposal to separate the rules on commercial references in television programming from those in radio programmes and are supporting of Ofcom's proposal to introduce rules regarding Public Information Programming. We agree the position regarding the content of sponsorship credits needs clarification but believe Ofcom's proposed wording risks further confusion and misunderstanding.
5. We do not broadcast radio programming and have therefore not responded to the questions regarding the proposed Section Ten of the Code.
6. We believe further guidance would be useful in certain areas of the Code and have identified these in the final section of our response.

Sexual Material Rules (Code Section One)

Question 1

a) *Do you consider that the rule in relation to 'adult-sex' material needs to be clarified?*

Yes.

b) *Do you agree with our proposed amendments to the rule on 'adult-sex' material (Proposed Rule 1.18 to replace Rule 1.24)?*

c) *If you do not agree with our proposed amendments, please explain why and suggest alternative wording where appropriate.*

Whilst we support the proposed amendments in principle we are not clear how Ofcom, and so broadcasters, will assess whether material is broadcast "for the primary purpose of sexual arousal or stimulation" and believe guidance should be provided to clarify how the purpose will be assessed. In particular it will be important to clarify that it is the broadcaster's purpose in broadcasting the material that will be relevant, not a viewer's purpose when viewing it. We believe guidance should also state that the context of the material will be as important in assessing its purpose as it will be for the purpose of judging its editorial justification.

We believe the rule would benefit from wording that would clarify whether the requirements of the rule will be satisfied where mandatory access restrictions are available to viewers who wish to use them, or whether access restrictions must prevent viewers from viewing the content unless the restrictions are disabled. This appears to be Ofcom's intention (see paragraph 4.28 of the consultation document) but we do not believe it is adequately reflected in the draft rule.

We believe what is meant by "premium subscription services" and "pay per view/night services" should be clearly defined, particularly with regard to push-VOD services.

Question 2

a) *Do you consider that the introduction of a new rule in relation to material of a strong sexual nature is appropriate?*

Yes.

b) *Do you agree with our proposed rule on material of a strong sexual nature (proposed Rule 1.19)?*

c) *If you do not agree with our proposed new rule, please explain why and suggest alternative wording where appropriate.*

We believe the new rule is helpful. We believe that plot or narrative are only two of the factors which may provide editorial context for the inclusion of strong sexual material and consider the addition of the words "or other factors" after these words where used in the fourth bullet point in this rule would be beneficial.

Question 3

a) *Do you consider that the rule in relation to material equivalent to the BBFC R-18 rating needs to be separated from the rule in relation to R-18 rated works?*

Yes.

b) *Do you agree with our proposed rule on material equivalent to the BBFC R-18 rating (proposed Rule 1.17)?*

c) *If you do not agree with our proposed new rule, please explain why and suggest alternative wording where appropriate.*

We agree with the proposed rule only on condition that clear guidance that will clarify the criteria for the BBFC R18-rating is published alongside the introduction of the rule.

Question 4

a) *Do you consider that the rule in relation to pre-watershed material needs to be clarified?*

We have no objection to the rule being clarified.

b) *Do you agree with our proposed amendments to the rule on pre-watershed material (proposed Rule 1.20 to replace Rule 1.17)?*

Yes.

c) *If you do not agree with our proposed amendments, please explain why and suggest alternative wording where appropriate.*

Question 5

a) *Do you consider that the associated revisions are appropriate following the other rule revisions outlined above?*

Yes.

b) *Do you agree with our proposed associated revisions in Section One?*

c) *If you do not agree with our proposed revisions, please explain why and suggest alternative wording where appropriate.*

It is not entirely clear from the consultation document, but we assume that the current rule 1.18 on nudity will remain unaltered (albeit differently numbered). We believe it is important that the Code continues to distinguish nudity from sexual material.

Question 6

a) *Do you wish to suggest an alternative approach to the proposed set of rules in relation to sexual material? If so, please outline your proposals, which should comply with relevant legislation (including the Communications Act 2003 and the European Convention on Human Rights).*

No.

Competitions and Voting Rules (Code Section Two)

Question 7

a) *Do you consider that the introduction of new rules in relation to competitions and voting is appropriate?*

Yes, but we believe care must be taken to avoid duplication with those proposed for sections Nine and Ten of the Code.

b) *Do you agree with our proposed new rules in relation to competitions and voting (proposed Rules 2.11 to 2.13 to replace Rule 2.11)?*

Yes, but see our response in respect of proposed rules 9.10 and 9.11.

c) *If you do not agree with our proposed new rules, please explain why and suggest alternative wording where appropriate.*

In our view, proposed rule 2.11 could achieve its purpose by being redrafted as follows:

Broadcasters must not materially mislead viewers or listeners as to the result of a viewer competition or vote.

Proposed rule 2.12 risks duplication with proposed rule 9.11 and we suggest it is deleted from this section.

Question 8

a) *Do you consider that the introduction of new meanings in relation to competitions and voting are appropriate?*

Yes.

b) Do you agree with our proposed new meanings in relation to competitions and voting?

Yes, although guidance should clarify those matters which Ofcom has stated are excluded from the meanings in paragraph 5.27 of the consultation document.

c) If you do not agree with our proposed new meanings, please explain why and suggest alternative wording where appropriate.

Question 9

a) Do you wish to suggest an alternative approach to the proposed set of rules in relation to competitions and voting? If so, please outline your proposals, which should comply with relevant legislation (including the Communications Act 2003, the Audiovisual Media Services Directive, the AVMS Directive (Implementation) Regulations 2009 and Article 10 of the European Convention on Human Rights.

No.

Commercial References in Television Programming Rules (Code Section Nine)

Question 10

a) *Do you consider that the rules on commercial television would benefit from being separated from those for radio?*

Yes.

b) *Do you agree with the introduction of the proposed new Section Nine on commercial references in television programming?*

Yes, subject to the points made below.

c) *If you do not agree with the proposed new Section Nine, please explain why and suggest alternative wording where appropriate.*

Question 11

a) *Do you consider that it is appropriate for Ofcom to include the enforceable provisions relating to product and prop placement, replicated from the AVMS Directive (Implementation) Regulations, as rules in the revised Code?*

Yes.

b) *If you do not consider this to be appropriate, please explain why.*

Question 12

a) *Would you consider that it appropriate for Ofcom to introduce rules that would allow Public Information Programming (as described above)? If so please explain why. If not, please explain why not.*

Yes. In March 2003, the ITC confirmed that public bodies like the UK government or European

Commission could, separate from current affairs programming, sponsor consumer information and fund public information programmes, provided that such broadcasts were genuinely informational and simply impart non-controversial information in an impartial manner, nothing more, and are properly labelled, as with COI information films.¹ We therefore welcome this proposal, which we believe restates that rule and extends it beyond public bodies to not-for-profit entities such as charities.

b) If Ofcom were to introduce rules in relation to Public Information Programming:

i. Are there any potential programmes that you believe could comply with the potential rules but that you consider would be undesirable or arguably not in the public interest? If so, please give details.

We believe it will be desirable for Ofcom to provide further detailed guidance on what the types of matters are in the public interest. We understand this to mean the public's common well-being or general welfare. Broadcasters will also need to be mindful of matters which may fall foul of the "political, industrial or public controversy" limitations identified in Ofcom's consultation document.

ii. What impact (e.g. social, economic, equality) do you think the potential rules would have on viewers, the television industry and any other parties?

We believe the rules would enable broadcasters to secure funding for programmes that could contribute to non-controversial social goals in the public interest. For example, the Department of Health might help fund programmes about its anti-obesity Change4Life campaign, or development charities might help finance documentaries that examine agricultural projects in developing countries. It will be important for broadcasters to retain editorial control and for the organisation providing funds not to be promoted in the programmes.

We believe that in practice such funding would make only a marginal contribution to

¹ ITC News Release 21/03, http://www.ofcom.org.uk/static/archive/itc/latest_news/press_releases/release.asp-release_id=692.html

broadcasters' finances, but in some instances may provide the extra funds that ensure programmes get made. As a consequence, they would add to the range and breadth of programming available to viewers, and so enrich some viewers' experience.

iii. Do you consider that the potential rules would maintain the editorial independence of the broadcaster and provide adequate consumer protection? If not, please explain why.

Yes. Proposed rule 9.28 is clear on this point and broadcasters are used to complying with the rule generally in relation to sponsored programming.

iv. Do you consider that additional or alternative safeguards to those included in the draft potential rules are necessary? If so, please provide details.

Further guidance from Ofcom should provide the safeguards needed.

v. Specifically, should there be any restriction on the type of non-commercial, not-for-profit entities permitted to fund Public Information Programming, and if so, what restrictions?

No. If an individual or organization is permitted to advertise on television there is no reason why they should not be permitted to fund Public Information Programming where they fall within the definitions required under the new rules.

vi. Do you consider it would be appropriate for Ofcom to review these rules two years after their introduction? If not, please explain why.

Ofcom will undoubtedly monitor broadcasters' compliance with these rules in the months following their implementation and will, we hope, continue to offer guidance to broadcasters in the light of experience gained. We do not feel it necessary to schedule a review of the rules and would expect Ofcom to conduct a review of them only where a need for such a review has been identified based on evidence in accordance with Ofcom's duty to ensure its resources are

appropriately targeted.

Question 13

a) *Do you consider that the proposed new Section Nine would benefit from the introduction of new meanings?*

Yes.

b) *Do you agree with our proposed new meanings for Section Nine?*

Yes.

c) *If you do not agree with our proposed new meanings, please explain why and suggest alternative wording where appropriate.*

We believe the definition of "products or services" would benefit from the addition of "and not-for-profit" after the word "non-commercial", particularly if the proposed rules on Public Information Programming are introduced.

Question 14

a) *Do you consider that the introduction of new Principles in relation to Section Nine is appropriate?*

Yes.

b) *Do you agree with the proposed new Principles for Section Nine?*

Yes.

c) *If you do not agree with our proposed new Principles, please explain why and suggest alternative wording where appropriate.*

Question 15

a) *Do you consider that the proposed Rules 9.1 to 9.5 are broadly the same, in terms of both scope and intent, of current Rules 10.1, 10.2, 10.3, 10.4 and 10.12?*

We consider proposed rules 9.4 to 9.4 are broadly the same, in terms of both scope and intent, of current Rules 10.1, 10.2, 10.3, and 10.4.

b) *If you do not consider the proposed rules are broadly the same as the current rules in this area, please explain why and suggest alternative wording where appropriate.*

We consider proposed rule 9.5 is wider than current Rule 10.12. Some programmes consist entirely of reviews and discussion of advertisements, and it could be argued that the new proposed rule 9.5 would effectively prevent this type of programming because the presence of advertisements is very prominent. We do not believe this is Ofcom's intention, and suggest the second sentence of the proposed rule 9.5 should read:

Where advertisements are featured as part of programming, the products or services being advertised must not be unduly prominent.

c) *Do you agree with the introduction of the proposed new Rule 9.6?*

No.

d) *If you do not agree with the proposed new Rule 9.6, please explain why and suggest alternative wording where appropriate.*

Whilst we do not seek to argue with the principle of introducing this rule, its current drafting goes wider than is necessary to meet Ofcom's reason for its proposed introduction. In its consultation document, Ofcom states that "the rule would be introduced in line with our

proposal to site specific rules regarding viewer protection from financial harm when participating in broadcast competitions and voting in Section Nine, whilst retaining the rules for the broader areas of harm under Section Two.”

In our view, the proposed rule 9.6 goes wider than communications pursuant to participation in broadcast competitions and voting and covers matters such as viewer solicitations for comments or programme ideas or contributions. It would also apply to programme contributor applications and could lead Ofcom to receiving complaints from viewers who believe they had been unfairly prevented from participating in a programme (e.g. a contestant on a game show or a participant in a reality series). We do not believe Ofcom intends broadcasters' obligation to treat viewer communications fairly to have such wide application.

We therefore propose rule 9.6 should be drafted to more accurately reflect broadcasters' licences:

Competition entries and votes that are solicited by or on behalf of the broadcaster in programming must be treated fairly and consistently.

Question 16

a) *Do you consider it appropriate to introduce the proposed new Rule 9.9?*

No.

b) *If you do not consider it appropriate to introduce the proposed new Rule 9.9, please explain why and suggest alternative wording where appropriate.*

We assume a drafting error has occurred here and that Ofcom's proposal is for the cost to "viewers" (not "listeners") to be made clear to them.

In addition, proposed rule 9.8 already contains an obligation to ensure the use of premium rate numbers complies with the PhoneyPayPlus Code of Practice. Appropriate rules on publicising

the cost of their use are contained within the Code. The introduction of a separate rule in the Broadcasting Code will merely duplicate the relevant requirements of the PhonepayPlus Code.

The cost to viewers of using premium rate services will vary widely according to their network providers and the nature of their contracts. It is not possible for broadcasters to make such information clear to viewers given the wide number of network operators and tariffs available to consumers.

Ofcom's PRS Scope Review is currently examining the issue of pricing transparency.² In our view, any proposal to introduce a rule of this nature should be judged in light of the outcome of that Review.

Question 17

a) *Do you consider that the introduction of a new competition and voting section is appropriate?*

Yes.

b) *Do you agree with the proposed new competition and voting section for Section Nine?*

c) *If you do not agree with our proposed new competition and voting section, please explain why and suggest alternative wording where appropriate.*

The Channel 5 Licence Condition on the requirements for the handling of communications from viewers is Condition 12(A), not 6(A) as stated in the draft introductory text.

We do not understand why there is a difference between the proposed rules 9.10 and 9.11, and proposed rules 2.11, 2.12. and 2.13. The proposed rules 9.10 and 9.11 are not stated only to apply to competitions and votes in which premium rate services are used. Even if a drafting error has occurred, and the intention is that these rules should only apply to PRS competitions, we do not see why there should be such a difference in the rules for PRS competitions and votes, and

² http://www.ofcom.org.uk/consult/condocs/prs_scope/

rules which do not apply to PRS competitions or votes. We accept the logic for locating these rules in both sections 2 and 9 but the drafting of the rules in section 9 appears to add little to the proposed rules 2.11 and 2.12.

It would appear to make more sense to remove the rules where there is duplication from section 2 completely and incorporate all rules on competitions and voting into the proposed section Nine. Proposed rules 2.12 and 9.11 in particular appear to cover exactly the same point. Our preference would be for the wording proposed for rule 9.11 to cover these matters.

In our view, proposed rule 2.11 could achieve its purpose by being redrafted as follows:

Broadcasters must not materially mislead viewers or listeners as to the result of a viewer competition or vote.

d) *Do you agree that it is appropriate to apply these rules to BBC services funded by the licence fee?*

Yes.

e) *If you do not agree that it is appropriate to apply these rules to BBC services funded by the licence fee, please explain why.*

Question 18

a) *Do you consider that the rules in relation to programme-related material would benefit from clarification?*

Yes.

b) *Do you agree with the introduction of the proposed programme-related material section for Section Nine?*

c) *If you do not agree with the proposed programme-related material section, please explain why*

and suggest alternative wording where appropriate.

We believe the drafting of proposed rule 9.12 could be improved to recognise that programme-related material is not always an “item” in that it could be a live event derived from a programme. We suggest the word “item” is replaced with “material”.

In order to better reflect the reasoning behind proposed 9.13 we suggest the word “promoting” is inserted after “appropriateness of”.

Question 19

a) Do you consider that the proposed cross reference to the Cross-promotion Code would assist stakeholders?

Yes.

b) If you do not consider that the proposed cross reference to the Cross-promotion Code would assist stakeholders, please explain why and suggest alternative wording where appropriate.

Question 20

a) Do you consider that the meanings in relation to sponsorship of television would benefit from revision?

Yes.

b) Do you agree that the revised meanings are consistent with those currently used, but more accurately reflect the definition of sponsorship as set out in the AVMS Directive?

c) If not please explain why, suggesting drafting changes where appropriate.

The introductory text which states that “the rules enable references to the sponsor within a sponsor credit, not within the sponsored content” appears to prohibit any references to the

sponsor within the sponsored programme and is inconsistent with the current rule 9.5 and proposed rule 9.19 which states that "sponsor references within the editorial of sponsored programming that do not result from the sponsorship arrangement must be non-promotional, editorially justified and incidental."

We would also appreciate clarification of the position of a third party funds a programme for a reason other than the promotion of its products, services, logos, images, name, trade marks, and/or activities, i.e. a co-funder. Is such a party always considered to be a "producer"?

Question 21

a) *Do you consider that the rules in relation to the content of sponsored output would benefit from clarification?*

Yes.

b) *Do you agree with the introduction of the proposed new rules on the content of sponsored output in Section Nine?*

Yes.

c) *If you do not agree with the proposed new rules on the content of sponsored output, please explain why and suggest alternative wording where appropriate.*

Question 22

a) *Do you consider that the rules in relation to sponsorship credits would benefit from clarification?*

Yes.

b) *Do you agree with the introduction of the proposed rule?*

No.

c) If you do not agree with the proposed rule, please explain why and suggest alternative wording where appropriate.

We are concerned over the introduction of the words “undue prominence” in proposed rule 9.23. The concept of undue prominence is well-known to broadcasters, and we note Ofcom’s proposal to include further guidance on it in proposed rule 9.3. If the definition of “undue prominence” contained in proposed rule 9.3 is applied to the reference to “undue prominence” in proposed rule 9.23 we believe it will lead to confusion as to the acceptability of a sponsor’s product or service featuring in a sponsor credit.

The AVMS Directive provides that sponsored programmes must not encourage the purchase or rental of the products or services of the sponsor or a third party, in particular by making special promotional references to those products or services. The European Commission’s Interpretative Communication on certain aspects of the provisions on televised advertising in the TVWF Directive³ stated that “no explicit reference may be made to the products or services of the sponsor or a third party during the broadcast of sponsored programmes, except where such a reference serves the sole purpose of identifying the sponsor or making explicit the link between the programme and the undertaking sponsoring it.”

Therefore, provided the purpose of the reference to the sponsor’s product or service serves the sole purpose of identifying the sponsor or the sponsorship arrangements we believe the requirements of the AVMS are met.

We suggest the omission of the “undue prominence” rule from proposed rule 9.23. To provide clarity over the acceptability of reference to the sponsor’s product or service in sponsor credits, and to better reflect the intention behind the AVMS, we propose the following amendments:

³ 2004/C 102/02, April 2004.

Sponsorship credits must be distinct from advertising. Sponsor credits ~~can~~ may include reference to the sponsor's products and services only for the purpose of helping to identify the sponsor and or the sponsorship arrangement. ~~However, any such references must not be given undue prominence.~~ [remainder as drafted.]

Whilst we do not object to passing reference to "undue prominence" in Ofcom's guidance on the issue, we believe inclusion of the concept in this rule would be particularly unhelpful and lead to even greater confusion.

Question 23

- a) *Do you consider that the rules in relation to appeals for funds would benefit from clarification?*
- b) *Do you agree with the introduction of the proposed Rule 9.29 and the section on appeals for funds for programming or services?*
- c) *If you do not agree with the proposals, please explain why and suggest alternative wording where appropriate.*

We do not object to the clarification. We assume Ofcom was referring to proposed rule 9.39 in this question and to not object to its introduction.

Question 24

- a) *Do you consider that the proposed rule revisions are appropriate and would remain consistent with current rule requirements?*

Yes.

- b) *If you not, please explain why and suggest alternative wording where appropriate.*

Question 25

- a) *Do you wish to suggest an alternative approach to the proposed revisions in relation to the regulation of commercial references on television?*

No.

b) If so, please outline your proposals, which should comply with relevant legislation (including the Communications Act 2003, the Audiovisual Media Services Directive, the AVMS Directive (Implementation) Regulations 2009 and Article 10 of the European Convention on Human Rights.

Commercial References in Radio Programming Rules (Code Section Ten)

Questions 26 - 43

Five does not broadcast any radio programming and so is not responding to this section.

Sections of the Code where no revisions proposed

Question 44

a) *Do you agree with the proposed approach which only proposes changes to Section One of the Code in relation to material of a sexual nature; only proposes changes to Section Two in relation to Competitions and Voting; and proposes no changes to Sections Three to Eight.*

Yes.

b) *If you do not agree with our approach, please explain which other sections of the Code you consider should be reviewed and why.*

c) *Do you agree with Ofcom's approach which will be to provide, and update, guidance to all sections on an on-going basis? If so, are there particular areas where you consider an updating of guidance would be helpful?*

Yes. We consider an updating of guidance would be helpful in the following areas:

1. Definition of "younger children"

Although "children" is defined, "younger children" is not, yet "younger children" are referred to in the Code and elsewhere. It would be helpful to have a definition of "younger children".

2. Offensive Language

We would be grateful for clarification on whether "bleeping" swearing and offensive language before the watershed is:

- (a) sufficient, or whether pixilation of the speaker's mouth is also required;
- (b) acceptable even where the amount of bleeping is quite high, or whether language which would require "bleeping" should be removed completely.

3. Exorcisms the occult and the paranormal

Clarification on what is meant by a "demonstration" would be welcome. For example, there may be occasions in an observational documentary where we may wish to show someone



undergoing what is purported to be a paranormal reading. It seems disproportionate to require this to be shown after the watershed, and also for this to not contain life-changing advice either before or after the watershed.

4. Photosensitive epilepsy and flashing lights and/or patterns

We do not believe the broadcast of flashing lights and/or patterns should require editorial justification provided viewers are given an adequate verbal and/or text warning at the start of the programme or programme item. This is particularly the case for news, but also for drama. Alternatively, we would appreciate clarification on when the inclusion of such images may or may not be editorially justified.

Channel 5 Broadcasting Limited

4 September 2009