

Code on the Prevention of Undue Discrimination between Broadcast Advertisers

Introduction

- 1.1 This Code applies to advertising on radio and television services regulated by Ofcom. It does not apply to BBC services funded by the licence fee or grant in aid.
- 1.2 This Code takes effect from 27 February 2012.

Purpose of this Code

- 2.1 Under section 319 of the Communications Act 2003 (“the Act”) Ofcom has a duty to set standards for the content of programmes to be included on television and radio services, in one or more codes. Under section 319(2) one of the standards objectives Ofcom must secure through such codes is that “there is no undue discrimination between advertisers who seek to have advertisements included in television and radio services”¹.

Enforcement of this Code

- 3.1 Section 325 of the Act requires Ofcom to include conditions in licences issued under the Broadcasting Acts 1990 and 1996 to ensure the observance of the standards set in any code.
- 3.2 This Code represents a code for the purposes of section 319 and holders of broadcast licences are required to comply with the terms of this Code under the conditions of their licences.
- 3.3 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 Ofcom Broadcasting Code, all of which may be relevant in interpreting and applying the Rules in this Code. Broadcasters should be similarly mindful of the purpose and requirements of the UK Code of Broadcast Advertising (BCAP Code)².

Rules

- 4.1 A television broadcaster must not unduly discriminate between advertisers³ that seek to have advertising included in its licensed service.**

¹ See sections 319(1), 319(2)(k) and 319(3) of the Act.

² Available at:
<http://bcap.org.uk/The-Codes/BCAP-Code.aspx>

³ For the sake of clarity, an ‘advertiser’ includes, but is not restricted to, any commercial or non-commercial entity.

Advertising

This is “any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking or natural person in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment”⁴.

4.2 A radio broadcaster must not unduly discriminate between advertisers that seek to have any commercial communication included in its licensed service.

Commercial Communication

On radio, this is a spot advertisement or a commercial reference⁵.

Guidance

- 5.1 The Rules prevent broadcasters from exercising undue discrimination between advertisers that seek to have their advertisements included in a television service or commercial communications included in a radio service.
- 5.2 Any consideration of whether or not a broadcaster that is licensed by Ofcom has engaged in undue discrimination will be a two-stage process. Firstly, Ofcom will assess whether or not the licensee has discriminated between advertisers. If it has, Ofcom will go on to consider whether such discrimination was undue.
- 5.3 In this context, discrimination means that the licensee does not reflect relevant differences between (or does not reflect relevant similarities in) the circumstances of advertisers in deciding whether or not to include advertisements in their licensed service and the terms on which a licensee agrees to broadcast the advertising in question. Discrimination can occur both where a licensee treats one third party advertiser in a different manner to another and where it offers more favourable terms to itself or an associated company.
- 5.4 Not all forms of different treatment will amount to discrimination since advertisers may not be in comparable positions. Ofcom will therefore need to consider on a case-by-case basis whether or not the licensee has, in fact, discriminated between advertisers.

⁴ This definition is derived from the definition of “television advertising” at Article 1(i) of the Audiovisual Media Services Directive, at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:EN:PDF>

⁵ ‘Spot advertisement’ and ‘commercial reference’, as defined in Section Ten of the Broadcasting Code, at:

<http://stakeholders.ofcom.org.uk/binaries/broadcast/831190/section10RADIOpdf.pdf>

- 5.5 However, it should be noted that the fact that a licensee has discriminated between advertisers does not of itself lead to a breach of the Rules. In order for a breach of the Rules to have occurred, any discrimination must be “undue”.
- 5.6 The Rules do not therefore mean that licensees are required to have single tariff practices for advertising and Ofcom does not consider this Code should prevent bespoke pricing according to the needs of broadcasters and advertisers, if such contracts are necessary to ensure that advertising needs are met. Prices charged to different advertisers may vary due to a range of factors, including (but not limited to) the level of demand for that particular product, the availability of particular impacts (e.g. peak), demographics or specific slots, and other terms and conditions also included in the contract.
- 5.7 We also note that many advertisers use media buyers to negotiate with broadcasters on their behalf. As a result many advertisers’ contracts are with media buyers rather than directly with licensees. This Code does not cover commercial relationships between media buyers and advertisers.
- 5.8 Discrimination will not be undue where it can be objectively justified. There may be various reasons why terms and conditions and access to airtime may differ between advertisers. The examples below are a non-exhaustive list of examples of potential objective justifications. However, every complaint will be dealt with on a case-by-case basis, taking account of the individual circumstances of each case.
- Where a licensee chooses to include the advertisements of one charity free of charge and will only carry the advertisements of another charity for remuneration, this may be discrimination where the nature and purpose of the advertisements are similar. This may however be objectively justified where, for example, the channel or station has chosen to support a particular charity as part of a social responsibility policy.
 - Where a licensee refuses advertising it does not wish to carry for legal or moral reasons, this may not amount to undue discrimination with respect to other advertisers. As a result, a licensee may choose not to carry a particular category of advertising (e.g. gambling services) or there may be particular circumstances why it may choose not to carry advertising from a specific party on legal or moral grounds. Accordingly, a licensee may be entitled to refuse to carry such advertising.
 - Other forms of objective justification may include situations in which there is a doubt over the creditworthiness of a particular advertiser which may justify additional guarantees or the refusal of advertising space altogether.
 - It may be objectively justified for a licensee to make specific technical adjustments in order to carry an advertising campaign for one advertiser where the campaign is significant in duration and expenditure but not to undertake similar technical adjustments for an advertisement of short duration and low value.

- 5.9 Ofcom also has powers and duties in relation to competition issues. Concerns raised by advertisers in relation to discrimination may require Ofcom to consider whether an arrangement or conduct is prejudicial to fair and effective competition. Ofcom is required, before exercising any enforcement powers under the Code to protect fair and effective competition, to consider whether it would be more appropriate to proceed under the Competition Act 1998. Depending on the circumstances, it may be the case that concerns which relate directly to, for example, abuse of market power or agreements designed to distort competition, are more appropriately dealt with under the Competition Act 1998.

Complaints

- 5.10 If an advertiser believes it has been unduly discriminated against and has been unable to negotiate a settlement with the broadcaster, the advertiser may submit a complaint to Ofcom in respect of the alleged undue discrimination.
- 5.11 Ofcom would expect advertisers and broadcasters to attempt to settle any dispute between themselves prior to any complaint being submitted.
- 5.12 If Ofcom receives a complaint under the Code in relation to undue discrimination, Ofcom will generally apply its procedures for investigating breaches of content standards for television and radio. These are available on Ofcom's website⁶.
- 5.13 However, if Ofcom receives a complaint under the Code in relation to undue discrimination which we consider may require us to consider whether an arrangement or conduct is prejudicial to fair and effective competition, we will contact the complainant to discuss how the complaint should be handled. In such cases, it may be more appropriate for Ofcom to apply its procedures under Ofcom's Enforcement Guidelines for the handling of competition complaints⁷.
- 5.14 This guidance will be reviewed from time to time to reflect Ofcom's experiences with individual cases.

⁶ Available at:
<http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/?a=0>

⁷ Available at:
<http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/complaints-disputes/>. These Guidelines are currently being reviewed.