

The BBC Response to the public consultation by ICSTIS on Introducing Prior Permission For Premium Rate Services used in Television and Radio Services

The BBC is pleased to have the opportunity to respond to this consultation. Our reply is not given in confidence and we expect it to be published by ICSTIS.

This response reflects the views of both BBC management and the BBC Trust (the relevant regulator in this instance and sovereign body of the BBC).

The BBC Trust fully understands the need to restore public confidence in the use by broadcasters of premium rate services (PRS) in programmes. We hope that this reply, which contains our considered opinions on the questions asked by ICSTIS, assists ICSTIS in deciding whether, and if so how, it will implement a prior permission regime for the use of premium rate services (PRS) in television and radio services.

There are two key points of difference, as regards the use of premium rate services in television and radio programmes, between the BBC and broadcasters licensed by Ofcom.

Firstly the BBC does not utilise premium rate services within its programmes in order to create a profit for the BBC. Indeed the BBC Editorial Guidelines expressly rule out the use of premium rate services which are specifically designed to make a profit. The BBC seeks to ensure that in the event that it makes any incidental surplus it donates this to charity. The only exceptions are premium rate services which are specifically run in order to raise money for charity e.g. Children in Need, Comic and Sport Relief.

Secondly, and linked to the above, BBC compliance with the ICSTIS Code is covered by the BBC Editorial Guidelines. Section Ten of the Ofcom Broadcasting Code, which imposes the requirement on broadcasters to comply with the ICSTIS PRS Code, states specifically that that Section of the Ofcom Broadcasting Code does not apply to BBC services funded by the licence fee or World Service grant-in-aid and that those services are regulated by the BBC Governors (now the Trust). At present then a breach of the ICSTIS Code is a matter which is subject to regulation by the Trust.

The BBC Editorial Guidelines (2005) Section 15 Interacting with our Audiences can be found at:

<http://www.bbc.co.uk/guidelines/editorialguidelines/edguide/interacting/>

This covers the use of telephone services in some detail. In particular, in relation to premium rate telephony it says:

We must comply with the code of practice issued by the industry regulator, the Independent Committee for the Supervision of Standards of Telephone Information Services (ICSTIS), which is available at www.icstis.org.uk.

It is important that the public's trust in the use of PRS by broadcasters is restored by the concerted action of all regulators who work in this area. Our response addresses not only the broader issues raised by the consultation but, in particular, the issue as

to how ICSTIS, the Trust and the BBC can work together to ensure confidence in the use of premium rate services on BBC programmes.

Q1. Do you agree with this definition of Broadcast Premium Rate Services? If not, why not and what would you propose instead?

Yes.

Q2. What evidence do you have as to how serious and widespread a problem there is in respect of calls received either before lines are announced as open or after lines are ostensibly closed, and what steps could be taken to manage this problem in a way that limits callers from incurring costs without the benefits of receiving the service?

The BBC has been informed by Service Providers that closing lines is not a simple matter and cannot be guaranteed to happen at a certain time. This is dependent on the network platform used to support the service. The platform will be determined by the specific requirements of the interactivity proposed. The main platform used for high volume interactivity does not currently provide this facility with ease. We would welcome a technical solution but this is a matter for the network operators. The BBC therefore ensures that on air announcements are completely clear so that the audience can be in no doubt as to when lines are open and closed. In recent months the BBC has strengthened its on air messages even further. The BBC has been advised that very few callers ring in error after the lines are closed and one of the main service providers the BBC uses has confirmed that they are not aware of any major issues regarding callers making calls when lines are closed. As an example, in the final episode of *Any Dream will Do*, on 9 June 2007, over 3 million voted yet less than 0.4% attempted to vote after the lines were closed.

Q3. Do you agree with our proposed conditions for prior permission in relation to connectivity and capacity (set out below)? Have we omitted anything that is critical to considering risk?

There must be sufficient time for all valid responses sent by viewers or listeners to be considered and reflected in any outcome of the event (where there is one) which may then be reported on air. Where arrangements exist for the handling of excess peak traffic by additional parties, these arrangements must ensure that all valid votes and entries so handled are treated equally with those received by the primary party.

Red button interactive calls made prior to the time announced for line closure must complete the relevant competition entry/vote count process.

Yes the BBC agrees with the proposed conditions, but we note the explanatory text suggested that callers to landlines cannot be asked to participate when lines are about to close:

*“...votes should not be solicited at a point when it is certain entry methods have closed **or are about to close** and so have no realistic chance of being counted.”*

However as long as the vote/entry can be counted or included the BBC can see no reason not to solicit calls (using interactive voice response). However in the case of SMS, due to the latency issue the BBC is careful over when it ceases to solicit SMS interaction.

Q4. Do you agree with our proposed conditions for prior permission in relation to conduct as set out below? Have we omitted anything that is critical to considering risk?

Calls and SMS entries must not be accepted before lines have been announced as opened or continue to be accepted after an announcement that lines are closed has been made. After an announcement that the lines have been closed has been made, the lines must be closed. Terms and conditions must be comprehensive, clear and up-to-date, and all amendments made during the service must be appropriately publicised. It must be clear whether and, in which case, how amendments during the course of the service may be made. No amendments should be made retrospectively if they affect the position of existing entrants, including their decision to participate at all. Phone lines must not remain open when programmes are repeated and, in addition, the premium rate number should be obscured where possible. Viewers and listeners must not be led to believe that a recorded programme featuring premium rate participation is being broadcast live. Winning entrants for competitions must be randomly selected from all correct entries unless there is a tie-breaker or totally skill-based outcome. In any competition where a prize is worth £5,000 or more, there must be independent third party verification of the fairness of winner selection.

Pre-broadcast selection of potential competition winners is not permitted unless necessary to prevent a contravention of competition rules or broadcasting regulations. In respect of competition services, records and evidence of winners and the distribution of prizes must be maintained for a minimum period of 12 months from closure of the competition. Customer service arrangements for handling participant enquiries should be in place.

Firstly, although the BBC would very much welcome the ability to close lines on demand we are not aware that this can be achieved. (See our response above.)

Secondly, we are concerned that ICSTIS has not considered that preventing a change in the terms and conditions after a competition has commenced may prevent the correction of a genuine error to the detriment of the caller. For example, forgetting to exclude people connected with the competition, or dealing with a situation where it has become apparent that there has been an attempt at vote rigging or another matter outside the broadcaster's control. We feel the text should be adjusted to take account of this possibility. The BBC does agree that alterations should not be made unless absolutely necessary.

With regard to the proposed rule that "*Phone lines must not remain open when programmes are repeated and, in addition, the premium rate number should be obscured where possible*" the BBC suggest that the wording is clarified so that it is apparent on the face of the text that the proposed rule only applies if a vote/competition is closed.

The BBC is concerned at the proposal that there should be independent verification of competitions where prizes are worth more than £5,000. We are not aware of the evidence that suggests there is an issue here that requires this level of intervention. There are also practical difficulties for broadcasters who, like the BBC give very few cash prizes but instead provide prizes which are difficult to value – for example the recent Children in Need fundraising competition on BBC Radio 2, where the prize was the chance to become the voice of the Speaking Clock. It is the case that competitions are regulated by the law and by Ofcom under rule 2.11 of its Broadcasting Code. This proposal therefore appears to be disproportionate. It also raises the issue as to why should a competition with a lesser prize be should be regulated differently?

There are occasions where the BBC does shortlist pre-broadcast but that is in accordance with the terms and conditions of the competition/ project.

The BBC supports the suggestion that service providers keep records as suggested. This matches the present ICSTIS requirement for the keeping of call records. However the BBC does not understand why the broadcaster should also be required to keep such records for such a period. This could lead to confusion over who has the responsibility to keep records for ICSTIS. If such record keeping is required then the BBC would propose that the time durations on broadcasters match those required by Ofcom for the keeping of recordings of programmes; that is 90 days for the Public Service Broadcasters, 60 days for Cable and Satellite services and 42 days for radios. In the case of small radio services in the UK generally the maintenance of records as proposed would be a serious financial and administrative burden which appears to be disproportionate. The case has not been made by ICSTIS for the need for retention of records by broadcasters for this period. The BBC would expect to keep such records for the duration of an investigation once an investigation had commenced. It may be useful to ICSTIS to set this requirement out as well.

Q5. Do you agree with our proposed conditions for prior permission in relation to cost and conditions as set out above? Have we omitted anything that is critical to considering risk?

Yes. (Please note our answer to the last question regarding the need to have the ability to alter Terms and Conditions after a competition has started if absolutely necessary.)

Q6. Do you agree with our proposed conditions for prior permission in relation to coherence as set out below? Have we omitted anything that is critical to considering risk?

Contractual arrangements between broadcasters, production companies, service providers and other partners must clearly and coherently identify which person is responsible for the performance or management of each activity associated with the service. There must be no amendments to operational systems or procedures relating to the service without senior management authorisation. All staff, whether internal or employed by contractual partners, must have the ICSTIS Code of Practice drawn to their attention and have

suitable training. Procedures must exist for the back-up of all operational systems and to deal with predictable problems inherent in providing Broadcast PRS. Subject to reasonable notice from ICSTIS, service providers must make provision for Executive staff of ICSTIS and/or its agents to visit the relevant premises from which the service is provided and have access to any records relevant to the provision of the service.

Yes for service providers, given the service provider is responsible for the provision of premium rate services. We have two amendments. The BBC suggests that ICSTIS should require that a category of staff should be responsible for each activity rather than a named person, as in a dynamic industry names may have to frequently change. The BBC also suggests that the wording should also require that all *relevant* staff that need to be aware of the ICSTIS Code have training. The present wording is imprecise and in the case of broadcasters it would be onerous if applied to all of its staff, many of whom have no connection with the use of premium rate services.

Q7. Do you agree with our analysis that the same inherent risks for premium rate use in programmes on television also exist in radio?

Yes.

Q8. Do you agree with our judgement that the definition of Broadcast PRS should specifically extend to radio for the reasons set out above? If not, why not?

Yes.

Q9. Do you agree with our proposal to require providers of Call TV Quiz Services to continue to obtain prior permission specific to Call TV Quiz Services but that we include in the existing permission certificates for providers of such services the above conditions? If not, why not?

Yes but we would seek clarification that specific provisions which are required for Call TV Quiz, which may of necessity be more rigorous, do not put undue restrictions on those running non Call TV quiz services.

Q10. Do you agree with our assessment that Broadcast PRS involving auctions should be included with the need to obtain prior permission? If not, why not?

Q11. Do you agree that music channels using premium rate votes to determine playlists from participants should be included with the need to obtain prior permission? If not, why not?

Questions 10 and 11 are not applicable to the BBC.

Q12. Do you agree with our analysis that premium rate services involving charitable giving and donations should be included with the need to obtain prior permission? If not, why not?

Yes.

Q13. Do you agree with our assessment as to why we suggest that chat services should be excluded from the prior permission regime proposed in this paper? If not, why not?

This is not applicable to the BBC.

Q14. Do you consider that there are other categories of service which fall within the definition of Broadcast PRS but which should not be required to obtain prior permission?

In our discussions with the value chain, it has been suggested that ICSTIS could perhaps give consideration to the possibility of applying this regime to calls above a certain price – for example, above 30p. ICSTIS could consider the complaints they have received regarding broadcast using PRS which were well founded and look at the cost of the calls. If the concerns that ICSTIS has are generally about the conduct of calls where the primary motive is to make money as opposed to enhancing the viewer or listener experience then we would suggest that need for prior permission for Broadcast PRS would only apply where higher rates are involved. Therefore rates which set a minimum tariff cost for callers (which is how some broadcasters use premium rate services) should be excluded. This might present an evidence-based and proportionate solution.

Q15. Do you agree with our proposals to introduce prior permission for Broadcast PRS where the primary focus of the need to obtain prior permission will be on service providers alone? If not, why not?

Yes.

Q16. Do you have any suggestions about how the effectiveness of the proposed prior permission regime might be improved?

The BBC would suggest that ICSTIS considers whether network providers should be included in the need for prior permission. As a result issues of varying call costs between networks could be addressed more effectively and procedures for accepting calls and texts i.e. mobile latency issues could also be addressed. The BBC feels that there could be more improvement in that area.

Q17. What thoughts or suggestions do you have as to whether or not it would be sensible to engage broadcasters and/or production companies (when information providers) directly within the prior permission regime by causing them to accept, in effect, a position where they are directly answerable to ICSTIS for Code and condition breaches?

The regulatory background

In responding to this question it is necessary to set out the regulatory background in detail as the BBC is in a different position to other broadcasters. This is because the requirement that BBC programme makers who use premium rate services in programmes ensure that the use of those services comply with the ICSTIS Code is

covered by the BBC Editorial Guidelines and is not covered by the Ofcom Broadcasting Code.

The Ofcom Broadcasting Code regulates PRS in Section 10 and expressly sets out that regulation of these matters is to be by the BBC and not Ofcom. It states that:

This section of the Code does not apply to BBC services funded by the licence fee or grant in aid, which are regulated on these matters by the BBC Governors.[sic]

Rule 10.9 and 10.10 are as follows:

Premium rate numbers

10.9 Premium rate numbers will normally be regarded as products or services, and must therefore not appear in programmes, except where: they form part of the editorial content of the programme; or they fall within the meaning of programme-related material (see above).

10.10 Any use of premium rate numbers must comply with the Code of Practice issued by the Independent Committee for the Supervision of Standards of Telephone Information Services (ICSTIS).

The BBC itself regulates PRS, amongst other things, by requiring compliance with the ICSTIS Code – just as Ofcom does for other broadcasters. The BBC Editorial Guidelines (2005) Section 15 Interacting with our Audiences can be found at: <http://www.bbc.co.uk/guidelines/editorialguidelines/edguide/interacting/>

This covers the use of premium rate telephone services in some detail. In particular it says:

We must comply with the code of practice issued by the industry regulator, the Independent Committee for the Supervision of Standards of Telephone Information Services (ICSTIS), which is available at www.icstis.org.uk.

At present then a breach of the ICSTIS Code is a matter which is covered in the BBC Editorial Guidelines and subject to regulation by the Trust and explicitly ruled out by the Ofcom Broadcasting Code with regard to BBC services funded by the licence fee or grant in aid.

This does not prevent Ofcom from investigating cases or complaints involving competitions under Section 2 of the Ofcom Broadcasting Code or from using other relevant Code provisions. This year for example Ofcom is considering *Blue Peter* and *Smile*.

In particular Rule 2.11 of the Ofcom Broadcasting Code requires that:

Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known.

The Consultation question

Turning now to the question asked in the consultation, the BBC does not consider that engaging broadcasters and/or production companies (when information providers) directly within the prior permission regime by causing them to accept, in effect, a position where they are directly answerable to ICSTIS for Code and condition breaches is necessary or desirable.

Broadcasters licensed within the UK and the BBC and S4C are specifically required to ensure by a broadcasting regulator that their use of premium rate services within programmes complies with the ICSTIS Code. In the case of the BBC this is the BBC Trust, with all other broadcasters the regulator is Ofcom.

This area of interactivity by the audience with the broadcaster using premium rate services is relatively new and has grown substantially in a very short time. There have been evident gaps in regulation. However those gaps can be covered by applying the systems already in place as opposed to the solution suggested by ICSTIS – that is requiring the broadcaster to accept regulation by ICSTIS.

The flaw in regulation has been that ICSTIS, Ofcom and the BBC Trust have looked at these matters separately and not in combination. However that has already begun to alter. ICSTIS is passing cases it has competed to Ofcom so that the matter is judged from the perspective of a broadcasting regulator. We would suggest that this can also occur in the future regarding a premium rate service used on a BBC programme which has been subject to an ICSTIS investigation. In this case the matter should be referred to either Ofcom if it concerns a competition under 2.11 of the Ofcom Code or is appropriately dealt with under another part of the Code or by the BBC Trust. The BBC Trust is empowered by the Charter and Agreement to undertake investigations. It can also require direct action by the BBC Executive.

It is therefore the BBC's position that whilst the BBC welcomes the suggestion that there should be a prior permission regime that regime should be applied to the service provider and should not be applied to the broadcaster. The proposal is disproportionate given that the regulatory framework exists to ensure broadcasters are appropriately regulated – it is the case that the framework needs to be properly applied.

The BBC is also concerned that the proposal seeks to extend the powers of ICSTIS without due regard to the fact that this is an extension of regulation without statutory backing in an area where Parliament has already set in place carefully considered broadcast regulation under the aegis of Ofcom and - in the case of the BBC - the BBC Trust.

The current ICSTIS proposal carries with it the likelihood that its implementation would cause Ofcom to act in a manner which is ultra vires. The reason for this is that the ICSTIS proposal would effectively make it compulsory for broadcasters who offer PRS services (and therefore, in effect, the entire industry) to submit to ICSTIS's jurisdiction in this area; in order for that jurisdiction to be enforceable the revised ICSTIS Code would need to be approved by Ofcom under its statutory powers; those statutory powers do not on their terms extend to broadcasters unless they operate an

electronic communications network or provide an electronic communications service (neither of which is provided by the BBC in these circumstances); therefore the approval of such a code by Ofcom would purport to extend Ofcom's powers over entities which are not subject to the statutory regime enforceable by Ofcom.

The present position directly reflects legislative intent given that the only other authority with a regulatory role as regards the BBC is Ofcom, whose role is established by section 198 of the Communications Act 2003 and relates to requirements set out in the BBC Agreement with the Secretary of State known as "*relevant enforceable requirements*". These include programme code standards set by Ofcom but only to the extent that they are specified in clause 46 of the BBC Agreement. As the Ofcom Broadcasting Code specifically excludes the BBC from the requirement to comply with the ICSTIS Code and recognises the regulation by the BBC Trust in this area it is clear that any move to make the BBC directly answerable to ICSTIS would run counter to the policy intentions behind the Communications Act/BBC Charter settlement.

We would ask ICSTIS to consider that the BBC Charter and Agreement were renewed by Parliament a year ago. The position of Ofcom is explicitly set out in the Agreement which was subject to careful consideration by Parliament following a public consultation by the Department of Culture Media and Sport. There is no mention of ICSTIS in the Agreement. It was not envisaged that the BBC would be subject, as a broadcaster, to ICSTIS regulation.

This is particularly concerning in that the BBC is funded by the licence fee-payer. ICSTIS's proposition would mean that the BBC would be liable to fines by ICSTIS. Fines levied by ICSTIS are penalties which attach to those who are seeking to make a commercial profit from premium rate services and have caused consumer detriment in the search for profit. The BBC is not seeking to run premium rate services in order to make a profit as we have set out in the opening to this response. Fines levied upon the BBC would be ultimately levied upon the licence fee-payer. The BBC has been made subject to sanction by Ofcom including financial sanction but this has occurred following considerable debate in Parliament and in the media and has properly taken account of the views of the public.

Finally the BBC Trust wishes to point out that the BBC is at risk of being placed in more than double jeopardy here. That is it could be liable to an investigation and fine by ICSTIS and also subject to investigation and sanction by Ofcom as well as investigation and action by the BBC Trust in relation to the same programme and the same set of facts.

It is imperative that the public's trust in the use of premium rate services on television and radio is restored. Interactivity is something the public has come to use and enjoy and it has enhanced the ability of the broadcaster to give the public programmes which inform, educate and entertain. However it is also important that the regulation that is in place is used effectively and that regulation is not imposed which is disproportionate.