

Proposed amendments to Section 10 (Commercial References) of the Broadcasting Code

Programme-related material

10.6 Programme-related material may be promoted in programmes only where it is editorially justified.

10.7 The broadcaster must retain responsibility for all programme-related material.

10.8 Programme-related material may be sponsored, and the sponsor may be credited when details of how to obtain the material is given. Any credit must be brief and secondary, and must be separate from any credit for the programme sponsor.

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Meaning of “programme-related material”:

These are products or services that are both directly derived from a specific particular programme and specifically intended to allow listeners or viewers to benefit fully from, or to interact with, that programme.

Premium rate numbers

10.9 Where a broadcaster invites viewers or listeners to take part in or otherwise interact with its programmes, it may only charge for such participation or interaction by means of premium rate telephone services or other telephony services based on similar revenuesharing arrangements.

10.9 10.10 Premium rate numbers services, and other telephony services based on similar revenue-sharing arrangements, will normally be regarded as products or services, and must therefore not appear in programmes, except where:

- they form part of are directly derived from a particular programme and/or enable viewers or listeners to participate in or contribute to the editorial content of the programme; or
- they fall within the meaning of programme-related material (see above).

10.11 When a premium rate service (or such other telephony service as described in Rule 10.9) is included within a programme to allow viewers or listeners to participate or otherwise interact with the programme, broadcasters must ensure that:

- the service is directly derived from the particular programme or the service enables viewers or listeners to participate in or contribute to the editorial content of the programme;
- the service is not given undue prominence within the programme;
- the programme consists primarily of content other than the promotion and use of the service; and
- the primary purpose of the programme is editorial, and any commercial activity associated with the service (including but not limited to the generation of call revenues) is secondary to that purpose.

10.10 10.12 Any use of premium rate numbers or services within the UK must comply with the Code of Practice issued by the Independent Committee for the Supervision of Standards of

Telephone Information Services (ICSTIS) PhonepayPlus.

Guidance to be added to existing guidance on Section 10

Where ‘programme’ content seeks to promote and use premium rate telephone services (‘PRS’) in a way that is not consistent with the rules in Section 10, then – in addition to being in breach of the Code and depending on the individual circumstances – it may be that such content is in effect advertising (more specifically in the case of television, teleshopping, that is, long-form advertising containing direct offers). It is therefore subject to the relevant advertising content and scheduling codes for that medium.

Rule 10.9

Where broadcasters choose to charge viewers or listeners for participation in programmes over and above the normal costs of communication, e.g. ordinary post or standard

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telephony, then the only permitted means of charging for participation is by PRS (including

via the red button) or similar telephony applications, e.g. 0870 and 0871 services. Other methods of payment, such as by credit card or via a special account, are acceptable only where viewers or listeners are buying programme-related material, e.g. a DVD, not where they are seeking to participate in or otherwise interact with a programme. In the context of this rule and Rule 10.11, interaction does not refer to programme enhancements, usually accessed by pressing the red button, that are part of the platform architecture (e.g. additional information about the programme, action replays, or different camera angles).

Rule 10.11

Rule 10.11 reflects a judgement by the European Court of Justice ('ECJ') on 18 October 2007¹¹, where the ECJ ruled that:

"a broadcast or part of a broadcast during which a television broadcaster offers viewers the opportunity to participate in a prize game by means of immediately dialling a premium rate telephone number, and thus in return for payment, is covered by the definition given by Article 1(f) of teleshopping if that broadcast or part of a broadcast represents a real offer of services having regard to the purpose of the broadcast of which the game forms part, the significance of the game within the broadcast in terms of time and of anticipated economic effects in relation to those expected in respect of that broadcast as a whole and also to the type of questions which the candidates are asked"

Whilst the ECJ's ruling was made in the course of proceedings between the Austrian communications authority and an Austrian broadcaster regarding a particular quiz show broadcast by that broadcaster, Ofcom considers that the ruling is of wider significance. If it is possible for a quiz show, which invites viewers to call a premium rate number for a chance of answering a question and winning a prize, to represent "a real offer of services", then it follows that other genres of broadcast content predicated on the use and promotion of premium rate services may – depending on the particular facts – also represent a "real offer of services".

Broadcasters using premium rate numbers must take careful consideration of each of the factors set out in Rule 10.11. These factors inevitably overlap to some extent. None of the factors should be considered in isolation although, depending on the particular facts, some may outweigh others. One of the factors refers to undue prominence; see also Rule 10.4. Each case must be assessed on its individual facts and Ofcom is not able to provide a definitive view here on whether a so-called 'programme' is in fact advertising (in the case of television, teleshopping) or editorial. Ofcom could only provide such a view following a formal investigation. However, broadcasters may find the following examples helpful in their consideration of the factors set out in Rule 10.11; again, these should not be considered in isolation. References in these examples to PRS should be taken as also referring to similar revenue-sharing telephony services:

¹¹ Judgement of the Court, 18 October 2007, in Case C-195/06, reference for a preliminary ruling under Article 234 EC from the Bundeskommunikationssenat (Austria), made by decision of 4 April 2006, received at the Court on 27 April 2006, in the proceedings *Kommunikationsbehörde Austria (KommAustria), v Österreichischer Rundfunk (ORF)*

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Considerations that would tend to suggest compliance with Rule 10.11

- The PRS promoted within the programme clearly provides viewers with a genuine opportunity to participate in, contribute to or otherwise influence editorial content, e.g. entry to a competition or quiz, voting, on-air display of text messages, on-air discussion in a magazine-format show.
- References within the programme to the PRS are occasional only.
- The degree to which PRS is referred to within the programme is clearly justified by the degree to which the PRS contributes to editorial content.
- PRS is clearly only one element of the broadcast content, e.g. as is often the case in a studio-based game show, a magazine-format show, a sports discussion show, or a reality show.
- On calling the PRS number promoted in the programme, viewers are not given advertising information or options other than participation in the programme or quiz.

- PRS calls are charged at the lower end of the range of PRS charges permitted.
- The programme is not primarily or wholly funded by revenues generated by PRS. For clarity, in radio, this refers to the overall programming in which the item in question appears. We also recognise that on radio some shorter features may be primarily or wholly funded by PRS (or similar revenue-sharing telephony services).

Considerations that would tend to suggest a breach of Rule 10.11

- The PRS does not clearly contribute to editorial content, e.g. in a chat-based service where all or most of viewers' calls are neither audible nor discussed on air.
- The programme appears in effect to be a promotional vehicle for the PRS. In particular, the PRS is promoted with a degree of prominence not clearly justified by its contribution to editorial content; there are excessively frequent calls to action, visual or oral; or a significant proportion of airtime is given to promoting the PRS or to featuring the PRS interaction.
- On calling the PRS number promoted in the programme, the caller is presented with advertising messages or with options other than participation, e.g. to purchase a product or a service, or is subsequently sent marketing messages.
- The programme includes advertising-type messages about the PRS, e.g. 'cheaper calls', 'happy hour', '20% cheaper'.
- PRS calls are charged at the higher end of the range of PRS charges permitted.
- The programme is primarily or wholly funded by revenues generated by PRS, rather than by, for example, advertising revenues. For clarity, in radio, this refers to the overall programming in which the item in question appears.
- In the case of a quiz or competition, the question or puzzle appears to be promoting a product or service. This is a separate consideration to sponsorship or prize donation.

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Broadcasters should also note that particular care must be taken with pre-recorded content which encourages viewers or listeners to participate, as it will often be unclear how viewers or listeners are in fact able to contribute to or influence that content.

In content predicated on inviting audiences to call presenters to 'chat' or seek advice, the use of 'off-screen' premium rate services, e.g. call centres or operatives described as being 'at home', is likely to be in breach of Rule 10.11, taking into account all the factors set out under that rule. Ofcom also considers it unlikely that such off-screen premium rate services are 'programme-related material' ('PRM') as defined in the Broadcasting Code. In any event, promotion of PRM is strictly regulated under the Code; continual promotion throughout a programme is unlikely to be acceptable.