

Part Two:

The Cross-promotion Code

Effective from 10 July 2006

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Introduction

- 1.1 Subject to this Cross-promotion Code (“the Code”), television broadcasters are able to promote programmes, channels and other broadcasting-related services without such promotions being considered advertising and included in the calculation of advertising minutage.
- 1.2 The amount of advertising that may be broadcast on a television channel is restricted by the Code on the scheduling of television advertising (“COSTA”). COSTA imposes a maximum on the amount of advertising that can be shown in a given hour and over any one day. For the purposes of COSTA, the term ‘advertising’ is used to refer to any form of promotional announcement broadcast in return for payment or similar consideration.
- 1.3 The Code replaces the rules regulating the promotion of programmes, channels and related services on commercial television issued by the ITC in January 2002 and takes effect from 10 July 2006.

- 1.4 The Code applies to television services regulated by Ofcom. However, it does not apply to BBC services funded by the licence fee. Cross-promotions on such services are subject to Clause 63 of the BBC Agreement.

All references to ‘licensees’ should be interpreted accordingly.
- 1.5 The Code applies to promotions outside programmes only.
- 1.6 Within programmes, references to all products and services, including broadcasting-related services, are subject to the rules in Broadcasting Code Section Nine on Commercial References in Television Programming.
- 1.7 The Ofcom Broadcasting Code applies in the usual way to the content of promotions outside programmes, unless otherwise stated in the guidance on Section Nine of the Broadcasting Code.

Legislative background to the Code

- 2.1 Under Ofcom’s powers to issue broadcasting licences under the Broadcasting Acts 1990 and 1996, broadcasting licences may contain such conditions as Ofcom considers appropriate having regard to the duties imposed on Ofcom under the Broadcasting Acts and Communications Act 2003. Under the Communications Act 2003 Ofcom also has the power to approve codes for the purposes of a provision contained in a licence.
- 2.2 Under section 316 of the Communications Act 2003 Ofcom has the power to include conditions which Ofcom considers appropriate for ensuring fair and effective competition. All television broadcasting licences currently contain a fair and effective competition licence condition. This condition requires licensees to comply with any code or guidance approved by Ofcom for the purpose of ensuring fair and effective competition.
- 2.3 Section 319 of the Communications Act 2003 imposes a duty on Ofcom to set standards to secure, amongst other things, that the international obligations of the United Kingdom with respect to advertising in television services are complied with. These international obligations include those contained in the Audiovisual Media Services Directive (Directive 2010/13/EU).

- 2.4 Broadcasters should bear in mind the legislative background that has informed the rules, the principles that apply to each section, the meanings given by Ofcom and the guidance issued by Ofcom, in this Code and in the Broadcasting Code, all of which may be relevant in interpreting and applying the Code.

Principles

- 3.1 There are two key principles which the Rules contained in Section 4 of the Code are designed to reflect:
- i) ensuring that cross-promotions on television are distinct from advertising and inform viewers of services that are likely to be of interest to them as viewers; and
 - ii) ensuring that promotions on television outside programmes do not prejudice fair and effective competition (and, in particular, ensuring that, as television broadcasting in the United Kingdom switches from analogue to digital transmission, consumers are made aware of the various platforms and digital retail TV services through which they can receive broadcasting services and that this is done in such a way that will avoid the distortion of fair and effective competition).

Rules

Meanings

‘Broadcasting-related Services’:

include all broadcasting activities licensable by Ofcom, for example television and radio services. They also include other services with a ‘broadcasting feel’, that is, services which deliver content similar to that delivered on a television or radio service. In addition, a website that provides content clearly and directly related to a Broadcasting-related Service may itself be a Broadcasting-related Service.

‘Cross-promotions’:

are promotions, on a channel, of programmes and Broadcasting-related Services, that are not Self-promotions.

‘Licensees’:

are the companies and legal entities which hold a broadcasting licence granted by Ofcom pursuant to the Broadcasting Act 1990 (as amended by the Broadcasting Act 1996 and the Communications Act 2003).

‘Promotions’:

are Self-promotions and Cross-promotions.

‘Self-promotions’:

are promotions on a channel for that same channel and/or for programmes broadcast on that channel.

Broadcasting-related Services

- 4.1 All licensees and S4C shall ensure that Cross-promotions are limited to Broadcasting-related Services.

Platform and retail TV service neutrality

- 4.1 The following rule shall apply to the analogue services of Channel 3, Channel 4 and Channel 5 licensees (“the Main Commercial Terrestrial Broadcasters”).

The Main Commercial Terrestrial Broadcasters shall ensure that Promotions to analogue households for Broadcasting-related Services that mention a digital retail television service and/or digital television broadcasting platform treat all major digital retail television services and/or digital platforms in an equal and impartial manner. In particular:

- (a) promotions that refer to a digital retail television service, such as Freeview or Sky, must also name all other digital retail television services on which the Broadcasting-related Service is available;
- (b) promotions that refer to a particular digital platform, such as digital terrestrial television (“DTT”) or cable, must refer to all other digital platforms on which the Broadcasting-related Service is available. Generic promotions for digital television are permitted if they do not specifically mention any particular platform; and

- (c) promotions must treat digital retail television services and/or digital platforms equally in respect of all aspects mentioned, such as pricing, brand names, availability and packages.

Guidance

- 5.1 This guidance is non-binding and will be reviewed from time to time to reflect Ofcom's experiences with individual cases. It is provided to assist licensees in interpreting and applying the Code. Every complaint or case will be dealt with on a case by case basis according to the individual facts of the case.

Broadcasting-related Services

- 5.2 Ofcom does not wish to be prescriptive in defining the term 'Broadcasting-related Services'. Depending on the individual facts, it may include a service whereby audiovisual content is delivered over a mobile or broadband platform, and video-on-demand. It is distinct from 'programme-related material', which is defined in Section Nine of the Broadcasting Code.

Cross-promotion relationships

- 5.3 Certain relationships between broadcasters (which are based on shareholdings or voting power) create a rebuttable presumption that there are sufficient incentives for the promoting channel to provide another channel or broadcasting-related service with free airtime without the need for additional consideration. In these specific circumstances Ofcom would not, in the absence of evidence to the contrary, consider these Cross-promotions to be advertising. However, if Ofcom believes that payment or some other consideration has passed or is passing between the parties, these types of arrangements could be investigated under the advertising minutage rules and may be counted as advertising minutage.
- 5.4 The relevant relationships that create this presumption of sufficient incentives are as follows:

- (i) the Licence Holder for the promoting channel has a shareholding of 30% or more (or voting power of 30% or more) in the Licence Holder for the promoted channel;
- (ii) the Licence Holder for the promoted channel has a shareholding of 30% or more (or voting power of 30% or more) in the Licence Holder for the promoting channel; or²
- (iii) the Actual Licence Holder for the promoted channel and promoting channel are the same.

5.5 For the purposes the relevant relationships outlined in paragraph 5.4³:

‘Actual Licence Holder’ means: the legal entity or company which holds the broadcasting licence granted by Ofcom pursuant to the Broadcasting Act 1990 (as amended by the Broadcasting Act 1996 and the Communications Act 2003); and

‘Licence holder’ means: the Actual Licence Holder or any legal entity or company which has a 30% or more shareholding (or 30% or more voting power) in the Actual Licence Holder.

- 5.6 If there is less than a 30% shareholding (or less than 30% voting power), there may be insufficient incentives for a broadcaster to provide another channel or service with free airtime and broadcasters will need to demonstrate that no consideration has passed between the parties and that Cross-promotion is justified on the basis of other incentives.
- 5.7 In the case of Cross-promotions between Channel 3 licence holders, there will be a rebuttable presumption that no consideration has passed.

² Please note that, since publication of the cross-promotion statement on 9 May 2006, this part of the guidance has been revised by adding the word “or”. This amendment has been made to make clear that in order to create the rebuttable presumption explained in paragraph 5.3, a broadcaster only needs to satisfy one of the three relationships which are outlined in paragraph 5.4.

³ Please note that, since publication of the cross-promotion statement on 9 May 2006, this part of the guidance has been revised by adding the text “For the purposes the relevant relationships outlined in paragraph 5.4”. This amendment has been made to make clear that the definitions only apply to the relationships outlined in paragraph 5.4.

5.8 These presumptions do not apply to public service announcements, charity appeals broadcast free of charge, announcements required by Ofcom and information to viewers broadcast in accordance with an Ofcom requirement, which are already excluded from paid for advertising by COSTA. In particular, information to viewers broadcast in accordance with requirements to inform viewers about digital switchover is excluded.

Platform and retail TV service neutrality

5.9 This guidance relates to the platform and retail TV service neutrality requirements that are imposed on Channel 3 licensees, Channel 4 and Five ('the Main Commercial Terrestrial Broadcasters').

5.10 For reasons of practicality and also relevance to viewers, Ofcom considers that it is reasonable to limit the number of platform and retail TV services that need to be mentioned by the Main Commercial Terrestrial Broadcasters. Ofcom considers that a 500,000 customer base ('the materiality threshold') represents an appropriate threshold for these purposes as this captures the major platforms and retail TV services which have wide ranging availability throughout the UK.

5.11 At the time of drafting, Ofcom considers that the retail TV services which are likely to satisfy the materiality threshold are as follows:

- the digital satellite retail TV services operated by Sky
- the digital cable retail TV services operated by NTL/Telewest
- the digital terrestrial retail TV services provided by Freeview

5.12 The Main Commercial Terrestrial Broadcasters will need to review which platform and retail TV services meet the materiality threshold from time to time. Ofcom considers that data provided in Ofcom's 'Digital Television Update' publications would be one appropriate source of information on customer numbers for these purposes.

5.13 Whilst the materiality threshold does not appear to be met for any particular retail TV services available via the broadband platform, Ofcom still considers

that it will be appropriate for the Main Commercial Terrestrial Broadcasters to refer to broadband TV⁴.

- 5.14 For the avoidance of doubt, the Main Commercial Terrestrial Broadcasters must still comply with the neutrality requirement if, instead of making a generic reference to smaller digital platforms, they refer to the availability of their channels on a specific digital platform or retail TV service which does not satisfy the materiality threshold (e.g. by mentioning a particular brand name). Therefore, the materiality threshold operates in a way which gives the Main Commercial Terrestrial Broadcasters a choice of either referring specifically to all the smaller digital platforms and retail TV services where their channels are available within the relevant reception area or making a generic reference such as “available on other digital platforms”.
- 5.15 Ofcom would recommend that the Main Commercial Terrestrial Broadcasters use the following two phrases when referring to appropriate platforms or retail TV services:
- If the broadcaster only wishes to mention platforms: “available on satellite, cable, digital TV through your aerial, or broadband TV⁵”
 - If the broadcaster wishes to mention retail TV service brands: “available on Sky, NTL/Telewest, Freeview or other digital platforms”⁶

General guidance on the Cross-promotion Code

- 6.1 It is the responsibility of the broadcaster to comply with the Cross-promotion Code.
- 6.2 Ofcom can offer general guidance on the interpretation of the Cross-promotion Code. However, any such advice is given on the strict understanding that it will not affect Ofcom’s discretion to judge cases and complaints after transmission and will not affect the exercise of Ofcom’s regulatory responsibilities. Broadcasters should seek their own legal advice on any compliance issues arising. Ofcom will not be liable for any loss or damage arising from reliance on informal guidance.

12 Please note that, since publication of the cross-promotion statement on 9 May 2006, this part of the guidance has been revised by adding the word “or”. This amendment has been made to make clear that in order to create the rebuttable presumption explained in paragraph 5.3, a broadcaster only needs to satisfy one of the three relationships which are outlined in paragraph 5.4.

13 Please note that, since publication of the cross-promotion statement on 9 May 2006, this part of the guidance has been revised by adding the text “For the purposes the relevant relationships outlined in paragraph 5.4”. This amendment has been made to make clear that the definitions only apply to the relationships outlined in paragraph 5.4.

14 Please note that, since publication of the cross-promotion statement on 9 May 2006, this part of the guidance has been revised by adding ‘TV’ after the word ‘broadband’ in the last sentence. The amendment has been made to give further clarity.

15 Please note that, since publication of the cross-promotion statement on 9 May 2006, this part of the guidance has been revised by replacing the text “available on satellite, cable, digital TV through your aerial or over broadband” with “available on satellite, cable, digital TV through your aerial, or broadband TV”. This amendment has been made to give further clarity.

16 This phrase is intended to reflect the current branding of the retail TV services which satisfy the materiality threshold. The main commercial terrestrial broadcasters who are subject to the platform neutrality requirement will need to amend such a phrase to reflect any branding changes made to the retail TV services.