Fakery and Deception in Participation TV – Lessons Learned from the UK's TV Phone-line Scandals

Gavin Smith examines the background and regulatory response to one of the UK's worst television public relations disasters involving the faking of winners in on-air phone competitions and broadcasters receiving revenue from premium-rate phone votes which were never counted.

Introduction

Television broadcasting in the UK has recently emerged from one of the most damaging scandals in its history. All four of the UK's major TV broadcasters – the BBC, ITV, Channel 4 and Five – were found to have breached the Office of Communications (**Ofcom**) Broadcasting Code relating to the conduct of certain on-air phone-in votes and competitions, resulting in the imposition by Ofcom of record fines. Separately, the UK's premium rate phone-line regulator PhonepayPlus[1] has found several premium-rate phone companies who operated the competition and voting lines for broadcasters to be in breach of its Code of Practice, also levying record fines in the process. The consequences of the scandal have been severe: aside from the record fines imposed, both Ofcom and PhonepayPlus have issued new regulatory codes and the country's largest free-to-air broadcaster, ITV, was forced to make an £18 million provision in its 2008 accounts not only to pay the fines but also to return premium phone-line revenue to its viewers. The scandal has struck at the heart of the UK public's trust in broadcasters and served as a blow to a relatively nascent, but significant revenue stream for TV broadcasters already struggling with a precipitous drop in advertising revenue.

Participation TV – The Commercial Context

In August 2008, Ofcom published its annual Communications Market Report (**CMR**).[2] The CMR found that TV advertising spend, as a proportion of total advertising spend, reduced from 30.9% in 2002 to 26.8% in 2007. The report also found that net advertising revenue for TV in the UK remained relatively static between 2001 and 2007, increasing only slightly from £3.471 billion in 2004 to £3.544 billion in 2008, a figure which itself represented a decrease from a high point in 2006 of £3.548 billion. Within this overall net advertising revenue, the UK's commercial public service broadcasters (ITV, Channel 4 and Five) reported a decrease in their net advertising revenue of 9.6% in 2006 and 2.4% in 2007. Adjusted for inflation over this period, these changes represent a significant drop in overall revenues for TV broadcasters.

More recently, in March 2009, Carat, the media buying network owned by Aegis, reported that TV advertising expenditure would fall by 12.5% in the UK during 2009.[3] This figure was contrasted against a rise (notwithstanding the prevailing economic climate) in internet advertising spend of 4.8% during the same period.

This downwards pressure on TV advertising revenues has been a key driver in broadcasters searching for alternative revenue streams. In Volume 27 Issue No 3 of the Communications Law Bulletin, Lesley Hitchens looked at the recent developments in product placement. One of the other major new revenue streams developed by broadcasters to counter the downward pressure on TV advertising revenues has been participation TV – the use of premium-rate phone services (both via telephone and SMS text) and paid "red button" interactivity for TV voting and competitions. According to research undertaken by Fathom Partners for PhonepayPlus and published in February 2008, TV voting and competitions generated £139 million in revenue during 2007 in the UK.[4] This amounted to as much as 13% of the overall £1.1 billion UK market in premium-rate phone services behind only directory and adult services.

Regulatory jurisdiction

Two regulatory bodies held jurisdiction over participation TV in the UK: Ofcom and PhonepayPlus (formerly known as the Independent Committee for the Supervision of Standards of Telephone Services, or **ICSTIS**).

Ofcom is required under section 319 of the UK's Communications Act 2003 (***Communications Act***) to draft, maintain, and monitor compliance with, a code governing the standards of broadcast content, programme sponsorship, and fairness and privacy.[5] Known as the Broadcasting Code,[6] it covers a wide range of matters including the protection of minors, prevention of harm and offence in broadcasting, rules on due impartiality, due accuracy and undue prominence of opinions, the treatment of religion and politics in broadcasting, sponsorship and rules governing cross-promotion between services and platforms. In scope, it is not dissimilar to Australia's Commercial Television Industry Code of Practice. Under the terms of all licences issued by Ofcom pursuant to the Communications Act, licensed TV and radio broadcasters are required to comply with the provisions of the Broadcasting Code and any breach of the Broadcasting Code accordingly can result in the same sanctions as for a breach of the licence itself.

Between 26 June 2007 and 18 December 2008, Ofcom issued numerous adjudications in participation TV cases. Two particular provisions of the Broadcasting Code (as then in force) were specifically relevant to this spate of cases:

- Rule 2.2: "Factual programmes or items or portrayals of factual matters must not materially mislead the audience"; and
- Rule 2.11: "Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known".

Under sections 120-124 of the Communications Act, Ofcom also has responsibility for the regulation of premium rate services,[7] premium rate services being defined in the UK broadly as services which offer some form of content, product or service that is charged to users' telephone bills.[8] Ofcom has appointed PhonepayPlus as its agency for regulating the premium rate services market under a formal framework agreement. PhonepayPlus is an independent agency, with up to three members of its board being appointed on the basis of contemporaneous industry knowledge. PhonepayPlus publishes a Code of Practice[9] (the **PRS Code**) which sets out the manner in which premium rate services must be operated and has the power to impose sanctions, including levying fines, for breach of the PRS Code.

Although the PRS Code has been amended on a number of occasions (and is now in its eleventh iteration), the version in force which applied in respect of the majority of the participation TV cases heard during 2007 by PhonepayPlus contained the following provision:

- Rule 4.3.1: "Services and promotional material must not:
  - a. mislead, or be likely to mislead in any way,
  - b. take unfair advantage of any characteristic or circumstances which may make consumers vulnerable."

The PRS Code applies to all "service providers" (the providers of the relevant premium rate service) and the "network operators" of the communications infrastructure over which the service provider offers the relevant premium rate service.[10]

The Infringements

Fines issued by Ofcom for breaches of the Broadcasting Code and the PRS Code relating to deception and irregularities in the use of premium rate services in participation TV, have reached £11,577,000 to date, almost £11 million of which has been levied by Ofcom. The sheer level of these financial sanctions is unprecedented both in the history of Ofcom, which was established in 2003, and of its predecessor organisation, the Independent Television Commission (***ITC***). A brief synopsis of some of the key cases which gave rise to these sanctions is set out below:

- 26 June, 2007: Ofcom found that Channel Five had faked the winners of a phone-in quiz on daytime show Brainteaser, in breach of Rule 2.11 of the Broadcasting Code.[11] The rule was breached when fake names were used as competition 'winners' on three occasions; and production staff posed as 'winners' on air another two occasions, despite viewers paying premium rate service call charges to enter the competition. In its adjudication, Ofcom found that there had been what it called a "*longstanding history of similar conduct in seven previous competitions on Brainteaser, dating back to 2003; and four competitions on a spin-off programme, Memory Bank, in 2004*".[12] Ofcom fined Channel Five £300,000.
- 9 July 2007: Ofcom found that the BBC had faked the winner of a phone-in competition on the childrens' TV show, Blue Peter and fined the BBC £50,000 for breaches of Rules 2.11 and 1.26 (due care of people under eighteen) of the Broadcasting Code.[13] Ofcom found that "*during a premium rate telephone competition conducted as part of the programme, technical problems prevented genuine callers being put to air to answer the competition question. Instead, a child visiting the studio was asked to call in and pose as the 'winner' of the competition*." The adjudication found that the problem had been further compounded when the same show was retransmitted at a later time on the BBC's sister channel, CBBC when a further 3,574 entrants called, and were charged to use, the premium rate telephone line to enter the competition when it had already closed because the on-screen caption showing the entry number had not been sufficiently obscured. This case was particularly notable for the fact that it was the first time an independent media regulator had imposed a fine on the BBC.[14]
- 26 September 2007: Ofcom found that GMTV (the morning provider of TV programming on ITV) had charged viewers for their entries to on-air phone-in competitions when they had no chance of winning, and fined GMTV £2 million for a number of breaches of Rule 2.11 of the Broadcasting Code stretching over a 4 year period.[15] According to Ofcom's adjudication, the breaches fell into three broad categories: competition finalists were regularly selected before lines closed, meaning that viewers phoning-in towards the end of the entry period had no chance of winning; a method of selecting finalists was used that resulted in those viewers who called to enter between 8:30am and 9:00am having significantly less chance of being selected as a finalist than those who entered before 8:30am; and, on some occasions, the competition finalists were all selected up to three minutes before lines closed. Two days earlier, PhonepayPlus had also fined Opera Telecom Limited, the premium-rate phone line operator which provided the telephone phone line service to GMTV, £250,000 in respect of the same competitions.
- 20 December 2007: Ofcom fined Channel 4 a total of £1.5 million for misconduct in the daytime quiz show "Deal or No Deal" and the phone-in contest "You Say We pay" which formed a part of the daytime chat TV show, Richard and Judy.
- 8 May 2008: Ofcom issued ITV with a £5.65 million fine – the highest fine ever imposed on a UK broadcaster – for what it described as "*some of the most serious breaches of [its] Broadcasting Code*". Ofcom stated that the fine was "*by far the highest imposed by Ofcom or any of the previous regulators [and] reflects not only the seriousness of ITV's failures but also their repeated nature*".[16] Ofcom's findings were informed, in part at least, by ITV's own independent report commissioned from Deloitte[17] which identified breaches of Rule 2.11 of the Broadcasting Code on repeated occasions in a number of phone-in competitions in prime-time TV shows (including Ant and Dec's Saturday Night Takeaway, Gameshow Marathon and Soapstar Superstar), and also identified a total of £7.8 million in revenues received by ITV through premium rate services which ought to be refunded to viewers or, if unclaimed, donated to charity. The list of breaches was long:
  - selecting competition finalists before telephone lines were announced as closed;
  - staggering selection of competition finalists so that all viewers did not have an equal chance of winning;
  - selecting finalists for competitions based on suitability to be on television and where they lived, rather than randomly;
  - selecting individuals already known to production teams to win competitions or be on shortlists;
  - ignoring viewers choices in phone-in votes by finalising counts before lines were closed; and
  - failing to adequately inform viewers that participation competition were finished during repeat broadcasts.

  The adjudication was also accompanied by some of Ofcom's most strongly worded statements on the subject. Philip Graf, Chairman of Ofcom's content sanctions committee said: "*ITV programme makers totally dis-*

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regarded their own publishing terms and conditions … there was a complete inadequate compliance system in place … millions of paying entrants were misled into believing they could fairly interact with some of ITV's most popular programmes." And Ed Richards, Chief Executive of Ofcom, said: "*this was a thorough set of investigations which uncovered institutionalised failure within ITV that enabled the broadcaster to make money from misconduct on mass audience programmes*."

- 30 July 2008: Ofcom fined the BBC £400,000 for a breach of Rule 2.11 of the Broadcasting Code in viewer and listener competitions across 8 different TV and radio shows, including the Children in Need and Comic Relief charity "telethon" events[18]. The breaches included production team members standing-in as winners of competitions to which viewers had entered using premium rate services and broadcasting fictitious names as winners of competitions.

A New Regulatory Regime

In March 2007, having already identified a number of breaches of the Broadcasting Code in the conduct of participation TV premium rate service competitions and voting by that juncture, Ofcom commissioned an independent inquiry (the **Ayre Inquiry**) into the use by broadcasters of premium rate phones services. The report was published on 18 July 2007[19] and concluded that there were "*systemic*" problems and an "*absence of systems designed to require, ensure and audit compliance. In the absence of such systems individual mistakes, whether the result of technical failure, misjudgement, negligence or deliberate deceit, too often went unnoticed or unreported and sometimes ignored.*"[20] The report contained a number of key findings. In particular, it stated that broadcasters had to do more to recognise the contractual relationship it had with viewer-consumers when it provided premium rate services and the obligations which that imparted on them.[21] It criticised what it said was significant confusion over the division of powers between PhonepayPlus and Ofcom. PhonepayPlus only had jurisdiction over the service provider of the premium rate service but not the broadcaster which had contracted with the service provider to offer that premium rate service.[22] In most cases, broadcasters therefore refused to accept that the PRS Code applied to them.[23] It also criticised the fact the PhonepayPlus was only capable of levying a maximum £250,000 fine, the amount it had imposed on Opera Telecom Limited on 24 September 2007.[24] The report posed a number of key options and recommendations to Ofcom:

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- to make broadcasters "*directly responsible for PRS compliance right through the supply chain, just as they would be for broadcast content*". The report said that this was the only way to "*give broadcasters the incentive to exercise due diligence in the design, commissioning, delivery and auditing of PRS based programming, together with effective contractual oversight of producers, service providers and telephony operators*". It would "*place responsibility firmly where the audience already believes it to rest – with the people who commission the programmes and put them to air*".[25]
- Potentially make ICSTIS have formal jurisdiction over broadcasters' use of premium rate services[26], or, alternatively, to amend existing broadcast licences to include a specific obligation requiring broadcasters to have responsibility for consumer protection in respect of all aspects of the provision of premium rate services.[27] The consequence of this second alternative would be to make Ofcom responsible for the regulation of all broadcast-related premium rate services rather than PhonepayPlus.
- Regular third party, independent audit of all broadcasters' use of premium rate services.[28]
- Updated guidance from Ofcom regarding the manner in which competitions are run (including recommendations as to the timing of counting of votes, the manner in which votes are counted, transparency of pricing of the relevant premium rate service, and general principles of fairness in the conduct of all premium rate service phone-in competitions and voting processes).[29]

Ofcom issued a consultation paper on the findings from the Ayre Inquiry[30] and, after considering responses received from stakeholders, issued a statement on 19 February 2008[31] setting out new measures to "*protect consumers and to help restore confidence in programmes that invite members of the public to participate in them via telephony, the internet or any other form of communication*".[32] On the same date, PhonepayPlus also issued its own policy statement.[33]

Ofcom's statement introduced almost all of the findings from the Ayre Inquiry report. New licence conditions were introduced which require that:

- "*Licensees shall be responsible for all arrangements for the management of communication, including telephony, between members of the public and the Licensee or the Licensee's contractors or agents… where such communication is publicised in programmes*"; and
- "*Arrangements for the management of methods of communication between members of the public and the Licensee must ensure, in particular, that: (i) reasonable skill and care is exercised by the Licensee in the selection of the means of communication and in the handling of communications received; (ii) voting, competitions, games or similar schemes are conducted in such ways as to provide fair and consistent treatment of all eligible votes and entries; and (iii) publicity in programmes for voting, competitions, games or similar schemes is not materially misleading*."

A new verification requirement has been introduced via a further licence condition. This requires licensees to implement and maintain appropriate compliance procedures to ensure compliance with the new licence provisions set out above. This verification must be via an independent third party, and must also "*include appropriately regular reviews by the third party of individual programmes … [and] track all votes or competition entries through all stages from receipt, and the results of each review must be fully documented*." A board member is required to have responsibility for the verification and the third party verification results are to be presented to that board member. Where irregularities are discovered, the board member must report them to Ofcom and also provide any other information requested by Ofcom. Each Licensee is also required to publish an annual statement signed by the relevant board member confirming that he is "*satisfied that the Licensee has in place suitable procedures to fulfil the requirements of paragraph 3(b) and confirming the name of the third party engaged [in the verification]*".

In conjunction with the new licence conditions described above, Ofcom also accepted the proposals from the Ayre Inquiry report to introduce new guidance to give further detail to the manner in which Ofcom expects premium rate services to be used in broadcasting.

PhonepayPlus has, at the same time, introduced a new requirement for service providers who are contracted by broadcasters to provide the premium rate services communicated to viewers in programming to seek prior permission before they are permitted to provide broadcasting related premium rate services[34]. This new regime requires service providers to comply with certain conditions attached to their prior permission. These include:

- Connectivity and capacity: An ability to adequately deal with peak-time traffic when votes and competition entries are being received and to ensure that all votes/competition entries are considered and reflected in time for the relevant outcome.
- Conduct: Calls and SMS must not be counted before or after lines are officially opened and closed; lines must not remain open when programmes are being repeated.
- Coherence: contractual arrangements with broadcasters must identify which party has responsibility for all aspects of each activity associated with the service; there can be no changes to the operational structure without senior management approval; all personnel must be aware of the PhonepayPlus code of conduct and have suitable training; procedures must be in place to deal with backup of operational systems; and service providers must permit PhonepayPlus staff and/or its agents to visit the service provider's premises and have access to any documents or records relevant to the service.

Even following the introduction of the new Ofcom and PhonepayPlus regulatory regimes in February 2008, both entities found themselves trying to unravel yet more past misdemeanours of the major public broadcasters until the end of 2008. In what many hoped would be the final major investigation into broadcast-related premium rate service scandals, Ofcom fined the BBC £95,000 on 18 December for breaches of the Broadcasting Code arising from programming which had been broadcast in 2006. But it remains to be seen whether the sheer scale of the fines imposed by Ofcom and PhonepayPlus during 2007 and 2008, together with the new regulatory regime, will ensure that the UK has seen the end of this series of scandals.

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(Endnotes)

1 http://www.phonepayplus.org.uk/

2 http://www.ofcom.org.uk/research/cm/cmr08/

3 http://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/media/5050270/Carat-says-UK-advertising-market-to-fall-7.1pc-in-2009.html

4 http://www.phonepayplus.org.uk/pdfs_research/Phone_paid_services_Fathom.pdf

5 s319 Communications Act 2003, which can be found at: http://www.opsi.gov.uk/ACTS/acts2003/ukpga_20030021_en_29#pt3-ch4-pb16-l1g319

6 http://www.ofcom.org.uk/tv/ifi/codes/bcode/

7 ss.120-124 Communications Act 2003, which can be found at: http://www.opsi.gov.uk/ACTS/acts2003/ukpga_20030021_en_13#pt2-ch1-pb19-l1g120

8 Ibid, section 120 Communications Act 2003.

9 http://www.phonepayplus.org.uk/service_providers/cop/default.asp

10 s.120 Communications Act, and section 1.2 of the PRS Code.

11 http://www.ofcom.org.uk/tv/obb/prog_cb/obb88/

12 http://www.ofcom.org.uk/tv/obb/prog_cb/obb88/

13 http://www.ofcom.org.uk/tv/obb/prog_cb/obb89/

14 The BBC is not licensed by Ofcom and is principally regulated by the independent BBC Trust. As a consequence, Ofcom has limited powers over its activities having jurisdiction over the BBC in only two areas: (i) competition issues relating to the BBC's activities; and (ii) the BBC's compliance with the Broadcasting Code.

15 http://www.ofcom.org.uk/tv/obb/prog_cb/obb94/

16 http://www.ofcom.org.uk/tv/obb/prog_cb/obb108/bb108.pdf

17 http://www.itvplc.com/files/itvnews/1146/2007_10_18.pdf

18 http://www.ofcom.org.uk/tv/obb/prog_cb/obb115/

19 http://www.ofcom.org.uk/tv/ifi/prsinquiry/ayrereport/report.pdf

20 Paragraph 1.9 of the Ayre Inquiry into PRS, Ibid.

21 Paragraph 1.14 of the Ayre Inquiry into PRS, Ibid.

22 Paragraphs 1.20-1.24 of the Ayre Inquiry into PRS, Ibid.

23 Paragraphs 1.20-1.24 of the Ayre Inquiry into PRS, Ibid.

24 Paragraphs 1.20-1.24 of the Ayre Inquiry into PRS, Ibid.

25 Paragraph 1.36 of the Ayre Inquiry into PRS, Ibid.

26 Paragraph 1.38 of the Ayre Inquiry into PRS, Ibid.

27 Paragraph 1.39 of the Ayre Inquiry into PRS, Ibid.

28 Paragraphs 1.45-1.47 of the Ayre Inquiry into PRS, Ibid.

29 Paragraphs 1.48-1.53 of the Ayre Inquiry into PRS, Ibid.

30 http://www.ofcom.org.uk/consult/condocs/participationtv/consultation.pdf

31 http://www.ofcom.org.uk/consult/condocs/participationtv/statement/ptvstatement.pdf

32 Paragraph 1.1, Ibid.

33 http://www.phonepayplus.org.uk/upload/statement_on_participation_tv.pdf

34 The new form of Prior Permission Notice for service providers of broadcasting related premium rate services can be found here: http://www.phonepayplus.org.uk/pdfs_news/Participation_TV_Prior_Permissions_Notice.pdf