

EFFECTIVE COMMUNICATIONS REGULATION IN AN ERA OF
CONVERGENCE? THE CASE OF PREMIUM RATE TELEPHONY AND
TELEVISION IN THE UK

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ABSTRACT

INTRODUCTION

Since the late 1970s, the UK has been at the forefront of regulatory innovation in electronic communications. In 2003, in a move designed to respond to changing technologies, services and markets, it took the unprecedented step of creating a single convergence regulator for communications, the Office of Communications (Ofcom). This landmark in regulatory design in Europe was not, however, all-encompassing. One notable exception was the maintenance of separate regulatory treatment of premium rate telephone number services (PRS). The regulatory history of PRS in the UK has since proved controversial, not least in respect of their use in television phone-in activity of various kinds – principally competitions and voting - on the surface a typical convergence regulatory matter. A series of high profile abuses of the system has occurred resulting, eventually, in fines for TV broadcasters and PRS providers, suspension of TV phone-ins on a number of terrestrial channels, and a major review of the state of PRS in participation TV. Even the UK Prime Minister at the time, Tony Blair, was moved to assert that it was ‘extremely important that broadcasters come together with the relevant telecommunication companies and make sure that this service is done in a reliable and trustworthy way’ (cited in Gibson, O. 2007a).

This paper explores the recent problems of PRS in phone-ins and competitions in UK participation TV through a regulatory convergence analytical lens. Its core argument is that maintaining the separate treatment of PRS proved something of a regulatory ‘hostage to fortune’ cases of TV phone-ins. Since 1986, PhonepayPlus (PPP) - until October 2007 known as the Independent Committee for the Supervision of Standards of the Telephone Information Services - has maintained responsibility for PRS delivered across fixed and mobile telephone and, more recently, broadcast and Internet networks. PPP is a non-profit making, independent, public body funded by the industry it oversees. It functions through regulating a code of practice. At its inception, Ofcom was given the responsibility for setting the regulatory conditions to apply to PRS providers done through approval or otherwise of the PPP Code. A Memo of Understanding lays out the relationship between PPP and Ofcom in which the former is described as the “enforcement authority” for the regulation of PRS.

This arrangement carried forward an institutional pattern established when telecommunications and broadcasting were regulated separately. The paper argues that PPP and its regulatees reflect the regulatory values and practices of evolving telecommunications much more than broadcasting. Ironically, use of phone-ins is not a new phenomenon in television, though it was the extent to which they became an increasingly important part of the commercial considerations of UK broadcasters, in a liberalised telecommunications services environment, that proved problematic. PPP, by definition of its regulatory remit, did not possess the scope to deal adequately with these developments.

In service terms, premium rate number phone-ins on TV present any convergence regulator with a challenge. They are more accurately an issue of regulatory ‘conjunction’ than convergence, since they involve two touching-in-part, though mostly separate, services. Nonetheless, the paper argues that a suitably charged and resourced convergence regulator, such as Ofcom, aware of both the changing commercial priorities of UK broadcasters, as well as developments in PRS delivery, could have anticipated the TV phone-ins problem or, at least, reacted to adverse developments more quickly than

transpired. PPP was unable to achieve this because of its regulatory culture and relatively narrower focus. The consequences of this, though far from non-rectifiable, have been significant. A legitimate revenue stream has been, for the time being at least, lost or significantly reduced. Damage to the reputation of the PRS business and, more significantly, commercial broadcasters, has occurred due to consumer mistrust. More broadly, because of the involvement of the BBC, citizen trust in public service broadcasting has been to some extent eroded too. The reputations of Ofcom, generally a positive regulatory exemplar, and PPP are now in need of some repair. Finally, a high profile, albeit necessary, review of UK PRS regulation has ensued.

The regulatory lacuna which arose from maintaining the fissured responsibility for PRS regulation from the rest of communications goes back further than the point of Ofcom's creation in 2003. Rather, the decision to create PPP as a separate regulator, for what are essentially telecommunications services, was key. The time around the creation of Ofcom, in Institutionalist parlance, provided a critical juncture at which such a reform could have been executed and the situation rectified. However, the decision to keep PRS regulation a separate activity cannot be explained by strong institutional independence and path dependency in PRS regulation. In fact, the creation of Ofcom involved disrupting and subsuming a set of 'legacy' regulators much longer established and better resourced than PPP. Rather, the paper argues that a set of at times contradictory and incoherent policy assumptions and preferences around the regulation of converging electronic network communications lie at the core of problems with PRS use in television.

The remainder of the paper is structured as follows. The next section explores the main features of the regulation of PRS in the UK. It places particular focus on the reasons why their regulation remained separate in a UK communications policy environment which, at the beginning of the decade, promoted and instigated regulatory convergence. Thereafter, the paper moves to consider the reasons behind, and the extent of, the growth of PRS in UK television over recent years. It goes on to explain the problems which have ensued from this. The penultimate section of the paper details the consequences of these problems which resulted in the most high profile communications convergence regulation controversy in the UK to date. The final section of the paper draws some conclusions on the lessons which can be learned from the case and their implications for the UK electronic communications regulatory institutional context.

PRS REGULATION IN THE UK

The regulation of PRS in the UK stretches back to 1986, when its recently liberalised telecommunications incumbent, BT, introduced the 0898 number prefix for independent companies to offer a range of information and entertainment services. PRS essentially constitutes the provision of content, something historically not regulated in telecommunications, a private-to-private communications system, unlike broadcasting. At the time, a debate arose around the governance of PRS, resolved by agreement between the then UK telecommunications regulator, Oftel, the UK Monopolies and Mergers Commission and BT. The latter was in favour of pure industry self-regulation though concerns existed about potential conflicts of interest in the regulatory adjudication

process (ICSTIS 2006), not to mention the danger of regulatory capture. Instead, ICSTIS was created as an independent, though sector funded, regulator whose legal status is a not-for-profit company limited by guarantee. In its early years, most problematic regulatory issues arose around adult chat services provided through the PRS system (ibid.).

The UK market for PRS expanded considerably from its modest origins and has recently been valued at £1.3 billion per annum (Ofcom 2008). PRS now incorporate information or entertainment delivered over fixed and mobile phone, fax, PC (email, Internet, bulletin board), and interactive digital TV (PPP Code 2008). The main applications are sports alerts, ringtones, directory enquiries, TV voting, competitions, chat and business information. The structure of the supply chain has three main components: network operators provide the networks carrying PRS services; service providers deal with the services carried by networks; and content or information providers provide the content of the service. Often the latter two elements are integrated into the service provision function. Until 2004, network operators paid PPP (then ICSTIS) its levy contributions, though thereafter this burden fell on service providers, whose fees were passed on to PPP by the network operators.

The UK system of PRS regulation is co-regulatory by design. Ofcom is empowered under Section 121 of the 2003 Communications Act, through the PRS Condition, to establish a system to ensure that providers of PRS comply with regulations in place. Ofcom approves a Code of Practice for PRS regulation which is then administered by an 'enforcement authority' – PPP in this case. Ofcom thus holds overall responsibility and accountability for PRS regulation in the UK. It takes action where a direction given by PPP under its Code is not complied with. It has legally ensconced powers in the 2003 Act to deal with a breach of the PRS Condition, action which may include 'issuing an enforcement notification, imposing a financial penalty, or requiring the contravening provider to suspend (for an indefinite period) the provision of premium rate services provided by it' (Ofcom 2008: 7). The 2003 Act defines a PRS as consisting of 'the provision of the contents of communications transmitted by means of an electronic communications network; or allowing the user of an electronic communications service to make use, by making of a transmission by means of that service, of a facility made available to the users of the electronic communications service' (Section 120, paragraph 8).

Ofcom has produced a set of criteria for effective co- and self-regulation, one of whose stipulations is that there must be a 'clear division of responsibility between co-regulatory body (sic) and Ofcom' (Ofcom and ICSTIS 2005: 3). PPP in practice has been responsible for operational regulation of the PRS industry, whilst Ofcom exercised approval or otherwise of the regulatory framework, budget and Activity Plan of PPP. In PPP's Activity Report produced annually, it is required to demonstrate how it has performed against a set of key performance indicators (KPI) laid out in its MoU with Ofcom, Ofcom's co-regulatory criteria and any other indicators defined and agreed by the parties (Ofcom and ICSTIS 2005: 7). Ofcom and ICSTIS have committed themselves to 'liaise to identify shared interests and concerns and to address these through mutually supportive activity' (ibid: 4).

PPP's role stems from its core responsibility to receive and investigate complaints related to breaches of its Code. It gives direction to - and can impose fines on where

appropriate - parties involved in PRS provision (Ofcom 2008: 3-4). Accordingly, the PPP Code is intended to address those who are involved in 'the content, promotion and overall provision of PRS' (Ofcom 2008: 3), though this definition has tended to focus on telecommunications service providers. Importantly, PPP cannot directly regulate broadcasters, which in the case of television phone-ins were found to be the key influential players. The PPP Code has, however, shown itself to be responsive to developments in the PRS sector throughout its history. In 1992, its fifth edition introduced a prohibition on services which offered callers prizes contingent upon call duration. In 1995, new provisions on betting tipster services were introduced, whilst in 2005 an emergency amendment was made instructing network operators to withhold revenue transfers to their service providers for a 30 day period after service delivery in order to combat PRS fraud (ICSTIS 2006: 12). Section 7.6 of the PPP Code of Practice makes stipulations about the conduct of competitions using PRS.

A key requirement placed on Ofcom as a result of the 1996 Broadcasting Act and the 2003 Communications Act is to advance the interests of the public as citizens and consumers (Ofcom 2007 – PCIP). Ofcom is required to draw up a code for TV and radio dealing with standards in the core areas of programmes, sponsorship, and fairness and privacy, the latest version of which was created in 2005 (Ofcom 2007: 7, PCIP). Reference to PRS in broadcasting stretches back to the Independent Broadcasting Authority's Television Programme Guidelines of 1990 (Ayre 2007). Rule 10.9 of the Broadcasting Code elaborates on the two circumstances where PRS can be used. They must either be derived directly from a particular programme and enhance viewer benefit from it or allow interaction with it; and they must form part of the editorial content of the programme as in the case of viewer votes and competitions (Ofcom 2007: 8, PCIP). The Ofcom code also includes a specific rule on the need to ensure fairness in the running of competitions which applies to all UK broadcasters (Ayre 2007). Rule 2.11 of the Ofcom code, introduced only as recently as 2005, stipulates that competitions should be undertaken clearly, fairly and appropriately. Ofcom has also supplemented this with specific advice on conducting competitions in respect of this Rule. Here, *inter alia*, broadcasters are advised: to ensure that they are au fait with PPP stipulations; to be able to demonstrate the methodology used in a constructing a competition; to make clear and regular announcement of the rules of competitions; and, saliently, to make clear to viewers when a repeat programme is being aired to ensure that they do not attempt to participate in a competition or vote which has already concluded (Ayre 2007: 28-29).

Given the sweep of power invested in Ofcom, it may well be asked why an 'intermediary regulator', such as PPP, was considered necessary. The institutional legacy of the regulation of telecommunications in the UK is likely to provide the answer. Here, the Office of Telecommunications, Oftel, was responsible for telecommunications infrastructure and service regulation. However, the regulation of content services, principally PRS and broadcast services, remained separate. A possible explanation lies in the nature of the PRS, as neither 'straightforward' telecommunications nor broadcasting. On the one hand, a typical service does involve sending and receipt of content. However, on the other, the exchange is of a private-to-private nature: nothing is broadcast which might have created the public interest issues which shaped the regulation of broadcasting historically in the UK.

That the PRS regulatory system should have been so constituted originally is itself a matter open to debate. There is little indication that the activities of ICSTIS figured high on Oftel's list of priorities, resulting in the development of considerable institutional autonomy on the part of the former and a 'separatism' in the regulation of PRS from the rest of electronic communication in the UK. In 2001, for example, Oftel claimed its desire to encourage 'self- and co-regulation where possible because it offers a faster and more flexible alternative to sector regulation by Oftel' (Oftel 2001: 4).

With the creation of Ofcom as the convergence regulator in 2003, the argument for having a separate PRS regulator should have proven impossible to sustain. For example, the current definition of PRS as offering - 'some form of content, product or service that is charged to users' phone bills' (PPP Code 2008) is at best overlapping with other telecommunications services and at worst confusing. However, a number of factors are likely to explain the continued separation of PRS regulation from the rest of electronic communications in the UK. First, around the time of Ofcom's creation, not least because of the emergence of the Internet, a penchant was growing in Europe and beyond for adopting self-regulatory and co-regulatory systems. Since PRS was a rare example of the existence of such a system already, it was unlikely to have been disrupted and might even have been seen as an exemplar of future communications regulation in appropriate areas. Second, a significant part of the development of PRS over the last decade has been associated with the emergence and growth of online activity based around the Internet. There was uncertainty about how this new growth are would develop. Not only in the UK, but across the EU as a whole, significant pains were taken not to impose any traditional hierarchical communications regulatory model which might compromise the ability of UK firms to take commercial advantage of what was assumed to be a burgeoning global market for electronic network commerce (author's interview). Related to this and thirdly, the EU regulatory system for electronic communications was by the beginning of this decade an important consideration for national member state governments designing policy at the national level. The EU's Electronic Communications Regulatory Framework, agreed in 2002, excluded what were described as Information Society - or online content services. The framework also excluded regulation of broadcasting content because of national political sensitivities. However, it is interesting to note that the EU's own policy review of convergence in the late 1990s which preceded the ECRF's agreement was driven initially by the motivation to create a convergence regulatory framework at EU level encompassing broadcasting. This radical approach was eventually pared down to the ECRF compromise, though the UK with a recent history of communications policy innovation became convinced of regulatory advantages in regulating broadcasting convergently, at the national level at least. Finally, and more mundanely, the system as regulated by ICSTIS since the mid 1980s was, on the whole, an efficacious performer. Combined with uncertainty over the future development of Internet-based information services in commercial terms promoted the desire to 'leave well alone' was promoted.

The first recorded mention of PPP in the broadcasting code is in the Independent Television Commission's (ITC) 1993 version where broadcasters are instructed to abide by its code as well as the ITC's (Ayre 2007: 25). It took until 1998 for a specific provision - related their potential to be considered as illegal gambling or lotteries - to be included in the ITC's Programme code on the use of PRS in TV competitions. It is

important to note that the Ofcom Broadcasting Code requires broadcasters to observe the PPP code 'so a breach of one is technically a breach of the other' (Ayre 2007: 7). However, this regulatory situation creates a serious risk of double jeopardy since a broadcaster and a service provider could be charged by their regulator regarding the same matter and be adjudged differently. The PPP code makes some specific reference to the promotion of competitions through PRS and stipulates that they should be run fairly. Until the recent controversy over PRN use in TV phone-ins, it was assumed that PPP was the regulatory body to handle problems that might arise in PRS use in TV, apart from in matters that deal with the editorial content of a programme which used PRS (Ayre 2007). Ofcom and PPP first began to consider jointly the developing system of PRS in television only recently through a consultation on call TV quiz services (PPP 2007).

The UK's main Public Service Broadcaster (PSB), the BBC, too has Editorial Guidelines which deal in some detail with PRS applications. In particular, it is stipulated that the lowest cost pricing policy should be pursued by the Corporation; that a clear editorial purpose for the use of PRS should be demonstrable; that integrity of votes is a priority in competitive award situations; and that enough time should be available between a vote closing and the announcement of the results for all the votes cast 'to arrive, be processed and checked' (Ayre 2007: 28).

THE GROWTH OF PRS USAGE IN TELEVISION IN THE UK

Premium rate number services usage in broadcasting has occurred since the mid-1980s when such services began to be licensed. Audience participation is a much longer established and popular element in UK TV, where viewers were traditionally encouraged to enter mostly prize draw and quiz competitions. Through the 1990s, with the advent of multi-channel TV the incidence of using premium rate phone-ins for these purposes increased significantly. An expansion of different kinds of PRS usage also occurred, particularly around applications such as viewer voting. Dedicated channels have even emerged such as the ITV Play quiz channel, launched in 2006 (Ofcom 2007: 3, PCIP). In the case of the latter, an important debate has arisen around the extent to which programmes are editorial or advertising in nature, and the regulatory implications of this. The popularity of TV phone-in activity is no more clearly underlined by the infamous statistic that 'more people vote to evict contestants from the *Big Brother* house than in general elections' (Robinson 2007: 2). In 2007, viewers were estimated to have spent £139 million on television voting and competitions, representing about 13% of the PRS market of £1.1 billion (Tryhorn 2008).

An increasingly competitive environment, in particular resulting in a reduction in the value of traditional revenue streams such as advertising, has contributed to the desire of commercial broadcasters to exploit PRS applications. This stands in contrast to the earliest regulatory expectations around them, where the Independent Broadcasting Authority stipulated that they should be used only where social or educational value could be demonstrated and that any excess profits above cost recovery should be donated to charity (Ayre 2007: 25). Ayre (2007: 16) has gone as far as to suggest that 'almost any programme genre that can accommodate a PRS-based competition, vote, poll or comment now does'. Whole programmes and channels, devoted to quizzes, adult chat and psychic readings mostly, have arisen based on the exploitation of PRS. Services are delivered

principally through three mechanisms: standard telephony, telephone text messaging, or use of the 'red button' on the TV set. It is important to note, however, that PRS revenue, whilst significant and until recently growing, represents a relatively modest part of the revenue streams of commercial broadcasters, possibly as little as 6% (derived from Mediatique and Ofcom data), not least those operating in the cable and satellite markets. The BBC does not use PRS to generate extra revenue. PRS is nonetheless prominent in the minds of audiences (88% are aware of it) and has been used frequently by a considerable number (26% per annum) mostly younger people (Ayre, 2007: 21).

In the commercial relationships which tend to be struck between broadcasters or production companies and service providers, call revenue splits are the order of the day, thus maximising the incentive of all parties to secure as much call volume as possible (Ayre 2007: 23). At the root of the public policy problems which have emerged from the increased use of PRS in television lie a series of technical and organisational deficiencies. One particularly notorious practice has been the charging of would-be entrants to competitions even though they receive an announcement, on getting through by telephone, that the competition/vote in question has finished and their vote will not count towards its outcome. This charging-but-non-counting has also occurred in the case of text message entrants. Here, it has been argued that the technical system used in both cases is functionally incapable of being altered to address this deficiency. Another problem with text messaging system is 'latency' where due to system capacity constraint, receipt of messages is delayed in the system, thereby missing the deadline for entry into the competition or vote in question. The issue of the charging mechanism for text messaging based entries is also the subject of some controversy. According to Ayre (2007), most systems use Mobile Originating billing, where customers are charged as they send their entry, as opposed to a system of Mobile Terminating billing where the charge occurs after the receipt of a text message from the service provider to the customer acknowledging the receipt of the initial text. The MT system has the advantage of allowing the customer to be informed of any problem with an entry and thus not charged for it. However, from the service operator's perspective, if the caller does not have sufficient telephone credit to receive the premium rate text message then the vote is counted even though the caller is unable to be charged.

These technical problems generated around the increased use of PRS in television contributed to a series of public policy concerns which the existing regulatory framework in the UK, articulated in the 2003 Communications Act, struggled to cope with. Here, regulation of broadcasting standards by Ofcom was dichotomised along the lines of editorial matters (dealing with issues such as the right of broadcasters to have freedom of expression and the right of audience members not to be exposed to harmful or offensive material) and advertising matters which in its dealings with issues of harm and offence is concerned with consumer protection (Richards 2007). The rigidity of this dichotomisation meant that PRS regulatory issues were difficult to deal with. On the one hand, they gave rise to issues of an editorial nature but, on the other, they also reflect matters of consumer protection. In practice, Ofcom has considered them in an editorial context, though doing this merely highlighted the need to create a new regulatory mechanism to cope with the increasing likelihood of dealing at one and the same time with issues of the audience member as citizen and consumer in an increasingly commercialised broadcasting environment.

PROBLEMS WITH PRS IN TELEVISION AND THEIR REGULATORY CONSEQUENCES

Evidence of serious and sustained problems with the system of PRS in UK participation TV began to emerge in 2006. By early 2007, a number of commercial terrestrial TV broadcasters, notably ITV and Channel 5, had suspended services utilising PRS pending internal investigations into their efficacy (Tryhorn 2007). In 2006, allegations were made that the PRS provider, Eckoh, had informed Channel 4, to whom it was contracted, in early 2005 of unfairness in the contestant selection process for the programme *You Say, We Pay* (Holmwood 2007a). Regarding the *Deal or No Deal* programme, it was found by Ofcom that Channel 4 had become aware of problems with the staggered selection of contestants in March 2007 but allowed the process to continue until May by which time it had accrued £2.1 million in revenue (Byrne 2007). A report by the auditors Deloitte, commissioned by ITV, suggested that on one of the latter's programmes, *Ant and Dec's Saturday Night Takeaway*, 'winners chosen by viewers were discounted in favour of other contestants who programme-makers believed were more telegenic or talented' (Robinson 2007: 1). It has been estimated that ITV viewers alone spent £7.8 on calls which did not exercise any influence on the outcome on the programmes in question (Gibson and Wray 2007). Problems initially seemed to be centred on commercial terrestrial TV channels with some degree of public service broadcasting remit (PSB) which had been losing revenue since the late 1990s (Grande 2004). However, the BBC soon became involved in the controversy as well. In one case, a PRS operator Audiocall, a subsidiary of the BBC's commercial arm BBC Worldwide, was found to have collected and retained £106,000 from calls made after lines to a charity phone-in had closed, a sum which it subsequently paid to charity with interest (Fenton 2008a). In July 2007, the BBC suspended all phone-in and interactive services on TV, radio and the Internet (Gibson, O. 2007b). It commissioned the auditor PricewaterhouseCoopers to undertake an investigation of its behaviour which concluded that between October 2005 and September 2007, over 20 separate BBC shows whose aim was to raise money for charity performed inappropriately. The BBC also appointed its legal advisers Baker and Mackenzie to undertake an investigation, an important conclusion of which was that whilst there was no illegality, evidence existed that some BBC Worldwide staff were aware of the practice of retaining caller revenue after the close of competitions (Byrne 2008). In November, the BBC produced a Code of Conduct on Competitions and Voting, which it emphasised would not be run to make a profit (except for charitable purposes), and where it promised to 'handle all interactive competitions and votes with rigorous care and integrity'. It also emphasised that in the future it would 'never ask anyone to pose as a competition contestant or winner' (BBC Trust 2007) and capped the cost of calls to premium rate phone-ins at 15p except in the case of charity events (Gibson 2008).

Find source and modify: Here, it was alleged and proven that potential contestants for the charades style programme were solicited after a decision had been made on a list of potential winners on the show in question (Morris 2007).

Soon after the issue of PRS in television problems reached the public domain Ofcom and PPP launched reviews aimed at identifying the precise nature and causes of the problems and prescribing rectifying measures. This classic regulatory reactivism included a joint

meeting with relevant industry parties. Ofcom also launched a PRS in television enquiry in March 2007, led by Richard Ayre. In May 2007, PPP followed suit. However, the power of Ofcom in the regulatory relationship is clear in that the PPP consultation's findings were put on hold until the Ayre enquiry had made its recommendations. The Ayre report produced a set of findings which proved the major catalyst for recent regulatory and procedural change in PRS TV provision.

First, a major theme of the report was the potentially confusing division of responsibilities between Ofcom and PPP. Here, viewer complaints arising from voting conducted through PRS on the Channel 4 programme *Big Brother 7*, was singled out. A large number of viewer complaints received by Ofcom (2000) were passed on to PPP, far outnumbering those sent directly to PPP (635), suggesting a relative lack of knowledge of the PRS regulator's existence. PPP then made a judgement on the parties involved, namely Channel 4 and two PRS service providers. The former was found to have created an editorial change in the content of the programme which caused viewers to feel misled. However, PPP was not in a position, because its remit did not extend to broadcasters, to fine Channel 4. Rather, it could impose administrative charges (for handling the dispute) and a fine (the latter of which it declined to impose) on the telecommunications service providers concerned. In 2007, Ofcom received as many as 60 separate complaints about voting through PRS on TV, most of which were considered to be matters for PPP, that is, related to the efficacy of the voting mechanism (Ayre 2007: 34). However, matters related to voting are often so deeply bound up with editorial policy issues that it seems logical to have these considered by one suitably qualified authority – the corollary is that not to do so creates the strong possibility of generating inefficiency and inefficacy.

Second, the Ayre report was particularly critical of the commercial relationships which had grown up between broadcasters, programme producers, telecommunications service providers and telecommunications network operators. Here, it was found that broadcasters were able to exert very considerable and unequal economic power on service providers. Tellingly, the report concluded that 'there is evidence of intense pressure applied by broadcasters upon producers, and by both upon service providers, to maximise revenues – and that meant maximising calls' (Ayre 2007: 6). Despite this, broadcasters did not have sufficient grasp of the technical and operational details of the value chain around the use of PRS in TV, particularly its potential technical inadequacies. Instead, they were found to be 'in denial about their responsibility to ensure the programmes they devise, commission or produce fully deliver on the transactions they offer to viewers' (Ayre 2007: 5).

Bringing these two themes together, Ayre (2007: 40) concluded that the 'absence of a suitable regulatory regime for broadcasters means that there is no compelling interest for broadcasters to give the same priority to principles of consumer protection as they do to delivering on general audience expectations'. The increased use of PRS created an important financial relationship between broadcasters and consumers - as opposed to viewers - which the former neglected. Competitions had historically been used by broadcasters as a free to enter means of generating viewer loyalty. The current situation, of premium rate charging created a new dynamic - and thus new responsibilities – for broadcasters. Concluding his report, Ayre recommended that licences of broadcasters should be amended to include specific requirements aimed at consumer protection in

respect of PRS and any other direct commercial transactions. The major outcome of this change in regulatory terms was that where a breach of a broadcaster's licence is alleged, it would in future fall to Ofcom to investigate (Ayre 2007:11). It was also concluded that except in instances where Ofcom's Broadcasting Code in relation to provisions on fairness in competitions apply, it is up to the BBC Trust to decide whether it would make the Corporation the primary point of responsibility in the chain, though the inference was clear that it should do so.

In February 2008, Ofcom introduced new regulations on participation TV, in line with the recommendations of the Ayre report¹, making broadcasters directly responsible for all interactions with viewers by telephone, email or post (Tryhorn 2008). As a consequence of a variation introduced into their licences, broadcasters are now 'responsible for all arrangements for the management of communication, including telephony, between members of the public and the Licensee of the Licensee's contractors or agents...where such communication is published in programmes...the Licensee shall ensure that the provisions of the code approved by Ofcom for regulating the provision of premium rate services, or in the absence of such a code, the terms of any order made by Ofcom for such purposes, are observed in the provision of the Licensed Service' (Ofcom 2008: 8-9). Broadcasters would also now be required by Ofcom to ensure that their systems were regularly vetted by an independent third party, the regulator also declaring its intention to introduce a 12-18 month programme of spot checks to monitor the evolving situation (Gibson 2008). Around the same time, PPP also introduced a new system of prior permission for would-be PRS providers to broadcasters². It also set out a number of conditions for operators to meet, not least ensuring the prompt closure of telephone lines and random choice of winners (Sweeney 2008) though this gave the distinct impression of closing the stable door after the horse had bolted. The broadcasters' new verification system will require inter alia 'confirmation by the third party that an end-to-end analysis of the technical and administrative systems to be used for the receipt and processing of votes and competition entries from members of the public has been conducted' as well as undertaking reviews of individual programmes to track votes and competition entries through all the relevant stages to ensure that probity has been maintained (Ofcom 2008:13). A potential problem for broadcasters is having the necessary technical expertise to deal with the technological aspects of managing PRS. In practice, Ofcom will only ask a broadcaster for detailed information on its scheme's performance if it developed a specific cause for concern (Ofcom 2008: 28).

In the interim between the allegations of impropriety and the aforementioned regulatory changes, a spate of high profile investigations of alleged abuses of PRS in UK television proceeded apace. By early 2007, Ofcom had launched as many as 23 separate investigations concerning alleged PRS in television irregularities, whilst PPP dealt with 15 cases (Robinson 2007). This resulted in a series of fines from Ofcom for UK terrestrial

¹ The draft licensing variation for broadcasters as well third party audit for broadcasters using PRS in programming were proposed in a July 2007 Consultation document (Ofcom 2007).

² These referred to procedures for treating audience responses, management of excess peak PRS traffic, line closure, winner selection, systems back up and clear contractual arrangements (PPP 2007: www.phonepayplus.org.uk/pdfs_news/Statement_on_Participation_TV.pdf). Importantly, broadcasters must also verify that any PRS provider they contract with has received prior permission status from PPP.

broadcasters levied between June 2007 and May 2008³. PPP similarly issued fines against a number of PRS providers⁴. In one of the most high profile cases, the *GMTV* programme was fined £2 million by Ofcom after it was found that over a period of more than four years competition winners were picked before telephone lines had closed. In relation to this case, PPP fined the telecommunications service provider used by *GMTV*, Opera Telecom, £250,000 (Sweney 2007a). The PPP Chief Executive, George Kidd, commenting on the case contended that ‘the consumer harm caused was aggravated by the sheer number of callers who paid to enter the competition but had no chance of winning, the huge amount of revenue that was unfairly generated from these callers, the length of time over which the practice had been going on and the extensive damage caused to public trust in phone-in competitions’ (cited in Brook 2007: 2). In July 2007, the BBC was twice fined (by Ofcom) for the first time in its history. The first, £50,000, concerned editorial failures arising from a competition run on the *Blue Peter* programme (Gibson, O. 2007d); the second, £400,000 related to unfair conduct in a range of competitions conducted across as many as eight TV and radio shows. The BBC expressed concern about public money for PSB being taken away as a result of the fines (Fenton 2008b). Between mid-2007 and mid 2008, broadcasters had been fined a total of £11,082,000 by Ofcom (Sweney and Holmwood 2008). At the time of writing, Ofcom was in process of conducting three more investigation related respectively to the BBC, ITV and Channel 5 (Holmwood 2008). The PRS in television saga has undoubtedly had a negative effect on the public’s trust of broadcasters. Problems have also severely dented the revenue streams of commercial broadcasters from PRS activity, as much as 20% less in the case of ITV for the March-April 2007 period. In March 2007, it was decided that ITV Play would be withdrawn. (Ofcom 2007: 52, July consultation). As a result of the PRS fines, ITV reported that it expected to accrue a one-off extra charge of £18 million in its 2007 accounts (Edgecliff-Johnson 2007). The effect of highly publicised irregularities in PRS has had a dramatic effect on service providers also: Eckoh, one of the main service providers for ITV claimed a 70% drop in call revenue in early-to-mid 2007 (Holmwood 2007).

The period also witnessed what could amount to a highly significant development of the regulatory relationship between Ofcom and PPP. In December 2007, a new framework agreement for PRS governance between the two bodies was. Here, a commitment was made to create closer coordination of strategies and objectives and better reporting of market trends and policy issues. Ofcom now approves all appointments and re-appointments on the PPP Board as well as its Chief Executive position. Ofcom can now intervene to give direction to PPP on matters which it considers to be particularly important or where ‘clarity of responsibility needs to be explicit’. Finally, a senior Ofcom official, the ‘Ofcom Sponsor’, would in future be responsible for overseeing the inter-organisational relationship with PPP (Ofcom 2008:4; Ofcom 2007), in effect making Ofcom the ‘lead regulator of premium rate phone services’ (Sweney 2007b: 1). This in

³ Channel Five (June 26, 2007: £300,000 fine for faking winners of phone in quiz on *Brainteaser*); GMTV (26 September 2007: £2million fine for phone competitions entrants had no chance of winning); Channel 4 (20 December 2007: £1.5 million for misconduct related to the shows *Richard and Judy* and *Deal or No Deal*); ITV (8 May 2008: £5.675 million for misconduct related to abuse of premium rate phone lines related to a range of shows)

⁴ 6 July 2007 – Eckoh (£150,000); 9 August 2007 – iTouch (£30,000); **fine over GMTV scandal**

marked contrast to the 2005 Memo of Understanding between Ofcom and PPP which declared that the ‘intention is that Ofcom will not involve itself in the operational work of ICSTIS or in relation to specific duties unless ICSTIS is failing to comply with undertakings, agreed processes or KPIs [key performance indicators] in circumstances where that is leading to a material negative impact on the adequacy of regulation’ (Ofcom and ICSTIS 2005: 2).

Ofcom Chief Executive, Ed Richards has referred to the changes as creating ‘a new relationship, whereby PPP will become an Agency of Ofcom to whom we can give direction, together with the new formal Framework Agreement that will codify the necessary changes’ (Richards 2007: 3; confirmed by PPP Press Release, 19.2.08). However, he separately argued that the saga was not one of a regulatory vacuum but rather a ‘systemic failure of compliance’ (cited in Tryhorn 2007: 1). It was also claimed by Lord Currie, Ofcom Chair, that it could not have incovered the problems earlier without being ‘incredibly heavy-handed’ (cited in Edgecliffe-Johnson 2007b: 1). As for PPP, its Chairman was recently reported as having argued that the regulatory body should focus in the future in anticipating where problems may occur (Parker 2006). In responding to Ofcom’s consultation, it had agreed that broadcasters should be directly responsible for PRS through a change in their licences. However, PPP was keen to position itself prominently in any future regulatory scenario by asserting that licence amendment in itself was not a guarantor of compliance and that PPP would be ‘well placed to help Ofcom deal with non-compliance by the party recognised as “service provider”’ using its Code of Practice (PPP 2007:3-4). In March 2007, PPP issued a consultation document making a number of recommendations for change to its Code, the most important of which relate to the creation of a smaller Board and the establishment of a Code Compliance Panel (Ofcom 2008).

In a 2008 statement, Ofcom issued a detailed list of guidance to broadcasters on how to conduct PRS use. In these an important distinction between the future roles of Ofcom and PPP was made. Regarding competitions, complaints alleging broadcast of misleading information about PRS charges or line availability would be referred to PPP since ‘they are considered to be complaints about promotional material concerning the premium rate services itself’. However, ‘complaints concerning potential unfairness surrounding the conduct of a competition or its solution and/or methodology’ would ‘normally be investigated by Ofcom (Ofcom 2008: 36-37). However, arguably this could create conflict – why can’t Ofcom do both?

The extent to which damage to viewer trust has occurred as a result of the revelations on PRS use in TV was clear from efforts made by regulators and regulates to reassure viewers. It was reported that PPP was contemplating the introduction of a trustmark system (Tryhorn, 2007) that would mean broadcasters paying for a regular independent audits (Gibson 2007), an interesting measure drawn from the self-regulatory toolbox. PPP also suggested that phone-in TV programmes should provide cost warnings after each £10 is spent by consumers, as well as information on viewers’ chances of being put through as a contestant in a phone-in competition (Holmwood 2007b). In September 2007, the Heads of the UK’s four main terrestrial broadcasters, BBC, ITV, Channel 4 and Channel 5, met to try to resolve the series of issues in an increasingly high profile affair (Robinson 2007). ITV’s involvement in PRS phone-ins was described by its Chairman, Michael Grade, as a ‘complete shambles’ (cited in Parker 2007: 1).

CONCLUSIONS

The recent problematic period in the history of PRS use in UK terrestrial TV competitions and phone-ins provides an important illustration of risks that can occur when regulatory fissures exist in converging - or more accurately interfacing - markets in electronic communication. Matters were exacerbated in regulatory terms in that, on the surface, a convergence communications regulator had been in place since 2003. However, whilst Ofcom was, officially, the 'backstop' regulator of PRS, in practice it had insufficient engagement with developments in the PRS sector due to operational responsibility for PRS lying with PPP. It has been suggested that Ofcom's apparent lack of curiosity over developments in the use of PRS in television may have partly been motivated by a desire not to tread on the regulatory ground of PPP (Bell 2007). Similarly, PPP had insufficient knowledge of the operational culture and changing priorities of broadcasters.

It is impossible to determine whether the problems generated by recent PRS use in broadcasting could have been prevented were Ofcom responsible directly for PRS regulation. In theory, a convergence regulator should be alive to areas where market-based convergence is occurring across its fields. However, PRS use in commercial TV was not a new phenomenon; rather it was the changing nature of its use that lay at the core of ensuing technical and operational difficulties. The episode also raises the question of the degree to which it is a regulator's job to be anticipatory or reactive. In the case of market-based regulation in a liberal economy, the dominant view is that regulation should be used as sparingly as possible to rectify problems which arise, such as consumer harm, for example. To do otherwise risks stifling technological and market developments. In some ways the PRS saga is a matter of rectifying consumer welfare abuses. The Ayre Report asserted that this vision of the viewer as a consumer was absent from the perspective of the terrestrial commercial broadcasters concerned. However, it could also be argued that the PRS abuses in broadcasting are not so easy to disentangle from the experience of the viewer as a citizen, with rights bound up in the traditional public interest stipulations of broadcasting. As one commentator noted, the abuses were all essentially fraudulent even when they're legal. They all abuse the lingering perception among the easily preyed upon that television won't rip them off because somehow it's different to, say, the Internet or junk mail' (Gibson, J. 2007:2). Here public interest regulation is often proactive as well as reactive and arguably a convergence regulator should have anticipated the potential problems of PRS use in the context of an awareness of the changing commercial priorities of UK terrestrial broadcasters as their traditional revenue streams weakened.

Regulatory remedies aside, Ofcom has argued that whilst 'regulators can deal with the consequences of failure...the necessary culture of straight-dealing and integrity can only be engendered from within organisations themselves' (Richards 2007: 2). Whilst viewers have been given the right to claim back money lost as a consequence of entering competitions, they have to provide itemised phone bills. It is also unclear how many will go to the trouble of doing so given the 'salami-like' nature of the deceptions. In the case

of the one Channel 4 show, it has been claimed that the offered refund was claimed by fewer than one in 10 viewers (Gibson, O. 2007c). The BBC does not make money out of PRS unlike commercial broadcasters: for the former breaches are thus a matter of trust undermined; for the latter both viewer trust and consumer welfare are potentially eroded. Even if PRS in programming has peaked, in the future broadcasters will look for ways to enter into one to one financial transactions with viewers. This required, in the view of Ayre, undertaking changes to the current system.

Despite the changes to the licences of broadcasters to make them directly responsible for the conduct of PRS services, concern has been expressed still about a lack of clarity existing in the remit of regulators of PRS (Sweney 2007c). The PRS operator, Eckoh, in the light of a record fine levied by PPP in July 2007 commented that it was 'something of a lottery as to which regulator presides over which case or, indeed, whether both regulators preside over the same case at different times, and makes regulation unpredictable, inconsistent and unfair' (cited in Sweney 2007d: 2). The regulatory remedies provided by Ofcom and PPP are likely to eradicate any future abuses of the system along the lines of the subject of this paper. Nonetheless, though Ofcom will exercise in the future much closer scrutiny over PPP, the fact that premium rate number regulation has not been completely subsumed into the Ofcom departmental structure seems an operational anomaly.

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