



**Broadcasting Code Review:  
Commercial Communications in  
Radio Programming**  
Proposals on revising the Broadcasting Code

**Consultation**

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## Part 1

# Executive Summary<sup>1</sup>

*This consultation explores four options in relation to commercial communications on radio<sup>2</sup>. These range from retaining current regulation through to the possibility of providing much greater liberalisations, including allowing commercial communications to be integrated within editorial.*

*Commercial communications on radio are, generally, paid-for broadcast references to products and services. They currently comprise:*

- *spot advertisements, which are broadcast in commercial breaks; and*
- *sponsorship credits, which identify programming (or station) sponsorship and are broadcast around (and sometimes in the course of) the sponsored programming.*

*Currently, spot advertisements must be kept separate from radio programming (sometimes referred to as 'editorial') and only feature in commercial breaks. The only paid-for commercial communications in the course of radio programming that are currently permitted are therefore sponsorship credits. However, it should be noted that advertising messages may currently be placed in both spot advertisements and sponsorship credits.*

## Introduction

- 1.1 Under the Communications Act 2003 ("the Act"), Ofcom is required to draw up and, from time to time, revise a code for television and radio services, covering standards in programmes, sponsorship and fairness and privacy. This code is known as the Ofcom Broadcasting Code ("the Code") and came into effect on 25 July 2005<sup>3</sup>, following extensive public consultation and research during 2004.
- 1.2 Ofcom made a commitment in the 2008/9 Annual Plan to review the Code and consider whether it still reflected the consumer, industry and regulatory environments. In response to these commitments in June 2009 Ofcom launched its Consultation on the Broadcasting Code Review<sup>4</sup>.
- 1.3 Following a full public consultation over the summer of 2009, Ofcom published a revised Code<sup>5</sup> in December 2009.
- 1.4 However Ofcom extended its review of Sections Nine and Ten of the Code (which currently apply to sponsorship arrangements and other commercial references). This extension was to take into account the Government's decision to permit (subject to limitations) product placement on television i.e. to permit non-promotional broadcast references to products or services within television programming, in return for payment.

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<sup>1</sup> Please see the Glossary at Annex 5 for the meanings of terms used throughout this document.

<sup>2</sup> For the purposes of this document, references to radio refer to radio services licenced by Ofcom (these do not include BBC services funded by the licence fee).

<sup>3</sup> The Code has been revised subsequently in October 2008 and December 2009.

<sup>4</sup> <http://www.ofcom.org.uk/consult/condocs/bcode09/main.pdf>

<sup>5</sup> <http://www.ofcom.org.uk/tv/ifi/codes/bcode/>

- 1.5 In this consultation paper on commercial communications on radio, Ofcom has taken into account the wider regulatory and broadcast policy landscape in relation to product placement and commercial references on television. We propose four options concerning the future regulation of commercial communications on radio, and invite stakeholders' responses to these. A separate consultation explores commercial references in television programming<sup>6</sup>.

## Overview of our approach

- 1.6 Ofcom's 2009 Code Review set out our intention to revise Sections Nine and Ten of the Code, replacing these with a revised Section Nine to deal with television and a revised Section Ten to deal with radio. We remain of the view that the proposed revised structure would better reflect the distinction between the statutory framework for commercial references in radio and television programming. This approach received stakeholder approval in the 2009 Consultation.
- 1.7 The current 2010 Consultation now sets out additional proposals on revisions to the proposed new Section Ten of the Code, in relation to commercial communications on radio.
- 1.8 The proposals seek to ensure that the Code remains fit for purpose, by continuing to take appropriate account of the interests of listeners (including appropriate consumer protection), the interests of the radio industry, and developments in the wider regulatory and public policy environment.
- 1.9 The following summarises briefly four options for public consultation set out in full in **Parts 4 to 7** of this document respectively<sup>7</sup>:
- **Option A:** *'Do nothing' and maintain principle of separation*<sup>8</sup>  
This is a 'status quo' option and would maintain the current comprehensive rules, which require all commercial communications (i.e. paid-for references to products or services), other than sponsorship credits, to be separated from programming. Under this option we would replicate the rules currently in Sections Nine and Ten of the Code, in relation to radio, in a new Section Ten. Under Option A, the current regulatory principles of **transparency, separation and editorial independence** would remain.
  - **Option B:** *Maintains principle of separation but provide a defined set of exemptions*  
This option would also be framed as a comprehensive set of rules and would maintain the requirement for commercial communications (i.e. paid-for references to products or services) to be separated from programming, but would provide a defined set of exemptions. This is the approach Ofcom took in 2009, although this option could include a wider range of exemptions than those proposed in the 2009 consultation. Again, the current principles of **transparency, separation and editorial independence**, referred to above, would underpin Option B.

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<sup>6</sup> <http://www.ofcom.org.uk/consult/condocs/bcrtv2010>

<sup>7</sup> Please see the Glossary at Annex 5 for the meanings of terms used throughout this document.

<sup>8</sup> Separation (on radio): currently commercial communications cannot be integrated into the editorial content of programmes. Instead they are required to be kept separate from the editorial content, normally (in the case of ads or sponsor credits) by appearing at the beginning and/or end of programmes (or in commercial breaks) and made readily recognisable from editorial content by aural means.

- **Option C:** *Allows the integration of commercial communications and programming (except in relation to spot ads).*

This option would remove the principle of separation between commercial communications and programming except in relation to spot ads (which would need to be distinguishable from programming). This would give radio stations wide discretion to integrate, for example, paid-for, promotional commercial references into programming, provided they were transparent to listeners. This option would retain spot ads as a distinct type of content and a distinct revenue source. It would be delivered as a slim set of rules designed to secure one principle:

**transparency** of commercial arrangements. Such transparency would be central to ensuring consumer protection. Listeners would know when a commercial arrangement was in place in relation to programming. The principles of editorial independence and separation (except in relation to spot ads) would no longer apply under Option C.

- **Option D:** *Allows the integration of commercial communications and programming (including in relation to spot ads).*

This option would remove the principle of separation between commercial communications (including spot ads) and programming. This would give radio stations complete discretion to integrate seamlessly commercial elements into programming and would no longer distinguish between traditional spot ads and other commercial communications. It would be delivered as a slim set of rules designed to secure a principle of **transparency** of commercial arrangements. As for Option C, above, such transparency would be central to ensuring consumer protection. The principles of editorial independence and separation would no longer apply under Option D.

1.10 Three rule sets (in relation to Options A to C) are included in this consultation for stakeholders' consideration. However if Option D were to be adopted we would re-consult on detailed regulatory options and accompanying rule set(s). Stakeholders are also invited to consider, at Annex 9, examples of output listeners could hear under each option.

## Relevant areas of legislation

1.11 Part 3 of this document outlines Ofcom's statutory duties and other areas of legislation relevant to this consultation. These include:

- Ofcom's duty to ensure that its regulation does not impose unnecessary burdens, and that it does not maintain regulatory burdens which have become unnecessary; and,
- Ofcom's powers to enforce relevant provisions of the Consumer Protection From Unfair Trading Regulations 2008<sup>9</sup>. Amongst other things, the Regulations make clear that the use of editorial content in the media to:

*"promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial)"*<sup>10</sup>

would constitute a commercial practice that is unfair and therefore prohibited.

<sup>9</sup> Regulations available at: [http://www.opsi.gov.uk/si/si2008/draft/ukdsi\\_9780110811574\\_en\\_1](http://www.opsi.gov.uk/si/si2008/draft/ukdsi_9780110811574_en_1)

<sup>10</sup> Schedule 1, paragraph 11 of the regulations.

This regulation ensures that audiences understand when, for example, promotional broadcast references have been paid for. It is of key significance in requiring appropriate signalling of paid-for promotions integrated within editorial content. It is reflected in the principle of transparency, which appears in the four proposed options offered in this consultation, as this contributes significantly towards ensuring adequate consumer protection.

- 1.12 In addition the Digital Economy Act<sup>11</sup> allows limited deregulation of radio content, in particular allowing local stations to merge within larger areas defined by Ofcom. Following our consultation last year, the statement published on 15 April 2010 sets out our new policy on localness<sup>12</sup>. Ofcom has also reviewed particular areas of radio regulation – for example, music formats.

## Issues arising from the proposed options

- 1.13 In considering these options we have identified a number of issues that may arise from them. These relate to whether additional restrictions or prohibitions should be placed on commercial communications integrated within radio programming in relation to:
- commercial arrangements with, and/or references to, potentially harmful products or services on radio;
  - programming primarily aimed at children;
  - consumer affairs programming;
  - current safeguards and prohibitions in relation to news and political and controversial matters;
  - religious programming;
  - whether funding of commercial arrangements by non-commercial not-for-profit organisations require particular consideration; and,
  - whether potential commercial arrangements around music selection or rotation requires consideration in relation to Options C and D.

- 1.14 These are discussed under ‘Introduction’, below, and in Parts 4 to 7.

## Consumer research

- 1.15 As part of the 2009 Code Review, deliberative and qualitative research was commissioned by Ofcom into consumer attitudes to commercial references on radio. The findings were published in June 2009<sup>13</sup>. The research was specifically commissioned to assess the degree to which radio listeners are prepared to accept references that are subject to commercial arrangements being included *within* programming. It indicated that consumers would be receptive to liberalisation. This was based on an expectation that “commercial radio” is, by nature, commercial.

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<sup>11</sup> [http://www.opsi.gov.uk/acts/acts2010/ukpga\\_20100024\\_en\\_1](http://www.opsi.gov.uk/acts/acts2010/ukpga_20100024_en_1)

<sup>12</sup> [http://www.ofcom.org.uk/consult/condocs/radio/statement/Localness\\_statement.pdf](http://www.ofcom.org.uk/consult/condocs/radio/statement/Localness_statement.pdf)

<sup>13</sup> <http://www.ofcom.org.uk/consult/condocs/bcode09/radioresearch.pdf>

- 1.16 The research is referred to, where appropriate, in relation to the options outlined above.

## Approach to Impact Assessment

- 1.17 The consultation document does not contain a separate impact assessment document. Instead the consultation document as a whole assesses the impact of the proposed changes on stakeholders (including citizen-consumers, radio broadcasters and advertisers).
- 1.18 This assessment has been informed by the responses to the 2009 Code Review, our 2010 pre-consultation discussions with stakeholders and the consumer research we have conducted in relation to commercial radio (referred to above).
- 1.19 In relation to equality, Ofcom is required by statute to have due regard to any potential impacts its proposals may have on race, disability and gender equality, as well as the other groups protected by legislation in Northern Ireland<sup>14</sup>. To fulfil this obligation, we have completed an Equality Impact Assessment (EIA) screening form (attached at Annex 6), which takes the form of an initial analysis of whether the proposals we are making raise equality issues, and if so, what their potential impacts might be.
- 1.20 Following completion of the consultation and consideration of stakeholder responses, we will review whether, on the basis of stakeholder responses received, there are, in fact, equality impacts and/or considerations that we had not, to date, accounted for. Should we find evidence to support this we will proceed to a full Equality Impact Assessment. Our published statement representing the conclusion of this consultation process will detail whether Ofcom did progress with a full Equality Impact Assessment and if so the conclusions drawn from this assessment. Such considerations will also inform our final revisions to the Code.

## Guidance

- 1.21 We propose to revise existing guidance to the Code, as appropriate, in the light of changes made following this consultation. We have indicated where we consider new guidance would be appropriate and of assistance to broadcasters and listeners in relation to the particular changes we are proposing. Current Code guidance can be found at <http://www.ofcom.org.uk/tv/ifi/guidance/bguidance/>

## Next steps

- 1.22 The following parts of this document set out our proposals and invite stakeholders' views on them. In responding to the questions for stakeholders, please see Part 3 which sets out Ofcom's regulatory objectives and statutory duties. The consultation responses will enable us to consider our proposals in light of stakeholder comments. We will publish a summary of responses and statement in response when the revised Code is published at the end of 2010.
- 1.23 Stakeholders should note that, until Ofcom has issued its statement and the revised Code, following the closure of this Consultation, the current Code rules remain in force.

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<sup>14</sup> In addition to race, disability and gender, equality legislation in Northern Ireland also covers age, sexual orientation, carers, marital status, religious belief and political opinion.

## Part 2

# Introduction<sup>15</sup>

*This consultation explores four options in relation to commercial communications on radio<sup>16</sup>. These range from retaining current regulation through to the possibility of providing much greater liberalisations, including allowing commercial communications to be integrated into editorial.*

*Commercial communications on radio are, generally, paid-for broadcast references to products and services. They currently comprise:*

- *spot advertisements, which are broadcast in commercial breaks; and*
- *sponsorship credits, which identify programming (or station) sponsorship and are broadcast around (and sometimes in the course of) the sponsored programming.*

*Currently, spot advertisements must be kept separate from radio programming (sometimes referred to as 'editorial') and only feature in commercial breaks. The only paid-for commercial communications in the course of radio programming that are currently permitted are therefore sponsorship credits. However, it should be noted that advertising messages may currently be placed in both spot advertisements and sponsorship credits.*

## Background

- 2.1 As part of its duties and functions in relation to broadcasting under the Communications Act 2003 ("the Act"), Ofcom is required to draw up and, from time to time, revise a code for television and radio services, covering standards in programmes (which include the protection of people under the age of 18 and the application of generally accepted standards to protect the public from the broadcast of offensive and harmful material), sponsorship and fairness and privacy. The Ofcom Broadcasting Code ("the Code") came into effect on 25 July 2005<sup>17</sup> following extensive public consultation and research during 2004.
- 2.2 Since the Code was first introduced, the consumer, industry and regulatory environments in which it operates have undergone many changes. Ofcom made a commitment in the 2008/9 Annual Plan to further develop the Code according to these changes. This was to ensure that the Code remains fit for purpose: providing both adequate protection for citizen-consumers, and a consistent and robust regulatory framework for broadcasters.
- 2.3 In response to these commitments, on 15 June 2009 Ofcom launched its Consultation on the Broadcasting Code Review<sup>18</sup>. As part of this consultation, Ofcom proposed revised rules relating to sponsorship and commercial references in television and radio programming (Sections Nine and Ten of the Code).
- 2.4 Section Nine of the current Code applies to both radio and television broadcast sponsorship arrangements. It is underpinned by three key principles: it seeks to

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<sup>15</sup> Please see the Glossary at Annex 5 for the meanings of terms used throughout this document.

<sup>16</sup> For the purposes of this document, references to radio refer to radio services licenced by Ofcom (these do not include BBC services funded by the licence fee).

<sup>17</sup> The Code has been revised subsequently in October 2008 and December 2009

<sup>18</sup> <http://www.ofcom.org.uk/consult/condocs/bcode09/main.pdf>

ensure that sponsorship arrangements are **transparent; separate** from programming and distinct from advertising; and that the broadcaster maintains **editorial control** over sponsored content so that programming is not distorted for commercial purposes.

- 2.5 Section Ten of the Code applies to other instances where references to a product or service may appear in the course of television or radio programming, whether as a result of a commercial arrangement or not. It is underpinned by two key principles: it seeks to ensure that advertising is **separate** from programming and that the broadcaster maintains **editorial control** over programme content so that programming is not distorted for commercial purposes.
- 2.6 When considering commercial communications on radio as a whole, the current overriding principles can therefore be summarised as: **transparency; separation; and editorial independence**.
- 2.7 Ofcom's 2009 Code Review set out our intention to revise Sections Nine and Ten of the Code, replacing these with a **revised Section Nine to deal with television** and a **revised Section Ten to deal with radio** (please see below under 'Purpose of this Consultation').
- 2.8 The review of Sections Nine and Ten of the Code was subsequently extended to 2010 (please see Annex 7 for an explanation and chronology in relation to this extension). This was in order for Ofcom to take account of the Government's decision to permit (subject to limitations) product placement on television i.e. to permit non-promotional broadcast references to products or services within television programming, in return for payment. Such references were not previously allowed.
- 2.9 Ofcom has recognised the significance for radio of the wider regulatory and broadcast policy landscape in relation to product placement and commercial references on television. This is discussed below under 'Context for regulatory intervention'.
- 2.10 This consultation paper represents the recommencement of the review in relation to commercial communications in radio programming, which are generally paid-for and promotional. A separate consultation has been published in relation to commercial references in television programming<sup>19</sup>.

## Purpose of this consultation

- 2.11 The Code is currently separated into ten sections, each designed to secure the relevant objectives in relation to standards, sponsorship, fairness and privacy, as set out in the Act.
- 2.12 Ofcom recognises that the statutory framework within which radio operates differs from television. As discussed in Part 3 of this document, radio broadcasts are not subject to the requirements of the European AVMS Directive (which applies only to audiovisual media services such as television). As a result there are, for example, no limits (as there are for television) on the amount of advertising permitted on radio.
- 2.13 Ofcom's 2009 Code Review therefore set out our intention to revise Sections Nine and Ten of the Code, replacing these with a revised Section Nine to deal with television and a revised Section Ten to deal with radio. We remain of the view that

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<sup>19</sup> <http://www.ofcom.org.uk/consult/condocs/bcrtv2010>

the proposed revised structure would better reflect the distinction between the statutory framework for commercial references broadcast on radio and television. This approach received stakeholder approval in the 2009 Consultation.

2.14 The current 2010 Consultation now sets out additional proposals on revisions to the proposed new Section Ten of the Code in relation to commercial communications in radio programming. These take into account the factors discussed under 'Context for regulatory intervention' discussed below.

2.15 These proposals seek to ensure that the Code remains fit for purpose and that it:

- takes appropriate account of the needs and wants of listeners and offers appropriate consumer protection; and
- takes appropriate account of changes and developments in the wider regulatory and public policy environment.

2.16 Where appropriate the proposals take into account the role of the Advertising Standards Authority ("ASA") which is the UK's independent regulator of advertising across all media, including radio and television. Its role is to ensure that advertising is legal, decent, honest and truthful by applying advertising codes. The relevant code for radio (and television) is the UK Code of Broadcast Advertising ("the BCAP Code"). The BCAP Code is issued by the Broadcast Committee of Advertising Practice ("BCAP") which is responsible for writing and reviewing it, and is applied by the ASA.

2.17 We offer four options for public consultation. The headline proposals under each option are as follows:

- **Option A:** *'Do nothing' and maintain principle of separation*<sup>20</sup>  
This is a 'status quo' option and would maintain the current comprehensive rules which require all commercial communications (i.e. paid-for references to products or services), other than sponsorship credits, to be separated from programming. Under this option we would replicate the rules currently in Sections Nine and Ten of the Code, in relation to radio, in a new Section Ten. Under Option A, the current principles of transparency, separation and editorial independence, referred to above, would remain.

Please see **Part 4** of this consultation paper where we include the rule set for Option A (for ease of reference this is set out as the rules appear in the current Sections Nine and Ten of the Code, although these rules would be amalgamated in a new Section Ten) and we invite stakeholders to respond to Option A.

- **Option B:** *Maintains principle of separation but provide defined set of exemptions*  
This option would also be framed as a comprehensive set of rules and would maintain the requirement for commercial communications (i.e. paid-for references to products or services) to be separated from programming, but would provide a defined set of exemptions. This is the approach we took in 2009, although this option could include a wider range of exemptions than those proposed in the 2009

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<sup>20</sup> Separation: currently commercial communications cannot be fully integrated into the editorial content of programming. Instead, they are required to be kept separate from programming. In the case of ads on radio, by appearing in commercial breaks and, normally, in the case of sponsor credits on radio, by appearing at the beginning and/or end of the relevant programming.

consultation. Again, the current principles of transparency, separation and editorial independence, referred to above, would underpin Option B.

Please see **Part 5** of this consultation paper where we include the rule set on which we previously consulted in the 2009 Code Review. Responses to that consultation were based on the then prohibition of product placement (please see definition and discussion below under 'Context for regulatory intervention'). We invite stakeholders to reconsider this option based on the change in public policy in this area (which although in relation to television sets the wider context for radio). We invite stakeholders to respond to Option B and to consider any additional exemptions to the requirement for separation.

- **Option C:** *Allows the integration of commercial communications and programming (except in relation to spot ads).*

This option would remove the principle of separation between commercial communications and programming except in relation to spot ads (which would need to remain distinguishable from programming). This would give radio stations wide discretion to integrate, for example, paid-for, promotional commercial references into programming provided these were transparent to listeners. This option would retain the value of spot ads as a distinct type of content and a distinct revenue source. It would be delivered as a slim set of rules designed to secure one principle: transparency of commercial arrangements. Such transparency would be central to ensuring consumer protection. Listeners would know when a commercial arrangement was in place in relation to programming. The principles of editorial independence and separation (except in relation to spot ads) would no longer apply under Option C.

Please see **Part 6** of this consultation paper where we include a rule set for Option C and invite stakeholders to comment on this option. .

- **Option D:** *Allows the integration of commercial communications and programming (including in relation to spot ads).*

This option would remove the principle of separation between commercial communications (including spot ads) and programming. This would give radio stations complete discretion to integrate seamlessly commercial elements into programming and would no longer distinguish between traditional spot ads and other commercial communications. It would be delivered as a slim set of rules designed to secure a principle of transparency of commercial arrangements. As for Option C, above, such transparency would be central to ensuring consumer protection. The principles of editorial independence and separation would no longer apply under Option D.

Please see **Part 7** of this consultation paper where we set out the approach under Option D. We invite stakeholders to indicate their responses to this approach. However, if Option D were to be adopted we would re-consult on detailed regulatory options and accompanying rule set(s).

**Note:** Three rule sets (in relation to Options A to C) are included in this consultation and stakeholders may choose to provide detailed comments or general observations in response to the questions which follow each option. Stakeholders are also invited to consider, at Annex 9, examples of output listeners could hear under each option.

## Context for regulatory intervention

### Product placement<sup>21</sup>

- 2.18 Ofcom is separately consulting on changes to the Code resulting from the Government's decision to permit (subject to limitations) product placement on television i.e. to permit non-promotional broadcast references to products or services within television programming, in return for payment. Please see Annex 7 for full details of this decision and the related consultation.
- 2.19 To date, product placement has been prohibited in programmes produced by, or on behalf of, broadcasters that are licensed by Ofcom. The 2009 Code Review was therefore premised on this prohibition.
- 2.20 Although this decision does not relate to radio, and the AVMS Directive (referred to above and discussed in Part 3) does not extend to radio services, the decision has a significant impact on separation<sup>22</sup>, which is one of the three key principles currently underpinning the regulation of commercial references broadcast on both radio and television. Hitherto, and reflecting the principle of separation (among other things), extensive reference to, or the promotion of, products and services within programming has not been permitted. In its consideration of radio, Ofcom has therefore recognised the wider regulatory and broadcast policy landscape and, in this regard, the context of legislative developments in relation to product placement and commercial references on television.
- 2.21 In addition public policy relating to products prohibited for placement on television (detailed at paragraph 2.32 to 2.32 below) provides a useful backdrop to considerations for radio, although any consideration of these throughout this document recognises the fundamental differences between radio and television output, audiences and regulatory framework.

### Unnecessary regulatory burden

- 2.22 Ofcom also has a duty to ensure that its regulation does not impose unnecessary burdens (referred to in Part 3 of this document), and that it does not maintain regulatory burdens which have become unnecessary. This consultation document has been drafted in this context.

### Wider radio regulation

- 2.23 This consultation should also be seen in the wider context of related Ofcom projects and consultations. The Digital Economy Act<sup>23</sup> allows limited deregulation of radio content, in particular allowing local stations to merge within larger areas defined by Ofcom. Following our consultation last year, the statement published on 15 April 2010 sets out our new policy on localness<sup>24</sup>. Ofcom has also reviewed particular areas of radio regulation – for example, music formats.

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<sup>21</sup> Product placement is the inclusion in a programme of a reference to a product, service or trade mark, for a commercial purpose, in return for payment or similar consideration. This is a summary of the definition of product placement set out in the amended Act (Schedule 11A, paragraph 1(1)).

<sup>22</sup> Please see Footnote 8 above on separation.

<sup>23</sup> [http://www.opsi.gov.uk/acts/acts2010/ukpga\\_20100024\\_en\\_1](http://www.opsi.gov.uk/acts/acts2010/ukpga_20100024_en_1)

<sup>24</sup> [http://www.ofcom.org.uk/consult/condocs/radio/statement/Localness\\_statement.pdf](http://www.ofcom.org.uk/consult/condocs/radio/statement/Localness_statement.pdf)

## Other relevant areas of legislation

- 2.24 Part 3 of this document outlines Ofcom's duties and legislation relevant to this consultation. In addition to Ofcom's statutory duties under the Act, Part 3 refers to Ofcom's powers to enforce relevant provisions of the Consumer Protection From Unfair Trading Regulations 2008.
- 2.25 Amongst other things, the Regulations make clear that the use of editorial content in the media to:
- “promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial)”*
- would constitute a commercial practice that is unfair and therefore prohibited.
- 2.26 This regulation ensures that audiences understand when, for example, promotional broadcast references have been paid for. It is of key significance in requiring appropriate signalling of paid-for promotions in editorial content. It is reflected in the principle of **transparency**, which appears in the four proposed options offered in this consultation, as this contributes significantly towards ensuring adequate consumer protection.

## Issues arising from the proposed options

- 2.27 In considering the above options we have identified a number of issues that may arise from them. These relate to whether additional restrictions or prohibitions should be placed on commercial communications in radio programming in relation to:
- potentially harmful products or services on radio;
  - programming primarily aimed at children;
  - consumer affairs programming;
  - whether current safeguards and prohibitions in relation to news should be preserved;
  - religious programming;
  - whether funding of commercial arrangements by non-commercial organisations require particular consideration; and
  - whether potential commercial arrangements around music selection or rotation require consideration.

These are discussed below and in the relevant sections of Parts 4 to 7.

## Additional prohibitions or restrictions

- 2.28 We have considered whether additional prohibitions or restrictions should be put in place for commercial communications, in relation to potentially harmful products or services in radio programming i.e. whether the public should be afforded protections.

- 2.29 Any such prohibitions or restrictions would be introduced under section 321(1) of the Act. This states that Ofcom may prohibit advertisements and forms and methods of advertising sponsorship in order to secure the objectives for advertisements and sponsorship. In addition, sections 319(2)(f), (i) and (j) set out standards objectives of particular relevance to commercial references in radio programming, to be secured with regard to ensuring public protection from harm. Ofcom could therefore impose additional protections for the public. Please see Part 3 of this standards document for the full references to the legislation.
- 2.30 Currently the UK Code of Broadcast Advertising (the “BCAP Code”)<sup>25</sup> prohibits the promotion of tobacco products, prescription medicines, infant formula and smoking accessories. In addition there are restrictions, for example on scheduling, in relation to alcohol, gambling, follow on formula and over-the-counter medicines. In relation to children the BCAP Code includes a rule making clear that advertisements must avoid anything likely to condone or encourage poor nutritional habits or an unhealthy lifestyle, especially in children.
- 2.31 As discussed in paragraph 2.12, the statutory framework within which radio operates differs from television, as does the nature of radio output, its audiences and the restrictions and prohibitions placed on radio. However it is useful to consider developments in public policy in relation to television regulation by way of background to considerations for radio.
- 2.32 The ‘Written Ministerial Statement on Television Product Placement’, published on 9 February 2010<sup>26</sup>, stated:

*“The [AVMS] Directive prohibits the placement of two specific types of product, that is tobacco products (as well as any other placement by or on behalf of a company whose principal activity is the manufacture or sale of tobacco products) and prescription medicines. The Government has decided to move significantly beyond this. Our legislation will specifically prohibit the placement of products and services in the following categories:*

- *alcoholic drinks;*
- *foods and drinks high in fat, salt or sugar [“HFSS”];*
- *gambling;*
- *smoking accessories;*
- *over-the-counter medicines; and*
- *infant formula and follow-on formula.*

[See paragraph 2.33, below, for the finalised list]

*“In reaching this decision the Government has had the issue of potential effects on health and welfare, and especially children’s health and welfare, particularly in mind. The Directive contains a ban on product placement in ‘children’s programmes’, and our legislation will enact that. However, children’s viewing is not confined to children’s programmes.*

*“An alternative to a ban on placement of HFSS foods and alcohol might have been restrictions of some kind on their placement in shows which have a large child*

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<sup>25</sup> <http://bcap.org.uk/The-Codes/New-Advertising-Codes.aspx>

<sup>26</sup> The full statement can be found at:

[http://www.culture.gov.uk/reference\\_library/minister\\_speeches/6624.aspx](http://www.culture.gov.uk/reference_library/minister_speeches/6624.aspx)

*audience, or which are shown before the watershed. But this would be complex to administer and would not provide the certainty which the Government seeks.*

*“In the circumstances we intend to legislate for a complete bar on placing these products. This is an important aspect of the cautious approach that we need to take.”*

- 2.33 This position was appropriately reflected in The Audiovisual Media Services (Product Placement) Regulations 2010<sup>27</sup>, which came into force on 16 April 2010 and prohibited the placement of products and services in the following categories:
- electronic or smokeless cigarettes, cigarette lighters, cigarette papers or pipes intended for smoking;
  - medicinal products;
  - alcoholic drinks;
  - infant formula or follow-on formula;
  - a food or drink high in fat, salt or sugar; and
  - gambling services.
- 2.34 The question of whether further prohibitions or restrictions are relevant to radio programming (i.e. in addition to those in the BCAP Code) is addressed separately under each option, and stakeholders are invited to address this issue in their responses.

### **Programming primarily aimed at children**

- 2.35 Considerations in relation to child audiences are discussed above under ‘Additional prohibitions or restrictions’ in relation to particular products and services. In addition we have considered whether, arising from the proposed integration of commercial communications within editorial under Option C (and Option D), further protections are required for child listeners.
- 2.36 As discussed above at paragraph 2.32, in relation to television product placement, the Ministerial Statement on product placement<sup>28</sup> acknowledged that the AVMS Directive “contains a ban on product placement in ‘children’s programmes’<sup>29</sup>” and confirmed that UK legislation “will enact that”.
- 2.37 It also expressed wider concerns about child audiences and took into particular account the issue of potential effects on health and welfare, and especially children’s health and welfare, when it decided to prohibit the placement of the categories of products and services discussed above. It described this decision as “an important aspect of the cautious approach that we need to take”<sup>30</sup>.
- 2.38 We recognise that related radio issues arise concerning the protection of children in relation to Option C. This is because the *integration* of commercial communications within radio programming, proposed under Option C, does not afford child listeners

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<sup>27</sup> This can be found at [http://www.opsi.gov.uk/si/si2010/uksi\\_20100831\\_en\\_1](http://www.opsi.gov.uk/si/si2010/uksi_20100831_en_1)

<sup>28</sup> The full statement can be found at:

[http://www.culture.gov.uk/reference\\_library/minister\\_speeches/6624.aspx](http://www.culture.gov.uk/reference_library/minister_speeches/6624.aspx)

<sup>29</sup> These are programmes made for a television programme service or an on-demand programme service, and for viewing primarily by persons under the age of sixteen (Schedule 11A, paragraph 3(2), of the Act)

<sup>30</sup> The full statement can be found at:

[http://www.culture.gov.uk/reference\\_library/minister\\_speeches/6624.aspx](http://www.culture.gov.uk/reference_library/minister_speeches/6624.aspx)

the protection provided by the current *separation* between editorial and commercial communications.

- 2.39 Our proposal, under Option C, is to prohibit commercial references, or material that implies a commercial arrangement, *integrated within* programming primarily aimed at children. This proposal, and its impact, is discussed further in Part 6 of this document.
- 2.40 Associated guidance would also clarify that specific programming (i.e. identifiable programmes or features) primarily aimed at children may be sponsored, as long as it complies with the requirement that no commercial reference is permitted in such programming (this requirement is set out in the rule set proposed for Option C in Part 6). This could be achieved by placing sponsor credits *around*, or *in the course of*, the relevant programming (as is currently permitted) but not *integrated within* it. This proposed approach is further detailed in Part 6 of this document.
- 2.41 Stakeholders are invited to comment on this approach under Option C.

### **Consumer affairs programming**

- 2.42 Consumer affairs programming is an area of output where the integrated commercial communications within editorial under Option C (and Option D) could raise particular concerns about the independence of observations and comments made within programming, and whether these may have been affected by commercial arrangements.
- 2.43 By way of background we again note wider broadcasting public policy in this area. The Ministerial Statement on product placement discussed above at paragraph 2.32, acknowledged concern about the possibility of product placement in consumer affairs programming on television and concluded that it was important that legislation ensured that product placement was specifically prohibited in this area of programming.
- 2.44 Part 6 of this document explains that we do not consider it necessary to place additional safeguards in relation to consumer affairs programming on radio under Option C. This is because we recognise the prohibitions and restrictions provided by the BCAP Code, the signalling arrangements under Option C (discussed in Part 6 at paragraph 6.105) and the fundamental differences between radio and television audiences, programming and consumption of output.
- 2.45 Whilst we are not proposing additional rules in this area, we do, however, propose to make it clear in guidance that broadcasters should take particular care in relation to broadcast material that could appear to provide an independent assessment of products or services. The proposed guidance will also clarify that any such assessment must be genuinely independent and not subject to a commercial arrangement.

### **News and political and controversial matters**

#### *News*

- 2.46 A further issue arises in relation to each of the options over whether current safeguards and prohibitions in relation to news on commercial radio should be maintained.

- 2.47 Section 319 of the Communications Act sets standards objectives in relation to news, which require news included in both television and radio services to be presented with due impartiality and due accuracy. It also includes an objective under which Ofcom must have regard to the desirability of maintaining the independence of editorial control over programme content.
- 2.48 In turn, the Code<sup>31</sup> safeguards the impartiality and accuracy of news (within Section Five of the Code) and underpins this with requirements over the integrity of news (within Section Nine of the Code, which states that news bulletins and news desk presentations on radio may not be sponsored).
- 2.49 Each of our proposals continues to maintain these safeguards and elects to prohibit the integration of commercial communications in news except to the extent that is already permitted (sponsorship of integrated sports news is currently permitted, for example).
- 2.50 In maintaining the safeguards in relation to news we have taken into account both our duties under the Act and our 2010 pre-consultation discussions with both industry and consumer stakeholders, neither of which showed an appetite for commercial references in or around news broadcasting.

*Political and controversial matters*

- 2.51 In addition to the safeguards in relation to news, there are further safeguards and rules in relation to political and controversial matters:
- Advertising scheduling and content rules, including Section Seven of the Broadcasting Committee of Advertising Practice UK Code of Broadcast Advertising<sup>32</sup> (“the BCAP Code”) on political and controversial matters, which requires, among other things, that no advertisement may:
    - be inserted by or on behalf of a body whose objectives are wholly or mainly of a political nature;
    - be directed towards a political end.

Objectives of a political nature and political ends include:

- influencing the outcome of elections or referendums;
- bringing about changes of the law or otherwise influencing the legislative process;
- influencing the policies or decisions of local, regional or national governments;
- influencing the policies or decision of persons on whom public functions are conferred by or under law or international agreements;
- influencing public opinion that, in the United Kingdom, is a matter of public controversy; and
- promoting the interests of a party or other group of persons organised for political ends.

(These rules do not apply to the party political and election campaign broadcasts that the Act obliges broadcasters to carry).

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<sup>31</sup> <http://www.ofcom.org.uk/tv/ifi/codes/bcode/>

<sup>32</sup> <http://bcap.org.uk/The-Codes/New-Advertising-Codes.aspx>

- The provisions of other sections of the Broadcasting Code:
  - Section Five: Due impartiality rules on matters of political or industrial controversy and matters relating to current public policy.
  - Section Two: Factual programmes or items must not materially mislead the audience (Rule 2.2).

2.52 The significance of these safeguards is discussed in relation to Options C and D where commercial communications can be integrated within programming.

### **Religious programming**

2.53 Since the following protections apply to religious programming we do not consider that any further safeguards are required:

- Section Four of the Broadcasting Code (Religion); and
- Section Fifteen of the BCAP Code (Faith, Religion and Equivalent Systems of Belief).

### **Not-for-profit funders**

2.54 An issue arises, in relation to Options B to D, over whether we should distinguish between commercial and non-commercial, not-for-profit funders of commercial arrangements.

2.55 When we consulted on the review of the Code in 2009, we sought respondents' views on potential new rules for consideration in relation to Public Information Programming ("PIPs") on radio and on television. This was defined as programming that seeks "to educate or inform the audience on matters in the public interest, that are funded by non-commercial, not-for-profit entities and that may refer to the interests and/or activities of the funder". (This is explored in detail in p100-103 of the 2009 Consultation paper<sup>33</sup>).

2.56 The Code currently treats such funding arrangements as sponsorship and they are therefore subject to the rules set out in Section Nine of the current Code. These rules prohibit sponsored programmes promoting the interests of the funder, whether it is a commercial or not-for-profit entity. The rules ensure that a distinction is maintained between programmes and advertising, and reinforce the UK's prohibition (prior to 16 April 2010), on product placement<sup>34</sup>.

2.57 Parts 4 to 7 of this document explain whether the potential for this type of programming could be considered under each of Options A to D, and in what circumstances. Broadly it would remain prohibited under Option A but could be considered under Option B. In relation to Options C and D no distinction would be made between different funders (i.e. whether the funder is a commercial or non-commercial entity) and all programming subject to, or associated with, a commercial arrangement would be required to be signalled as such, and to comply with all other Broadcasting Code requirements and the BCAP Code (in relation to advertising

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<sup>33</sup> <http://www.ofcom.org.uk/consult/condocs/bcode09/main.pdf>

<sup>34</sup> For a full discussion of Public Information Programming in relation to television please refer to p52-56 <http://www.ofcom.org.uk/consult/condocs/bcode09/main.pdf>

content, scheduling and pre-clearance requirements) – see above, for example, under ‘Political and controversial matters’.

- 2.58 This issue is discussed separately in relation to Options B to D and stakeholders are invited to address it in their responses.

## Music

- 2.59 Options C and D (outlined above) allow commercial arrangements to be introduced in relation to speech-based commercial references integrated within programming. We recognise that this raises the possibility that, under these options, commercial arrangements might also be introduced in relation to the selection or rotation of music for broadcast.
- 2.60 Proposals in Part 6 of this document therefore give consideration to appropriate signalling that would be required if such arrangements were in place.
- 2.61 Stakeholders are invited to address this issue in their responses.

## Consumer research

- 2.62 As part of the 2009 Code Review, deliberative and qualitative research was commissioned by Ofcom into consumer attitudes to commercial references on radio and published in June 2009<sup>35</sup>.
- 2.63 This research was specifically commissioned to understand listener tolerance of promotional activity within editorial content (i.e. the degree to which radio listeners are prepared to accept references that are subject to commercial arrangements being included *within* programming). The public’s views were reflected in the specific liberalisations proposed by Ofcom in its 2009 review consultation (and outlined in Part 5 of this document).
- 2.64 The research indicated that consumers would be receptive to liberalisation. This was based on an expectation that “commercial radio” is, by nature, commercial. Transparency is key to listeners, who identified the following key concerns:
- ensuring that commercial activity could be clearly understood as such;
  - the protection of listener trust (for example, in relation to the editorial integrity of presenters); and
  - the quality of their listening experience.
- 2.65 In summary, research showed overall that:
- Listeners expect to be ‘sold to’ on commercial radio;
  - Traditional spot ads are associated with commercial radio but tend to be regarded negatively. Listeners appreciate that the current separation of commercial communications from programming prevents surreptitious advertising

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<sup>35</sup> <http://www.ofcom.org.uk/consult/condocs/bcode09/radioresearch.pdf>

but consider that, if the commercial arrangement is transparent, then the need for separation is reduced;

- Sponsor credits (a form of commercial reference in programming) are often well-received on the grounds of brevity, relatively low level of intrusiveness and less overt sales agenda;
- Listeners have a clear appetite for some liberalisation of Ofcom's rules on commercial references in programming. However, this should not be at the expense of the three factors identified as listener concerns at paragraph 2.64, above.

2.66 This research is referred to, where appropriate, in relation to the four Options outlined above.

## Approach to impact assessment

### General impact issues

2.67 Ofcom's aim is to ensure that the Code appropriately furthers the interests of citizens and consumers as well as those of the radio industry; and enables Ofcom to meet its duties effectively and efficiently. Ofcom seeks to provide adequate protection for consumers and an appropriate level of freedom of expression for broadcasters, while remaining responsive to changes in the industry and regulatory environment since the publication of the 2005 Code.

2.68 This consultation document does not contain a separate impact assessment document. Instead the consultation document as a whole assesses the impact of the proposed changes on stakeholders (including citizens, consumers and radio broadcasters). This assessment has been informed by the responses to the 2009 Code Review, our 2010 pre-consultation discussions with stakeholders and the consumer research we have conducted in relation to commercial radio (referred to above).

2.69 Impact considerations in relation to consumers are addressed under each option. Pre-consultation talks with consumer groups indicated some concern about an increase in commercial references within radio programming. However deliberative research<sup>36</sup>, conducted for Ofcom as part of its 2009 Code Review process and focused specifically on commercial radio and its listeners, indicated that consumers expect commercial references on commercial radio, generally understand that this is the way in which commercial radio is funded, and are likely to be receptive to some liberalisation in this area (as long as consumer protection is safeguarded). Please see above under 'Consumer Research'.

2.70 Impact considerations in relation to advertisers and regulation differ under each approach and are dealt with separately in Parts 4 to 7.

2.71 In relation to industry, the impact considerations are again dealt with under each Option. It is difficult to estimate the economic benefits to industry that might accrue from each of the liberalising approaches (Options B to D), the main unknown being to

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<sup>36</sup> The published research report 'Commercial references within radio programming', can be found at: <http://www.ofcom.org.uk/consult/condocs/bcode09/radioresearch.pdf>, while a summary of its principal findings can be found in Annex 3

what extent new commercial references revenues might replace existing spot ad income.

- 2.72 One radio broadcaster<sup>37</sup> has broadly estimated, on the basis of its sector knowledge, annual benefit, to the radio industry as a whole, of £5m from proposed changes in the 2009 Code Review, which correspond to the approach under Option B. On the same basis it estimates annual benefit of £25m from a more liberalised approach, corresponding to the approaches under Options C or D. For context, annual industry net advertising revenues are around £400m which would imply that Options B to D have the potential to yield a benefit in the order of 1-6% of industry revenues. Given this single point of reference, our discussion of the costs and benefits of the different proposals is inevitably qualitative rather than quantitative.
- 2.73 No general issues in relation to the impact of our proposals on Community Radio have been identified. However where there are any related matters (for example, in relation to commercial funding limits) these will be addressed in guidance.

### **Equality impact issues**

- 2.74 Ofcom is required by statute to have due regard to any potential impacts its proposals may have on race, disability and gender equality, as well as the other groups protected by legislation in Northern Ireland<sup>38</sup>. To fulfil this obligation, we have completed an Equality Impact Assessment (EIA) screening form, which takes the form of an initial analysis of whether the proposals we are making raise equality issues, and if so, what their potential impacts might be.
- 2.75 In relation to equality issues we consider that our proposals would be unlikely to involve any adverse effect with regard to the above equality groups. Our view is set out further in our Equality Impact Assessment Screening at Annex 6.
- 2.76 However, we do consider that particular proposals may benefit some diversity groups that are radio listeners.
- 2.77 Many radio stations (some community, some commercial) serve members of diversity groups through the type and range of programmes they transmit. We consider that the proposed regulatory liberalisations (under Options B to D) will offer the potential for such stations to develop fresh revenue streams and thereby strengthen their radio operations and financial viability. This could offer the possibility of enriching these stations, and their offering to varied groups within the community, at a time of difficult trading conditions.
- 2.78 Where appropriate, the consultation document will ask stakeholders specifically to submit responses on any potential impacts they consider should be taken into account, including in relation to matters of equality. This will ensure we have not failed inadvertently to consider any possible equality impacts resulting either from this Code Review or our specific proposals.
- 2.79 In particular, we will request stakeholder responses on the issue of additional restrictions on promoting certain products, which may have relevance to vulnerable groups, including children (discussed above at paragraphs 2.28 to 2.34). We will also request stakeholder responses in relation to our proposal to prohibit commercial

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<sup>37</sup> Source: UTV Media (GB)

<sup>38</sup> In addition to race, disability and gender, equality legislation in Northern Ireland also covers age, sexual orientation, carers, marital status, religious belief and political opinion.

references, or material that implies a commercial arrangement, integrated within programming primarily aimed at children (discussed at paragraph 2.35 to 2.41 above).

- 2.80 Following completion of the consultation and consideration of stakeholder responses, we will review whether, on the basis of stakeholder responses received, there are, in fact, equality impacts and/or considerations that we had not, to date, accounted for. Should we find evidence to support this we will proceed to a full Equality Impact Assessment.
- 2.81 Our published statement representing the conclusion of this consultation process will detail whether Ofcom did progress with a full Equality Impact Assessment and if so the conclusions drawn from this assessment. Such considerations will also inform our final revisions to the Code.

## Guidance

- 2.82 We propose to update and revise existing guidance to the Code, as appropriate, in light of changes made following this consultation. We have indicated where we consider new guidance would be appropriate, and of assistance to broadcasters and listeners, in relation to the particular changes we are proposing. The current guidance to the Code can be found at <http://www.ofcom.org.uk/tv/ifi/guidance/bguidance/>

## Next steps

- 2.83 The following parts of this document set out our proposals and invite stakeholders' views on them. In responding to the questions for stakeholders, please see Part 3 which sets out Ofcom's regulatory objectives and statutory duties. The consultation responses will enable us to consider our proposals in light of stakeholder comments. We will publish a summary of responses and statement in response when the revised Code is published at the end of 2010.
- 2.84 Stakeholders should note that, until Ofcom has issued its statement and the revised Code, following the closure of this Consultation, the current Code rules remain in force.

## Part 3

# Regulatory objectives and statutory duties

## Ofcom's statutory duties

- 3.1 As part of its duties in relation to broadcasting, Ofcom is responsible for setting broadcast standards for the content of programmes. The objectives under Section 319 of the Act to be secured by these standards, which are relevant to this consultation are:
- that persons under the age of eighteen are protected;
  - that material likely to encourage or to incite the commission of crime or to lead to disorder is not included in television and radio services;
  - that news included in television and radio services is presented with due impartiality and that the impartiality requirements of Section 320 are complied with;
  - that news included in television and radio services is reported with due accuracy;
  - that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material;
  - that advertising that contravenes the prohibition on political advertising set out in Section 321(2) is not included in television or radio services;
  - that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented;
  - that the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with;
  - that the unsuitable sponsorship of programmes included in television and radio services is prevented; and,
  - that there is no use of techniques which exploit the possibility of conveying a message to viewers or listeners, or of otherwise influencing their minds, without their being aware, or fully aware, of what has occurred.
- 3.2 In setting, or revising, these standards Ofcom must have regard to the following matters under Section 319(4) of the Act:
- the degree of harm or offence likely to be caused by the inclusion of any particular sort of material in programmes generally, or in programmes of a particular description;
  - the likely expectation of the audience as to the nature of a programme's content and the extent to which the nature of a programme's content can be brought to the attention of potential members of the audience;

- the desirability of securing that the content of services identifies when there is a change affecting the nature of a service that is being watched or listened to and, in particular, a change that is relevant to the application of the standards set under section; and
  - the desirability of maintaining the independence of editorial control over programme content.
- 3.3 In relation to the standard objectives in relation to sponsorship, Section 321 of the Act provides that Ofcom:
- must include general provision governing standards and practice in sponsorship; and
  - may include provision prohibiting forms and methods of sponsorship.
- 3.4 Broadcast standards are maintained by means of codes. The Broadcasting Code identifies the standards that apply to editorial content (i.e. programming) and sponsorship arrangements. Content is assessed on a case-by-case basis to determine whether it complies with the Code. The Code itself must comply with European legislation.

## European legislation

- 3.5 Legislation has been passed at the European level (the EC Directive 2007/65/EC – Audio Visual Media Service (“AVMS”) Directive) seeking to create a level playing field for emerging audiovisual media services in Europe; and to protect consumer and citizen interests by ensuring that these services will be subject to some basic content standards.
- 3.6 The AVMS Directive has been implemented into UK legislation through the Audiovisual Media Services Regulations 2009 and the Audiovisual Media Services (Product Placement) Regulations 2010. It sets minimum standards in relation to the protection of minors and commercial communications such as advertising, sponsorship and product placement for both broadcast television and video-on-demand services.
- 3.7 The AVMS Directive applies only to audiovisual media services. It does not, therefore, extend to radio services but is referred to here by way of background because it sets out a framework for considering analogous commercial references in television.

## Other relevant areas of legislation

- 3.8 Ofcom has powers under Part 8 of the Enterprise Act to enforce relevant provisions of the Consumer Protection From Unfair Trading Regulations 2008.
- 3.9 Regulation 3 prohibits unfair commercial practices and sets out the circumstances in which a commercial practice is unfair. Amongst other things, under Regulation 3(4)(d), a commercial practice is unfair if it is one that is listed in Schedule 1. In particular, paragraph 11 of Schedule 1 is clear that the use of editorial content in the media to:

*“promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial)”*

would constitute a commercial practice that is unfair and therefore prohibited.

- 3.10 This regulation ensures that audiences understand when, for example, promotional broadcast references have been paid for. It is therefore of key significance in requiring appropriate signalling of paid-for material in editorial content. It is reflected in the principle of transparency, which appears in the four proposed options offered in this consultation, as this contributes significantly towards ensuring adequate consumer protection.
- 3.11 The regulations applying to community radio services previously prohibited a community radio station from taking more than half of its annual income from a single source. However, that rule was removed earlier this year.
- 3.12 Community radio stations remain subject to rules about the amount of advertising and sponsorship that these services can include. Community stations that overlap with a small local radio service (meaning a service that covers no more than 150,000 adults) cannot include any paid-for advertisements or sponsorship. Other community stations can include advertisements or sponsorship, but may take no more than half of their annual income from these sources<sup>39</sup>.

## Relevant consultation considerations

- 3.13 In consulting upon the review of the Code in relation to commercial communications in radio programming, we must take into account our wider responsibilities under the Act and other relevant legislation.
- 3.14 Section 3(1) of the Act says that Ofcom’s principal duty in carrying out its functions shall be to further the interests of:
- citizens in relation to communications matters; and
  - consumers in relevant markets, where appropriate by promoting competition.
- 3.15 Section 3(2) specifies matters which Ofcom must secure in carrying out its functions. These include:
- the availability throughout the UK of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests;
  - the maintenance of a sufficient plurality of providers of different television and radio services; and
  - the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services.
- 3.16 Section 3(3) and Section 3(4) say that in performing the duties set out in Section 3(1), Ofcom must have regard to a variety of other factors, including:

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<sup>39</sup> Community Radio Order 2004 as amended by the Community Radio (Amendment) Order 2010.

- the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed;
  - the desirability of promoting competition in relevant markets;
  - the need to secure the application of standards in the manner which best guarantees an appropriate level of freedom of expression;
  - the vulnerability of children and of others whose circumstances appear to Ofcom to put them in need of special protection;
  - the needs of persons with disabilities, of the elderly and of those on low incomes; and
  - the opinions of consumers in relevant markets and of members of the public generally; and
  - the different interests of persons in the different parts of the UK, of the different ethnic communities within the UK and of persons living in rural and urban areas.
- 3.17 Where it appears to Ofcom that any of its general duties conflict with one another, it must secure that the conflict is resolved in the manner it thinks best in the circumstances (Section 3(7)).
- 3.18 In performing its duties under Section 3(1)(b) to further the interests of consumers, Ofcom must also have regard to the interests of those consumers in respect of choice, price, quality of service and value for money.
- 3.19 Ofcom has both a general responsibility with respect to advertisements and forms and methods of advertising and sponsorship, as well as a related power to include conditions in any licence granted by Ofcom that go beyond the provisions of its standards code (Section 321(4)).
- 3.20 Ofcom also has duties that relate to how to carry out our work under the Act, including requirements:
- i) to secure that regulation by Ofcom does not involve the imposition of burdens that are unnecessary, or the maintenance of burdens which have become unnecessary (Section 6(1)); and
  - ii) to carry out an assessment of the impact of a change in the way we carry out our activities where this would have a significant impact on persons carrying on businesses in markets that we regulate (Section 7).
- 3.21 In addition to our responsibilities under the Act, as a public authority we have a duty under the Human Rights Act 1998 to ensure that we do not act in a way which is incompatible with the European Convention of Human Rights ('the Convention').
- 3.22 Article 8 of the Convention provides for the right to respect for private and family life, home and correspondence. It states that there shall be no interference by a public authority with the exercise of this right, except "as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for

the protection of health or morals, or for the protection of the rights and freedoms of others”.

- 3.23 Article 10 of the Convention provides for the right to freedom of expression. It encompasses the broadcaster’s right to “impart information and ideas” and also the audience’s “right to receive information and ideas without interference by public authority”. Such rights may only be restricted if the restrictions are: “prescribed in law and necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary” (Article 10(2) of the Convention).
- 3.24 Ofcom must exercise its duties in light of these rights and not interfere with the exercise of these rights in broadcast services unless it is satisfied that the restrictions it seeks to apply are required by law and necessary to achieve a legitimate aim.
- 3.25 The case law of the European Court of Human Rights on Article 10(2) of the Convention shows that national authorities have a discretion in deciding whether there is a pressing social need capable of justifying a restriction on freedom of expression. According to that case law, such a discretion is particularly essential in commercial matters and especially in a field as complex and fluctuating as advertising<sup>40</sup>.

## Regulatory objectives in this consultation

- 3.26 Taking into account the legislation referred to above, the regulatory objectives of this consultation in relation to commercial communications in radio programming are as follows:
- i) To further the interests of citizens and consumers, in particular, in relation to:
    - the application of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in radio services (addressed in further detail in objective (ii) below);
    - the range, quality and appeal of radio services available throughout the UK; and
    - the importance of securing a sufficient degree of plurality of providers of radio services.
  - ii) To review and revise standards for the content of radio services to secure the following objectives:
    - that persons under the age of eighteen are protected;
    - that generally accepted standards are applied to the content of radio services to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material;

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<sup>40</sup> See *VGT Verein gegen Tierfabriken v Switzerland*, judgment of the ECHR of 28 June 2001, Reports of Judgments and Decisions 2001-VI, paragraphs 66 to 70

- that the inclusion of advertising which may be misleading, harmful or offensive in radio services is prevented; and
  - that the international obligations of the UK with respect to advertising included in radio services are complied with.
- iii) To review the carrying out of its functions to ensure that regulation by Ofcom does not involve:
- the imposition of burdens that are unnecessary; or
  - the maintenance of burdens which have become unnecessary.
- iv) To have regard to the right to freedom of expression, as expressed in Article 10 of the European Convention on Human Rights. Ofcom must have regard to the need to guarantee an appropriate level of freedom of expression in relation to standards in radio services.
- v) That any changes to current regulation should, in furthering the interests of citizens and consumers, so far as possible:
- be evidence-based, transparent, proportionate, consistent and limited to the measures needed to achieve the objectives above;
  - take account of the desirability of promoting competition, and the nature and interests of different consumers, in relevant markets; and
  - take account of the desirability of promoting and facilitating effective self-regulation.

## Part 4

# Option A: proposed revisions to the Broadcasting Code in relation to commercial communications in radio programming

*Option A: 'Do nothing' and maintain the principle of separation<sup>41</sup>*

## Introduction

- 4.1 In this part of the consultation paper we set out an option under which the 'status quo' would be maintained. The approach of Option A continues the current regulation of radio within the Broadcasting Code and would therefore replicate the rules for radio currently contained in Code Sections Nine (sponsorship) and Ten (commercial references) in a new Section Ten of the Code.
- 4.2 Option A would maintain the current approach to prohibiting commercial communications within radio programming and would not therefore mirror the liberalised approach that has been taken to allow product placement within television programming (i.e. the decision to permit non-promotional broadcast references to products or services within television programming in return for payment discussed in full in Part 2 of this document).
- 4.3 At paragraph 4.38 below we set out the rule set for Option A. For ease of reference this is set out as it currently appears in the current Sections Nine and Ten of the Code, although these rules would be amalgamated in a new Section Ten.
- 4.4 At the close of this part of the consultation document we invite stakeholders to respond to Option A.

## Key features of Option A

- 4.5 Option A is a 'do nothing' option. Under it Ofcom would maintain the current comprehensive rules that require all commercial communications (i.e. paid for references to products and services), other than sponsorship credits, to be separated<sup>42</sup> from programming. Stakeholders are invited to consider, at Annex 9, examples of output listeners could hear under Option A.
- 4.6 Option A is based on the current three regulatory principles of:
  - **Separation** (between programming and all commercial communications);

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<sup>41</sup> Separation: currently commercial communications on radio cannot be integrated into the editorial content of programming. Instead they are required to be kept separate from the editorial content. Normally (in the case of ads or sponsor credits) by appearing at the beginning and/or end of programming (or in the centre breaks) and made readily recognisable from editorial content by aural means.

<sup>42</sup> Please see Footnote 8 above on separation..

- **Transparency** (of commercial communications – i.e. advertising and sponsorship); and
- **Editorial independence** (of the broadcaster).

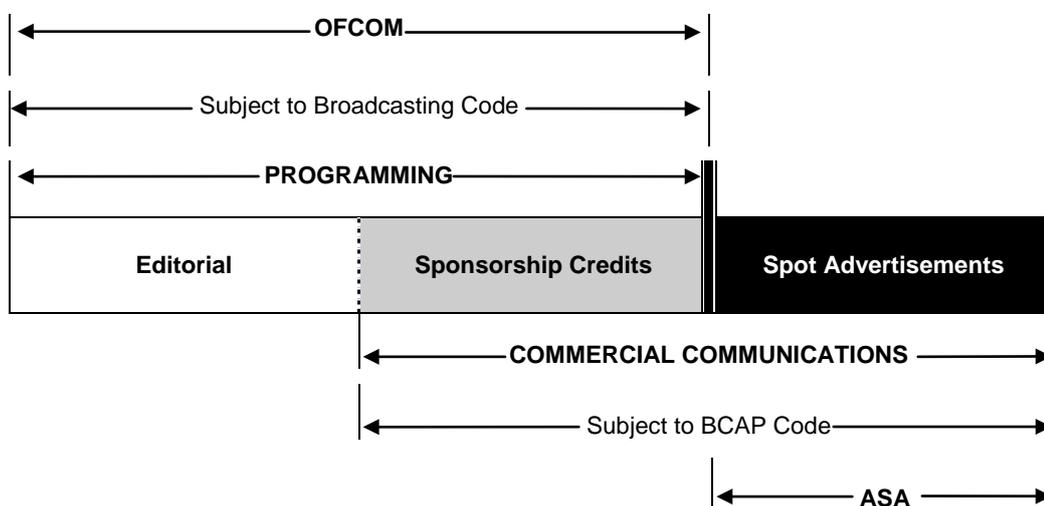
## Regulatory responsibility under Option A

4.7 Under Option A regulatory responsibility would continue as at present (please see paragraphs 4.9 and 4.10).

4.8 The following is a diagrammatic representation of how radio output would be classified and regulated under Option A (Figure 1):

- It identifies the areas of output which would fall under **Ofcom**'s remit, and those areas which would fall under the **ASA**'s remit;
- It explains which Code would apply to different areas of output (i.e. whether this would be the **Broadcasting Code** or the **BCAP Code**);
- It breaks down output into **programming** (sometimes referred to as 'editorial', programming comprises programmes (e.g. a Breakfast Show), music, and features (e.g. weather) and includes sponsorship, and programme trails etc.) and **spot advertisements**.
- It identifies key areas of programming: **editorial** and **sponsorship credits** (please see the Glossary at Annex 5 for further explanation of the terms used).

Figure 1: Option A



4.9 Ofcom would be responsible for the regulation of radio programming, including sponsorship. It would regulate these under the Broadcasting Code, but refer to the scheduling and content requirements of the BCAP Code<sup>43</sup>, with regard to the regulation of radio programming/station sponsorship in general and sponsor credit content.

<sup>43</sup> <http://bcap.org.uk/The-Codes/New-Advertising-Codes.aspx>

- 4.10 The Advertising Standards Authority (“ASA”) would be responsible for the regulation of radio advertising under the Broadcast Committee of Advertising Practice UK Code of Broadcast Advertising (the “BCAP Code”).

## Overview of the impact of this proposal

- 4.11 As discussed above in Part 2 (Introduction), this consultation document does not contain a separate impact assessment document. Instead the consultation document as a whole assesses the impact of the proposed changes on stakeholders (including consumers and radio broadcasters).
- 4.12 In considering issues relating to impact, Ofcom has noted the responses to the 2009 Consultation<sup>44</sup>, research on consumer attitudes conducted as part of that Consultation, and views expressed in informal pre-consultation discussions with industry and consumer stakeholders in 2010.
- 4.13 Responses to this Consultation, including responses to specific questions on impact, will further inform our considerations. Stakeholders are invited to respond to the proposals on Option A in ‘Questions for Stakeholders’ below.

## Consumer stakeholders

- 4.14 From a consumer protection perspective, Option A provides a high level of protection. This is likely to be welcomed by those consumers who have concerns about an increase in commercial references within radio programming (such concerns were raised in pre-consultation talks with consumer groups in 2010).
- 4.15 However, deliberative research<sup>45</sup>, conducted for Ofcom as part of its 2009 Code Review process, and focused specifically on commercial radio and its listeners, indicates that current restrictions may be out of line with listener expectations. It suggests that consumers are likely to be receptive to some liberalisation in this area, subject to the provision of adequate transparency, the protection of listener trust and the maintenance of the quality of their listening experience. This attitude was based on a consumer expectation that “commercial radio” is, by nature, commercial; and on a negative response to spot advertising.
- 4.16 As there would be no change from the current regulatory position, listeners would be no worse off under Option A. However, given the indications of the consumer research referred to above, it is arguable that the level of consumer protection afforded by the current rules may no longer be warranted.

## Industry stakeholders

- 4.17 In response to the 2009 Code Review, the radio industry including RadioCentre (the UK radio industry’s trade body) submitted correspondence that outlined the financial state of the industry<sup>46</sup>. In particular it stated that: “*current restrictions place a substantial impediment on Commercial Radio’s ability to ... address the gap in on-air advertising revenue affecting many stations*”.

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<sup>44</sup> <http://www.ofcom.org.uk/consult/condocs/bcode09/responses/>

<sup>45</sup> The published research report ‘Commercial references within radio programming’, can be found at: <http://www.ofcom.org.uk/consult/condocs/bcode09/radioresearch.pdf>, while a summary of its principal findings can be found in Annex 3

<sup>46</sup> Copy correspondence can be found at:

[http://www.ofcom.org.uk/consult/condocs/bcode09/responses/Radio\\_Centre\\_Annex\\_1.pdf](http://www.ofcom.org.uk/consult/condocs/bcode09/responses/Radio_Centre_Annex_1.pdf)

- 4.18 This point has been echoed in informal pre-consultation discussions with the radio industry in 2010.
- 4.19 As there would be no change from the current regulatory position under Option A, it is arguable that industry would be no worse off financially. However, radio broadcasters argue that they are being denied, without justification, the opportunity to develop potential sources of revenue particularly at a time when the rules for television are being liberalised. Industry stakeholders are also likely to question the adoption of Option A in light of Ofcom's proposed liberalisations for radio in 2009, and this was at a time when the Government's public policy continued to support a prohibition on product placement (discussed under 'Introduction' above).
- 4.20 Ofcom's duty to remove unnecessary regulatory burden is discussed in Part 2 of this document. Under Option A Ofcom would arguably be imposing regulatory burdens in relation to a continuing prohibition on product placement, which is not supported by government policy on television.

### **Advertising stakeholders**

- 4.21 As there would be no change from the current regulatory position, it is arguable that advertisers would be no worse off. However, current rules may be constraining their ability to exploit, to its full potential, radio as an advertising medium.

### **Regulatory impact**

- 4.22 Again, since there would be no change from the current regulatory position, any additional economic impact on Ofcom or the ASA (see above under 'Regulatory responsibility') would be unlikely.
- 4.23 See also above, under paragraph 4.20, in relation to Ofcom's duty to remove unnecessary regulatory burden. It is arguable that Ofcom if Option A were adopted Ofcom would be imposing unnecessary regulatory burdens.

### **Equality considerations**

- 4.24 As discussed in Part 2, Ofcom is required by statute to have due regard to any potential impacts its proposals may have on race, disability and gender equality, as well as the other groups protected by legislation in Northern Ireland<sup>47</sup>. In relation to equality our approach to regulation as a result of Option A would remain unchanged and therefore we do not consider that our proposals would have any particular implications for people to whom these considerations relate.

### **Issues arising from the proposed option**

- 4.25 As discussed in Part 2 of this document, in considering Option A we have identified further issues which arise from it.

### **Additional prohibitions or restrictions under Option A**

- 4.26 We recognise that permitting commercial references to be integrated within radio programming (proposed under Options C and D) may raise concerns which have not

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<sup>47</sup> In addition to race, disability and gender, equality legislation in Northern Ireland also covers age, sexual orientation, carers, marital status, religious belief and political opinion.

arisen in the current regulatory environment where commercial references and programming are separated.

- 4.27 Part 2 of this document explains that, in relation to Options C and D, we have considered whether additional prohibitions or restrictions should be put in place for commercial communications in relation to potentially harmful products or services integrated within radio programming – i.e. whether the public should be afforded further protections.
- 4.28 In relation to Option A, however, this issue does not arise since no such integrated commercial references are proposed, and listeners would be afforded the protection provided by the current separation between editorial and commercial communications.

### **News and political and controversial matters**

- 4.29 As discussed in Part 2 of this document a further issue arises in relation to each of the Options over whether current safeguards and prohibitions in relation to news on commercial radio should be maintained.
- 4.30 Under the approach of Option A the status quo is preserved and therefore the question of whether the integration of commercial communications within programming could extend to news does not arise as it remains prohibited.
- 4.31 Rules in relation to political and controversial matters under Section Seven of the BCAP Code and Section Five of the Broadcasting Code would remain unchanged.

### **Not-for-profit funders**

- 4.32 An issue arises, in relation to Options B to D, over whether we should distinguish between commercial and non-commercial, not-for-profit funders of commercial arrangements.
- 4.33 Part 2 of this document explains that as part of our consultation on the review of the Code in 2009, we sought respondents' views on whether Ofcom should introduce specific rules for Public Information Programming ("PIPs") on radio and on television. This was defined as programming that seeks "to educate or inform the audience on matters in the public interest, that are funded by non-commercial, not-for-profit entities and that may refer to the interests and/or activities of the funder".
- 4.34 The Code currently treats such funding arrangements as sponsorship and they are therefore subject to the rules set out in Section Nine of the Code. These rules prohibit sponsored programming promoting the interests of the funder. The rules ensure that a distinction is maintained between programming and advertising, and reinforce the UK's prohibition (prior to April 2010), on product placement (discussed in Part 2 of this document).
- 4.35 Under Option A this position is maintained and this type of programming would therefore remain prohibited.

## Proposed new Section Ten of the Code under Option A: Commercial communications in radio programming

- 4.36 As discussed above Option A would replicate the principles, general rules and detailed rules in relation to radio contained in Sections Nine and Ten of the current Code<sup>48</sup>.
- 4.37 Under Option A the television-only rules (Rules 9.12 to 9.14 and Rule 10.17), legislation and other references to television would be removed and the remaining rules in current Sections Nine and Ten of the Code would be brought together in a new Section Ten on Commercial Communications in Radio Programming.
- 4.38 For ease of reference the rule set for Option A is included below as the rules appear in the Sections Nine and Ten of the Code, with references to television removed and ancillary changes made to make them radio-specific. However, if Option A is adopted, these rules would be amalgamated and re-numbered in a new Section Ten.

**NOTE:** For ease of reference the rule set for Option A is included below as the rules appear in the Sections Nine and Ten of the Code, with references to television removed (shown as deletions) and ancillary changes made to make them radio-specific (shaded in grey).

### Section 9: Sponsorship

(Relevant legislation includes, in particular, sections 319(2)(i) and (j) and 319(4)(e) and (f) of the Communications Act 2003, ~~Articles 1, 3(e), 3(f) and 10(1), of the Audiovisual Media Services Directive~~, and Article 10 of the European Convention on Human Rights.)

This section of the Code does not apply to BBC services funded by the licence fee.

#### Principle

To ensure that the unsuitable sponsorship of **programmings** on radio and television is prevented, with particular reference to:

- **transparency** – to ensure sponsorship arrangements are transparent;
- **separation** – to ensure that sponsorship messages are separate from **programmings** and to maintain a distinction between advertising and sponsorship; and
- **editorial independence** – to ensure that the broadcaster maintains editorial control over sponsored content and that **programmings** isare not distorted for commercial purposes.

In this Principle, **programmings** include "station**channels**" as defined below.

#### Rules

**Meaning of "sponsored **programminge**", "sponsored channel" and "sponsor":**

A ~~s~~Sponsored **programminge**, which includes an advertiser-funded **programminge**, is a **programminge** that has had some or all of its costs met by a sponsor with a view to

<sup>48</sup> <http://www.ofcom.org.uk/radio/ifi/codes/bcode/>

promoting its own or another's name, trademark, image, activities, services, products or any other direct or indirect interest.

A ~~station~~channel is a ~~television or~~ radio service. A sponsored ~~station~~channel is a ~~station~~channel that has had some or all of its costs met by a sponsor with a view to promoting its own or another's name, trademark, image, activities, services, products or any other direct or indirect interest.

Costs include any part of the costs connected to the production or broadcast of the ~~programming~~ or ~~station~~channel.

A sponsor is any public or private undertaking (other than the broadcaster or ~~programming~~ producer), who is sponsoring the ~~programming~~, programming or ~~station~~channel in question with a view to promoting their or another's name, trademark, image, activities, services, products or any other direct or indirect interest. This meaning extends to those who are otherwise supplying or funding the ~~programming~~ or ~~station~~channel.

### **Content that may not be sponsored**

9.1 ~~News bulletins and news desk presentations~~The following may not be sponsored:

- ~~• news bulletins and news desk presentations on radio; and~~
- ~~• news and current affairs programmings on television.~~

#### ***Meaning of "current affairs programme(s)":***

~~A current affairs programme is one that contains explanation and analysis of current events and issues, including material dealing with political or industrial controversy or with current public policy.~~

### **Prohibited and restricted sponsors**

9.2 No channel or ~~programming~~ may be sponsored by a sponsor that is not allowed to advertise on the relevant medium.

9.3 Sponsorship on radio ~~and television~~ must comply with both the advertising content and scheduling rules that apply to ~~radio~~that medium.

### **The content of sponsored output**

9.4 A sponsor must not influence the content and/or scheduling of a ~~station~~channel or ~~programming~~ in such a way as to impair the responsibility and editorial independence of the broadcaster.

9.5 There must be no promotional reference to the sponsor, its name, trademark, image, activities, services or products or to any of its other direct or indirect interests. There must be no promotional generic references. Non-promotional references are permitted only where they are editorially justified and incidental.

#### ***Meaning of "promotional reference":***

This includes, but is not limited to, references that encourage, or are intended to encourage, the purchase or rental of a product or service.

### **Sponsorship credits**

### ***Television and radio***

- 9.6 Sponsorship must be clearly identified as such by reference to the name and/or logo of the sponsor. For programminges, credits must be broadcast at the beginning and/or end of the programminge.
- 9.7 The relationship between the sponsor and the sponsored stationchannel or programminge must be transparent.

### ***Radio***

- 9.8 During longer sponsored output, credits must be broadcast as appropriate to create the degree of transparency required.
- 9.9 Credits must be short branding statements. However, credits may contain legitimate advertising messages.
- 9.10 Credits must be cleared for broadcast in the same way as advertisements.
- 9.11 Programminge trails are treated as programminges and the same sponsorship rules apply.

### ***Television***

- ~~9.12 Sponsorship credits must be clearly separated from programmes by temporal or spatial means.~~
- ~~9.13 Sponsorship must be clearly separated from advertising. Sponsor credits must not contain advertising messages or calls to action. In particular, credits must not encourage the purchase or rental of the products or services of the sponsor or a third party.~~
- ~~9.14 Where a programme trail contains a reference to the sponsor of the programme, the sponsor reference must remain brief and secondary.~~

## **Section 10: Commercial References and Other Matters**

Relevant legislation includes, in particular, sections 319(2)(f) and (i) and 319(4)(e) and (f) of the Communications Act 2003, ~~Articles 1, 3(e), 10(1), and 18 of the Audiovisual Media Services Directive~~, section 21(1) of the Financial Services and Markets Act 2000, paragraph 3 of the Investment Recommendation (Media) Regulations Act 2005, and Article 10 of the European Convention on Human Rights.)

This section of the Code does not apply to BBC services funded by the licence fee, which are regulated on these matters by the BBC Trust.

~~The rules in this section are subject to, and supplemented by, Ofcom's Cross-promotion Code.~~

### **Principles**

**To ensure that the independence of editorial control over programminge content is maintained and that programming ises are not distorted for commercial purposes.**

**To ensure that the advertising and programming elements of a service are clearly separated.**

### **Rules**

- 10.1 Broadcasters must maintain the independence of editorial control over programming content.
- 10.2 Broadcasters must ensure that the advertising and programming elements of a service are kept separate.

### **Products or services in programming**

- 10.3 Products and services must not be promoted in programming. This rule does not apply to programming-related material. (See Rule 10.6.)
- 10.4 No undue prominence may be given in any programming to a product or service.

### **Note:**

"Undue prominence" may result from:

- the presence of, or reference to, a product or service (including company names, brand names, logos) in a programming where there is no editorial justification; or
- the manner in which a product or service (including company names, brand names, logos) appears or is referred to in a programming.

- 10.5 Product placement is prohibited.

### **Meaning of "product placement":**

Product placement is the inclusion of, or a reference to, a product or service within a programming in return for payment or other valuable consideration to the programming maker or broadcaster (or any representative or associate of either).

- ~~Prop placement: For the purpose of this rule, references to products or services acquired at no, or less than full, cost, where their inclusion within the programme is justified editorially, will not be considered to be product placement. On television, a brief, basic text acknowledgement of the provider of these products or services may be included within the end credits of the programme. This is permitted only where the identity of the product is not otherwise apparent from the programme itself.~~
- ~~Acquired programmes: With the exception of children's programmes produced after 19 December 2009, Rule 10.5 does not apply to arrangements covering the inclusion of products or services in a programme acquired from outside the UK and films made for cinema provided that no broadcaster regulated by Ofcom and involved in the broadcast of that programme or film directly benefits from the arrangement.~~

~~Children's programmes in this context are programmes commissioned for, or specifically directed at, audiences below the age of 16.~~

~~Broadcasters should note that all acquired programmes or films must nevertheless comply with all other relevant rules in this Code. In relation to references to products and services in acquired programmes that may have resulted from commercial arrangements, broadcasters should pay particular attention to the requirements of Sections One, Two and Ten of the Code.~~

### **Programme-related material**

- 10.6 Programme-related material may be promoted in programmes only where it is editorially justified.
- 10.7 The broadcaster must retain responsibility for all programme-related material.
- 10.8 Programme-related material may be sponsored, and the sponsor may be credited when details of how to obtain the material is given. Any credit must be brief and secondary, and must be separate from any credit for the programme sponsor.

#### ***Meaning of "programme-related material":***

These are products or services that are both directly derived from a specific programme and intended to allow listeners or viewers to benefit fully from, or to interact with, that programme.

### **Premium rate numbers**

- 10.9 Premium rate numbers will normally be regarded as products or services, and must therefore not appear in programmes, except where:
- they form part of the editorial content of the programme; or
  - they fall within the meaning of programme-related material (see above).
- 10.10 Any use of premium rate numbers must comply with the Code of Practice issued by PhonepayPlus.

### **Competitions**

- 10.11 References to brands within competitions must be brief and secondary. (See Rule 1.30 in Section One: Protecting the Under-Eighteens and Rules 2.13 to 2.16 Section Two: Harm and Offence.)

### **Use of advertisements in programmes**

- 10.12 Advertising must be clearly separated from programmes. Advertisements must not appear in programme time, unless editorially justified.

### **Charity appeals**

- 10.13 Charity appeals that are broadcast free of charge are allowed in programmes provided that the broadcaster has taken reasonable steps to satisfy itself that:
- the organisation concerned can produce satisfactory evidence of charitable status, or, in the case of an emergency appeal, that a responsible public fund has been set up to deal with it; and
  - the organisation concerned is not prohibited from advertising on radiothe relevant medium.
- 10.14 Where possible, the broadcast of charity appeals, either individually or taken together over time, should benefit a wide range of charities.

### **Appeals for funds for programmings or services**

10.15 Broadcasters may broadcast appeals for donations to make programmings or fund their service. The audience must be told of the purpose of the donation and how much has been raised as a result of the appeal. All donations must be separately accounted for and used for the purpose for which they were donated.

### **Financial promotions and investment recommendations**

10.16 When broadcasting financial promotions and investment recommendations broadcasters must comply with the relevant provisions in Appendix 4 to this Code.

#### ***Meaning of "financial promotion(s)":***

A financial promotion is an invitation or inducement to engage in investment activity (in accordance with section 21(1) of the Financial Services and Markets Act 2000 (Restrictions on financial promotion)).

#### ***Meaning of "investment recommendation(s)":***

An investment recommendation occurs when someone directly recommends a particular investment decision, for example, buying or selling a particular share or underwriting a particular share offer.

### **Virtual advertising**

#### ***Television***

~~10.17 The use of electronic imaging systems during broadcast coverage of an event must comply with the following requirements:~~

- ~~• broadcasters and viewers must be informed in advance of the presence of virtual images;~~
- ~~• virtual advertising may only replace existing on-site advertising — virtual advertising messages must not be more visible or conspicuous than the actual advertising at the venue;~~
- ~~• rules relating to prohibited advertisers also apply to virtual advertising; and the broadcaster may not trade in virtual advertising.~~

#### ***Meaning of "virtual advertising":***

~~Virtual advertising normally (but not exclusively) takes place at events, for example, sporting events, and involves altering the broadcast signal to replace existing venue advertising with other advertising in the television picture (potentially targeted at a particular geographical audience).~~

## **Questions for stakeholders**

4.39 We are consulting on each of Options A, B, C and D (please see also Parts 5 to 7).

4.40 Stakeholders are invited consider each of the approaches, to comment on them and to offer any alternative.

4.41 In relation to Option A stakeholders are invited to respond to the following questions:

*Question 1*

- a) *Do you consider that Option A should be adopted by Ofcom?*
- b) *If so, do you wish to comment on Option A?*
- c) *If not, please explain why. You may wish to respond to this under Question 2 below under 'Alternative approaches'.*
- d) *Do you have any comments on the rule set for Option A above? If so, please refer to any individual rules by reference to their current rule numbers.*
- e) *Do you agree with our assessment of the impact, including in relation to equality issues, of Option A on listeners, the radio industry and any other parties?*
- f) *If not, please explain why, providing any evidence or data you have to support your answer.*

## **Alternative approaches**

4.42 We invite stakeholders to offer any alternative approaches to the regulation of commercial communications in radio programming.

4.43 Stakeholders should be aware that any alternative approaches must comply with relevant legislation including the Communications Act 2003, Article 10 of the European Convention on Human Rights, Schedule 1 of The Consumer Protection from Unfair Trading Regulations 2008.

*Question 2*

- a) *Do you wish to suggest an alternative approach in relation to the regulation of commercial communications on radio?*
- b) *If so please outline your proposals, which should comply with relevant legislation (including the Communications Act 2003, Article 10 of the European Convention on Human Rights and Schedule 1 of The Consumer Protection from Unfair Trading Regulations 2008).*

## Part 5

# Option B: proposed revisions to the Broadcasting Code in relation to commercial communications in radio programming

*Option B: Maintains the principle of separation<sup>49</sup> but provides a defined set of exemptions*

## Introduction

- 5.1 In this part of the consultation paper we set out an option which builds on the proposals of last year's Code consultation (discussed in full in Part 2 of this document).
- 5.2 In the 2009 Consultation three new sets of rules were proposed within the new Section Ten on Commercial References in Radio Programming<sup>50</sup>:
- Content-related promotions – proposals to allow a brief offer of further information, or offer for sale, of a product or service that is directly associated with specific content and funded by a third party;
  - Sponsored outside broadcasts – proposals to allow the sponsorship of an outside broadcast by the venue or venue owner; and
  - Sponsored listener competition features – proposals to allow sponsor references to form part of listener competition features.
- 5.3 These comprised a range of liberalisations relating to commercial references on radio, in the form of exemptions to the requirement for separation between programming and commercial communications. The 2009 Consultation paper argued that the proposed rules reduced unnecessary regulatory burden (whilst maintaining adequate consumer protection). In addition it argued that the proposed approach would answer a commercial imperative in relation to the funding and viability of this sector, while also ensuring that broadcasters were able to provide output that kept pace with listeners' expectations in relation to commercial radio. It referred to deliberative and qualitative research commissioned by Ofcom into listeners' attitudes

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<sup>49</sup> Separation: currently commercial communications cannot be integrated into the editorial content of programmes. Instead they are required to be kept separate from the editorial content. Normally (in the case of ads or sponsor credits) by appearing at the beginning and/or end of programmes (or in the centre breaks) and made readily recognisable from editorial content by spatial, temporal or aural means.

<sup>50</sup> <http://www.ofcom.org.uk/consult/condocs/bcode09/main.pdf>

towards commercial references on radio, which underpinned the proposals<sup>51</sup>. It explained that the remaining current rules would not significantly change.

- 5.4 In addition to these proposals the consultation stated that Ofcom was considering the potential introduction of a set of new rules in Section Ten in relation to Public Information Programming. This was defined as a new category of programming funded by non-commercial not-for-profit entities that seek to educate or inform the audience on matters in the public interest (please also see below at paragraph 5.41 to 5.44).
- 5.5 Part 2 of this document explains the extension of Ofcom's 2009 consultation and the relevance of both the Government's decision to permit product placement (i.e. to permit non-promotional broadcast references to products or services within television programming, in return for payment) and its wider public policy implications (please also see Annex 7).
- 5.6 Option B builds on the approach adopted in the 2009 Code Review. The difference between Option B and the approach of the 2009 Code Review is that Option B would not be limited to the specific carve outs offered in the 2009 Code Review consultation, but could offer a wider range of carve outs to the separation between commercial communications and programming.
- 5.7 The approach under the 2009 Code review was premised on the then prohibition of product placement (discussed above). The proposed rules in the 2009 Consultation were therefore exemptions to this prohibition, since hitherto, any promotion of, or paid-for reference to, a product or service within programming had not been allowed.
- 5.8 Following the Government's announcement<sup>52</sup> on 9 February to permit product placement on television (subject to limitations) public policy in the regulatory landscape has radically altered. As detailed in Annex 7, product placement will be allowed on UK-produced television in the four genres of 'cinematographic works, films and series made for television and on-demand services, sports programmes, and light entertainment programmes'.
- 5.9 While the Government's decision is in relation to television and not radio, it provides a significant background to this Consultation paper in that it relates to the wider context of the regulatory and broadcast policy landscape. It therefore raises key questions in relation to Option B, which takes as its starting point the prohibition of product placement and then allows exemptions. These issues are discussed below.
- 5.10 At paragraph 5.46 below we set out the rule set for Option B. This is the rule set on which we previously consulted in the 2009 Code Review. Responses to that consultation were based on the then prohibition of product placement and do not take account of the significant developments in public policy in this area. We therefore invite stakeholders to reconsider this option in the context of the wider change in public policy discussed above. We also invite stakeholders to consider any additional exemptions to the requirement for separation.

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<sup>51</sup> The published research report 'Commercial references within radio programming', can be found at: <http://www.ofcom.org.uk/consult/condocs/bcode09/radioresearch.pdf>

<sup>52</sup> The announcement can be found at: [http://www.culture.gov.uk/reference\\_library/minister\\_speeches/6624.aspx](http://www.culture.gov.uk/reference_library/minister_speeches/6624.aspx)

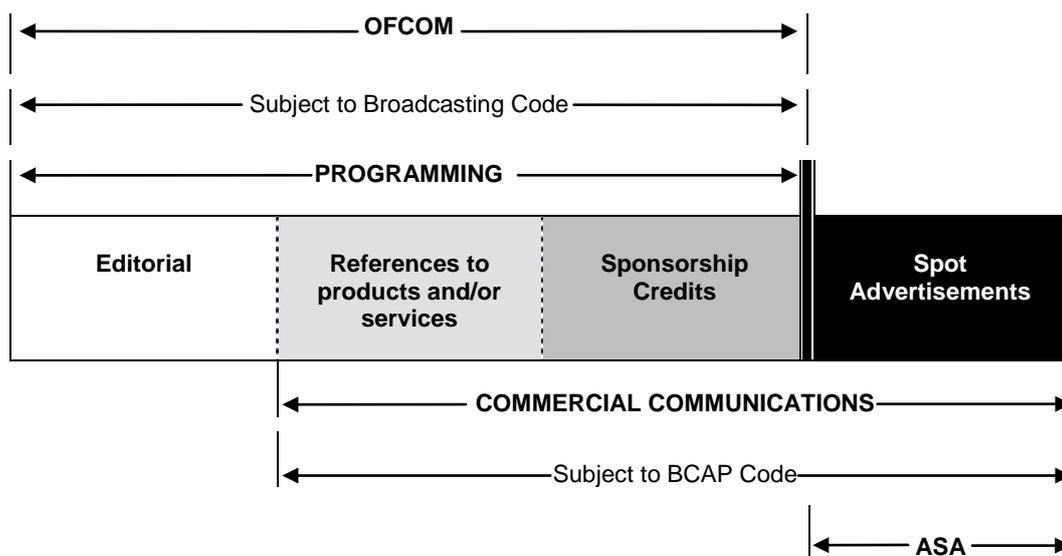
## Key features of Option B

- 5.11 Under Option B Ofcom would maintain the separation between commercial communications (i.e. paid-for references to products or services including spot ads) and programming, but provides a defined set of exemptions. Stakeholders are invited to consider, at Annex 9, examples of output listeners could hear under Option B.
- 5.12 Option B is based on the current three regulatory principles of:
- **Separation** (between programming and all commercial communications – except those specifically covered by exemption);
  - **Transparency** (of commercial communications – i.e. advertising and sponsorship); and
  - **Editorial independence** (of the broadcaster).

## Regulatory responsibility under Option B

- 5.13 Under Option B commercial messages within programming (allowed under the exemptions to the prohibition, discussed above) would be regulated by reference to the BCAP Code with enforcement by Ofcom. This would be a natural extension of the current regulatory regime.
- 5.14 The following is a diagrammatic representation of how radio output would be classified and regulated under Option B (Figure 2):
- It identifies the areas of output which would fall under **Ofcom's** remit, and those areas which would fall under the **ASA's** remit;
  - It explains which Code would apply to different areas of output (i.e. whether this would be the **Broadcasting Code** or the **BCAP Code**);
  - It breaks down output into **programming** (sometimes referred to as 'editorial', programming comprises programmes (e.g. a Breakfast Show), music, and features (e.g. weather) and includes sponsorship, and programme trails etc) and **spot advertisements**.
  - It identifies key areas of programming: **editorial, references to products and/or services** i.e exemptions to the requirement for separation between programming and commercial communications (for example, a content related promotion or other reference discussed at paragraphs 5.2 and 5.3 above) and **sponsorship credits**. Please see the Glossary at Annex 5 for further explanation of the terms used.

**Figure 2: Option B**



- 5.15 Ofcom would be responsible for the regulation of radio programming, including commercial references within radio programming, and the ASA/BCAP would be responsible for the regulation of radio advertising.
- 5.16 With regard to broadcast commercial communications, BCAP would continue to administer its Code and Ofcom would continue to administer the Broadcasting Code, while also referring to the scheduling and content requirements of the BCAP Code, with regard to the regulation of commercial communications in radio programming.

## Overview of the impact of these proposals

- 5.17 As discussed under Part 2 (Introduction), the consultation document does not contain a separate impact assessment document. Instead the consultation document as a whole assesses the impact of the proposed changes on stakeholders (including consumers and radio broadcasters).
- 5.18 In considering issues relating to impact, Ofcom has noted both the responses to the 2009 Consultation<sup>53</sup>, research on consumer attitudes conducted as part of that Consultation, and views expressed in informal pre-consultation discussions with industry and consumer stakeholders in 2010.
- 5.19 Responses to this Consultation, including responses to specific questions on impact, will further inform our considerations. Stakeholders are invited to respond to the proposals on Option B in 'Questions for Stakeholders' below. If stakeholders responded to the 2009 Code Consultation, they may wish to refer Ofcom to their responses to it, while also commenting on the wider range of exemptions (to the separation between commercial communications and programming) which would be permitted under Option B.

<sup>53</sup> <http://www.ofcom.org.uk/consult/condocs/bcode09/responses/>

## Consumer stakeholders

- 5.20 Under Option B, listeners would be likely to benefit to the extent that it would allow industry to innovate and offer different forms of programming. It is also likely that the current level of consumer protection would be maintained.
- 5.21 Ofcom notes, from pre-consultation discussion with consumer groups in 2010, concern from some consumer groups about an increase in commercial references within radio programming
- 5.22 However, Ofcom's deliberative research undertaken as part of the 2009 Code Review, and focused specifically on commercial radio and its listeners, indicated that listeners would be receptive to further liberalisation, subject to the provision of adequate transparency, the protection of listener trust and the maintenance of the quality of their listening experience.

## Industry stakeholders

- 5.23 While industry stakeholders welcomed liberalisation with regard to commercial references in radio programming, responses to the 2009 consultation also made clear that they believed our proposals did not go far enough. In particular, industry sought:
- the removal of separation (of commercial communications from editorial) within programming;
  - further liberalisation; and
  - a review of Ofcom's three tier approach (i.e. principles, general rules, and specific rules) plus detailed guidance.
- 5.24 As part of its response the radio industry trade body RadioCentre submitted an alternative set of principles and rules<sup>54</sup>. In essence, it sought to be able to integrate commercial messaging into radio programming.
- 5.25 One industry source estimated "the annual benefit of Ofcom's proposed changes at around 5% of all sponsorship and promotions revenue, or around £5million to the industry as a whole", while it believed that "commercial radio's proposed approach, which [would deliver] much greater simplicity, clarity and flexibility, could deliver incremental annual benefits of £20million or more<sup>55</sup>."
- 5.26 Based on these estimates, Option B would be likely to benefit industry by more than £5m a year, but less than £20m, as under Option B Ofcom would be likely to liberalise further than proposed in 2009 but not as far as industry has argued for. Against a backdrop of annual commercial industry revenue of around £400m this would imply a benefit in the range of 1-5%. The familiar regulatory framework of Option B indicates that no additional costs in relation to compliance would be likely.
- 5.27 In the course of 2010 pre-consultation discussions, industry observed that if Ofcom seeks to achieve liberalisation by further carve outs from an unfounded prohibition on product placement (discussed above under 'Introduction'), this approach would, in

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<sup>54</sup> Copy correspondence can be found at:

[http://www.ofcom.org.uk/consult/condocs/bcode09/responses/Radio\\_Centre\\_Annex\\_1.pdf](http://www.ofcom.org.uk/consult/condocs/bcode09/responses/Radio_Centre_Annex_1.pdf)

<sup>55</sup> Source: UTV Media (GB) – note: Calculations were informed by "sector knowledge and should be treated as rough estimates."

time, be likely to limit the potential for relevant programming. This is because it would limit the scope of commercial involvement.

- 5.28 Ofcom's duty to remove unnecessary regulatory burden is discussed in Part 2 of this document. As discussed above the 2009 Code Review reflected Ofcom's view of the limited liberalisation that was then appropriate within a regulatory system preserving the Government's then product placement prohibition. The case for limiting liberalisation is arguably harder to make now that the Government has allowed product placement on television in significant broadcasting genres.
- 5.29 Under Option B exemptions to the required separation of commercial messages, in addition to those proposed in the 2009 Consultation, may be offered. However Ofcom would arguably be imposing regulatory burdens on industry, in relation to a continuing, underlying prohibition on product placement, which are not supported by wider government policy on product placement (in relation to television).

### **Advertising stakeholders**

- 5.30 While there would be some limited potential economic benefit for advertisers – from the ability to develop content-related promotions (to boost sales) – it is possible there would be insufficient liberalisation to prompt significant additional commercial involvement in programming.

### **Regulatory impact**

- 5.31 Since there would be only limited change to the current regulatory position, any additional economic impact on Ofcom or the ASA (see above under 'Regulatory responsibility') would be likely to be marginal.
- 5.32 See also above under paragraph 5.28 in relation to Ofcom's duty to remove unnecessary regulatory burden. Under Option B Ofcom would arguably be imposing regulatory burdens in relation to a continuing prohibition on product placement (discussed above) which is not supported by government policy in relation to television.

### **Equality considerations**

- 5.33 As discussed in Part 2, Ofcom is required by statute to have due regard to any potential impacts its proposals may have on race, disability and gender equality, as well as the other groups protected by legislation in Northern Ireland<sup>56</sup>. In relation to equality our broad approach to regulation as a result of Option B would remain unchanged and therefore we do not consider that our proposals would have any particular implications for people to whom these considerations relate.

### **Issues arising from the proposed option**

- 5.34 As discussed in Part 2 of this document, in considering Option B we have identified issues which may arise from it.

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<sup>56</sup> In addition to race, disability and gender, equality legislation in Northern Ireland also covers age, sexual orientation, carers, marital status, religious belief and political opinion.

## **Additional prohibitions or restrictions under Option B**

- 5.35 As discussed in Part 4 of this document, we recognise that permitting commercial references to be integrated within radio programming (proposed under Options C and D) may raise concerns which have not arisen in the current regulatory environment where commercial references and programming are separated.
- 5.36 In relation to Options C and D, we have considered whether additional prohibitions or restrictions should be put in place for commercial communications in relation to potentially harmful products or services in radio programming. i.e. whether the public should be afforded further protections .
- 5.37 In relation to Option B, however, this issue does not arise since only limited liberalisations are proposed (rather than the integrated commercial communications within programming proposed under Options C and D). Under Option B listeners would therefore be afforded, in the main, the level of protection provided by the separation between editorial and commercial communications under the 2009 Code Review proposals.

## **News and political and controversial matters**

- 5.38 As discussed in Part 2 of this document a further issue arises in relation to each of the Options over whether current safeguards and prohibitions in relation to news on commercial radio should be maintained.
- 5.39 Under Option B news bulletins and news desk presentations would remain ring-fenced from commercial references, as currently required (with regard to sponsorship) and as proposed in the 2009 Code review (with regard to the proposed exemptions from the then prohibition on product placement, discussed above).
- 5.40 Rules in relation to political and controversial matters under Section Seven of the BCAP Code and Section Five of the Broadcasting Code would remain unchanged.

## **Not-for-profit funders**

- 5.41 An issue arises, in relation to Option B, over whether we should distinguish between commercial and non-commercial, not-for-profit funders of commercial arrangements.
- 5.42 Previously, as discussed in Part 2 of this document, as part of our consultation on the review of the Code in 2009 we sought respondents' views on potential new rules for consideration in relation to Public Information Programming ("PIPs") on radio and on television. This was defined as programming that seeks "to educate or inform the audience on matters in the public interest, that are funded by non-commercial, not-for-profit entities and that may refer to the interests and/or activities of the funder".
- 5.43 This is explored in detail in p100-p103 of the 2009 Consultation paper<sup>57</sup>.
- 5.44 Stakeholders are invited (below) to respond to the approach to Public Information Programming set out in the 2009 Consultation paper and may wish to refer Ofcom to their responses submitted in 2009.

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<sup>57</sup> <http://www.ofcom.org.uk/consult/condocs/bcode09/main.pdf>

## **Proposed new Section Ten of the Code under Option B: Commercial communications in radio programming**

- 5.45 The proposed Option B is framed as a comprehensive set of rules which can also be found at Part 7 of the 2009 Consultation Document <http://www.ofcom.org.uk/consult/condocs/bcode09/main.pdf> (p78-87).
- 5.46 The rule set proposes exemptions (to the separation between commercial communications and spot ads) discussed above. Stakeholders are invited in 'Questions for stakeholders' below to comment on these and put forward any additional exemptions.

### **Section Ten: Commercial References in Radio Programming**

Relevant legislation includes, in particular, sections 319(2)(i) and (j) and 319(4)(e) and (f) of the Communications Act 2003, Article 10 of the European Convention on Human Rights, Schedule 1 of The Consumer Protection from Unfair Trading Regulations 2008 and The Community Radio Order 2004.

**This section of the Code covers all commercial references that feature within radio programming.**

**Examples of radio programming include programmes, features, trails and sponsorship credits. "Programming" does not include advertisements.**

**For the purposes of this Code section, "commercial references" means any references to products or services.**

**"Products and services" includes logos, image, names and/or associated activities, and may include references to non-commercial organisations.**

This section of the Code recognises that commercial references within radio programming occur in a range of different circumstances. It contains a set of general rules that apply to **all** commercial references in radio programming. It also contains specific rules for different types of commercial references (e.g. programming-related material and sponsorship).

The rules ensure that the broad principles of editorial integrity; distinction between advertising and programming; transparency of commercial arrangements; and the appropriate protection of consumers are maintained.

With the exception of Rules 10.11 and 10.12, this section does not apply to BBC radio services funded by the licence fee.

### **Principles**

- **To ensure that broadcasters maintain editorial independence and control over programming (editorial integrity).**
- **To ensure that programming and advertising remain distinct (separation).**
- **To protect audiences from surreptitious advertising (transparency).**

- **To ensure that audiences are protected from the risk of financial harm (consumer protection).**
- **To ensure that unsuitable sponsorship is prevented (unsuitable sponsorship).**

## Rules

### General Rules

*Rules 10.1 to 10.6 apply to all commercial references included within radio programming. They reflect the fact that the inclusion of commercial references in radio programming creates a particular risk that the key principles may be, or appear to be, undermined.*

- 10.1 Broadcasters must maintain independent editorial control over programming.
- 10.2 Products and services must not be promoted in programming, unless permitted by specific rules in this section of the Code (e.g. programming-related material).
- 10.3 No undue prominence may be given in programming to a product or service. Undue prominence may result from:
- the presence of, or reference to, a product or service in programming where there is no editorial justification; or
  - the manner in which a product or service appears or is referred to in programming.
- 10.4 Broadcasters must ensure that advertising and programming are kept separate (see Rule 10.5 for limited exemptions that apply to the use of advertisements as part of programming).
- 10.5 Advertisements must not appear as part of programming, unless editorially justified. Where advertisements are featured as part of programming, their presence must not be unduly prominent.
- 10.6 All listeners' communications that are solicited by or on behalf of the broadcaster in programming must be treated fairly and consistently.

*In the case of premium rate services, particular provisions apply to protect consumers from financial harm (see Rules 10.8 to 10.10). In all cases, however, it is important that broadcasters should also consider carefully the provisions in Section Two of the Code.*

### Product placement

*Product placement is the inclusion of, or reference to, a product or a service so that it is featured within programming, in return for payment or for similar consideration.*

- 10.7 Product placement is prohibited.

For limited variations to this rule see:

- Rules 10.17 to 10.24 (content-related promotions); and

- Rules 10.31 to 10.34 (specific sponsorship arrangements).

**Premium rate services [Note: this would require updating in 2010 in line with the 'Note to stakeholders', below]**

*The definition of Premium Rate Services ("PRS") in this section is based on PhonepayPlus' definition.*

**[Note to stakeholders:**

The rules for the promotion of premium rate services ("PRS") within programming will be determined after, and will be consistent with, the outcome of Ofcom's consultation on Participation Television planned for autumn 2009<sup>58</sup>. Rules 10.8 and 10.9 which follow are the current rules relating to PRS].

10.8 Premium rate numbers will normally be regarded as products or services, and must therefore not appear in programmes, except where:

- they form part of the editorial content of the programme; or
- they fall within the meaning of programme-related material (see below).

10.9 Any use of premium rate numbers must comply with the Code of Practice issued by PhonepayPlus.

10.10 The cost to listeners for using premium rate services must be made clear to them and broadcast as appropriate.

**Broadcast competitions and voting**

*The following rules apply to:*

- *competitions featured in programming in which listeners are invited to enter for the opportunity to win a prize; and*
- *features in programming in which listeners are invited to register a vote to decide or influence the outcome of a contest (at any stage).*

*They apply to all radio broadcasters, including BBC services funded by the licence fee, and should be read in conjunction with Rules 2.2 and 2.11 to 2.13 of the Code.*

*The rules reflect the potential for listener participation to result in financial harm. Broadcasters should be particularly mindful of the need to ensure adequate consumer protection when inviting listeners to participate in broadcast competitions and voting.*

*For competitions and voting that involve the use of PRS, broadcasters should also refer to Rules 10.8 to 10.10.*

10.11 Broadcast competitions and voting must be fairly promoted and conducted

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<sup>58</sup> This note is reproduced as it appeared in the 2009 Consultation. Following that consultation Ofcom has now determined that services whose primary purpose is the promotion of PRS services (such as psychic and adult chat participation TV services) will in future be regulated by Ofcom as long-form advertising (teleshopping) under the relevant BCAP Code rules, rather than as editorial material under the Broadcasting Code. This change will take effect from 1 September 2010.

and broadcasters must not materially mislead listeners so as to cause financial harm.

- 10.12 Terms and conditions of entry or participation must be drawn up by the broadcaster and be appropriately brought to the attention of listeners. In particular, significant conditions that may affect a listener's decision to participate must be made clear at the time an invitation to participate is broadcast.

### **Programming-related material**

*Programming-related material consists of products or services:*

- *that are specifically intended to allow listeners to benefit more fully from the programming to which they are related; and*
- *the promotion of which **should not be funded by, or otherwise dependent on a commercial arrangement with, a third party.***

*The following rules address the potential for the promotion of programming-related material on radio to undermine the key principle of transparency.*

- 10.13 Programming-related material may be promoted in programming only where it is editorially justified and the promotion must not be unduly prominent. References to programming-related material should be brief and confined to the name of the item, a basic description, its cost and/or availability.
- 10.14 The promotion of programming-related material must be presenter-read (live or pre-recorded).
- 10.15 The broadcaster must retain responsibility for ensuring the appropriateness of all programming-related material.
- 10.16 No reference must be made on air to any third party involved in funding the production of programming-related material.

### **Content-related promotions**

*A content-related promotion is the offer of further information, or the offer for sale, of a product or service that is directly associated with specific editorial content and **is funded by, or otherwise dependent on a commercial arrangement with, a relevant third party.***

*The limited promotional references in programming afforded by the following rules are intended to enable radio broadcasters to offer added benefit to the listening experience. Radio broadcasters are therefore required to ensure that content-related promotions remain distinct from advertisements.*

*The rules therefore require radio broadcasters to pay particular attention to editorial justification and the presentation of the promotions, so as to maintain editorial integrity. The rules also seek to ensure transparency, consumer protection and distinction from advertising.*

- 10.17 A content-related promotion may only be broadcast in or around the content

with which it is directly associated.

- 10.18 Content-related promotions must not be unduly prominent, and must not give undue prominence to products, services or any third party.
- 10.19 Content-related promotions may include **only** the offer of information or the offer for sale of a product or service, and may contain **only** the name of the item, its most basic description, its cost and/or availability. They may not contain any advertising messages other than a basic invitation to purchase or a call to action.
- 10.20 Content-related promotions must be clearly identifiable as such and must remain distinguishable from the surrounding content and from full advertisements. They must be pre-recorded and brief. They must not be (or appear to be) read by a presenter of the programme.
- 10.21 A content-related promotion may only be subject to a commercial arrangement with a third party that is not prohibited from advertising on radio.
- 10.22 Content-related promotions must comply with both the content and scheduling rules that apply to radio advertising.
- 10.23 Content-related promotions must be cleared for broadcast in the same way as advertisements.
- 10.24 Content-related promotions must not be broadcast in or around news bulletins or news-desk presentations.

### **Radio sponsorship**

- *Sponsored programming (which may include a radio service, programmes or features) is programming that has had some or all of its costs met by a sponsor.*
- *A sponsor is any public or private undertaking or natural person (other than the broadcaster or programming producer) who is funding the programming with a view to promoting its products, services, logos, image, name, and/or activities.*
- *A sponsor reference means any reference to the sponsor's products, services, logos, image, names and/or activities.*
- *"Costs" means any part of the costs connected to the production or broadcast of the programming.*
- *Advertiser-funded programming is sponsored programming and therefore subject to the following rules.*

*The following rules enable the inclusion of restricted promotional references in **some** sponsored radio programming but limit the extent of these references to ensure sponsorship remains distinct from advertising. The rules also reflect the importance of maintaining editorial integrity, transparency and consumer protection.*

#### Content that may not be sponsored on radio

- 10.25 News bulletins and news desk presentations must not be sponsored.

### Prohibited and restricted sponsors on radio

- 10.26 Programming (including a radio service) may not be sponsored by any sponsor that is prohibited from advertising on radio.
- 10.27 Sponsorship must comply with both the content and scheduling rules that apply to radio advertising.

### Content of sponsored output on radio

- 10.28 A sponsor must not influence the content and/or scheduling of a radio service or programming in such a way as to impair the responsibility and editorial independence of the broadcaster.
- 10.29 Sponsorship arrangements must not result in sponsor references being included within the editorial of sponsored programming, unless permitted under:
- Rules 10.17 to 10.24 (content-related promotions); or
  - Rules 10.31 to 10.32 (venue-sponsored outside broadcasts); or
  - Rules 10.33 to 10.34 (sponsored listener competition features).
- 10.30 Sponsor references within the editorial of sponsored programming (including generic references) that do not result from the sponsorship arrangement must be editorially justified, non-promotional and incidental.

### Venue-sponsored radio outside broadcasts

*A radio outside broadcast (“OB”) is radio programming broadcast from a remote (i.e. non-studio) location. It is usually a live broadcast. However, a live report or interview fed back to the radio station as part of a studio-based programme is not an OB (e.g. a presenter phoning into the studio with a report from a sports game).*

*An OB is characterised by the lead presenter(s) hosting a programme from a location outside the studio, although various components which make up a typical clock-hour, such as advertisements, travel reports, news and/or music tracks may be ‘driven’ from the studio or elsewhere.*

*The following rules apply **only** when the sponsor of an outside broadcast is the venue (or owner of the venue).*

- 10.31 Sponsorship arrangements for outside broadcasts may result in sponsor references being included within the sponsored programming. Such references must be editorially justified and must not be overtly promotional or unduly prominent.
- 10.32 Sponsor references in an outside broadcast must not directly encourage the purchase or rental of the sponsor’s products or services unless they are broadcast as content-related promotions (see Rules 10.17 to 10.24).

### Sponsored listener competition features on radio

*Most ‘promotions’ arranged by radio sales and promotions (“S&P”) teams are*

*sponsored listener competition features. Sponsor references may form part of the sponsorship arrangement in listener competition features.*

- 10.33 The sponsor of a listener competition feature (and/or the sponsor's products or services) may form an integral part of the competition itself (e.g. by involvement in its execution or as the subject of a question). Sponsor references made in a listener competition feature may contain brief, legitimate advertising messages (including claims that require objective substantiation), but must remain distinguishable from full advertisements.
- 10.34 Advertising messages included in a sponsored listener competition feature must be cleared for broadcast in the same way as advertisements.

#### Sponsorship credits on radio

- 10.35 Sponsorship must be clearly identified as such by reference to the name of the sponsor. Credits must be broadcast at the beginning and/or end of the programming concerned.
- 10.36 The relationship between the sponsor and the sponsored service or programming must be transparent. During longer sponsored output, credits must be broadcast as appropriate to create the degree of transparency required.
- 10.37 Credits must be short branding statements. They may contain brief, legitimate advertising messages (including claims that require objective substantiation) but must remain distinguishable from full advertisements.
- 10.38 Credits must be cleared for broadcast in the same way as advertisements.
- 10.39 Programming trails for sponsored programming are subject to sponsorship rules.

#### **Public Information Programming**

*Public Information Programming is programming funded by a non-commercial, not-for-profit entity that seeks to educate or inform the audience on matters in the public interest.*

*A non-commercial, not-for-profit entity is either an individual who operates without seeking to make a profit or an organisation that has non-profit making status. The entity's activities must be wholly or mainly of a non-commercial nature. In cases where such an entity does pursue some activities of a commercial nature, Public Information Programming funded by that entity may not relate to or include any form of reference to those commercial activities.*

*Public Information Programming must be restricted **solely** to seeking to educate or inform the audience on matters in the public interest. Examples of matters in the public interest in this context include public health or safety, crime detection/prevention and education.*

*The following rules do not enable surreptitious advertising or allow broadcasters to circumvent rules for sponsorship or those prohibiting political advertising. The rules ensure the maintenance of editorial integrity, transparency and separation.*

*Broadcasters are reminded that Public Information Programming must also comply with the requirements of all other relevant sections of the Code. Broadcasters should also cross-refer to the rules prohibiting political advertising.*

- 10.40 Public Information Programming is programming which has as its purpose a public interest benefit. Public Information Programming may not be funded with a view to promoting the name, trade mark, image, activities or products of the funder. It may be funded **only** by a non-commercial, not-for-profit entity.
- 10.41 Public Information Programming must not be funded by an individual or organisation that is prohibited from advertising on radio.
- 10.42 The funder of Public Information Programming must not influence the content and/or scheduling of the programming in such a way as to impair the responsibility and editorial independence of the broadcaster.
- 10.43 Public Information Programming must not cover matters relating to political, industrial or public controversy. Similarly, Public Information Programming must not seek to influence the policies or decisions of local, regional or national governments, whether in the UK or elsewhere.
- 10.44 Public Information Programming must be identified as such by reference to the name and/or logo of the funder in credits at the start and end of the programming, and also at the start and end of any commercial break. There must be no other information and/or message included in such credits.
- 10.45 The relationship between the funder and the Public Information Programming must be transparent to listeners.
- 10.46 Public Information Programming must not relate to, or refer to, any commercial activities of the funder and/or any connected person.
- 10.47 References to non-commercial activities of the funder are permitted within the Public Information Programming **only** where they are in the public interest. All such references must be editorially justified and must not be unduly prominent.

### **Service Level Agreements (Community Radio only)**

*As part of a Service Level Agreement, Community Radio broadcasters may accept funding to deliver programming of social benefit.*

*The following rules seek to ensure the broadcaster's editorial integrity is maintained. They are not intended to allow the broadcast of material that would otherwise be prohibited directly under the terms of its licence.*

- 10.48 A Community Radio broadcaster may agree a service contract to fund programming only with a statutory or voluntary sector organisation, and only where the funded content contributes towards the delivery of the social gain objectives that form part of its licence.
- 10.49 Programming made under a service contract with a statutory or voluntary sector organisation must not give undue prominence to the organisation's

products, services, logos, image, name or activities.

### **Charity appeals**

*Charity appeals are allowed in programming only if they are broadcast free of charge.*

*The following rules recognise that, while charities differ from purely commercial entities, there is still a potential risk that the audience may suffer financial harm as a result of such appeals (consumer protection). Further, many charities operate in competition with one another and the rules therefore aim to ensure that charity appeals benefit a range of charities. Where appropriate, broadcasters must also pay particular attention to Section Five of the Code (Due Impartiality).*

10.50 Charity appeals that are broadcast free of charge are allowed in programming provided that the broadcaster has taken reasonable steps to satisfy itself that:

- the organisation concerned can produce satisfactory evidence of charitable status, or, in the case of an emergency appeal, that a responsible public fund has been set up to deal with it; and
- the organisation concerned is not prohibited from advertising on television.

10.51 Where possible, the broadcast of charity appeals, either individually or taken together over time, should benefit a wide range of charities.

### **Financial promotions and investment recommendations**

*A financial promotion is an invitation or inducement to engage in investment activity (in accordance with section 21(1) of the Financial Services and Markets Act 2000 (Restrictions on financial promotion)).*

*An investment recommendation occurs when someone directly recommends a particular investment decision, for example, buying or selling a particular share or underwriting a particular share offer.*

*The rules applying to such promotions and recommendations reflect the particular risk that such references could result in financial harm to the audience (consumer protection), and the resulting need for editorial integrity and transparency to be maintained and protected.*

10.52 When broadcasting financial promotions and investment recommendations broadcasters must comply with the relevant provisions in Appendix 4 to this Code.

### **Appeals for funds for programming or services**

*During programming, broadcasters may broadcast appeals for donations to make editorial content or fund their service.*

*Rules 10.53 to 10.56 reflect the potential for financial harm when broadcasters appeal for funds from listeners (consumer protection) and ensure editorial integrity and transparency.*

10.53 Listeners must be told the purpose of the donation for which an appeal is

made and how much it raises.

- 10.54 All donations must be separately accounted for and used for the purpose for which they are donated.
- 10.55 Broadcasters must not offer any additional benefits or other incentives to donors. This Rule does not apply to Community Radio broadcasters conducting on air society lotteries that are managed and run by broadcasters for the sole purpose of raising funds for making programming or running their specific services.
- 10.56 Appeals for funds for programming or services must not be given undue prominence.

## Questions for stakeholders

- 5.47 We are consulting on each of Options A, B, C and D (please see also Parts 4, 6 and 7).
- 5.48 Stakeholders are invited to consider each of the approaches, to comment on them and to offer any alternative.
- 5.49 In relation to Option B stakeholders are invited to respond to the following questions:

### *Question 3*

- a) *Do you consider that Option B should be adopted by Ofcom?*
- b) *If so, do you wish to comment on Option B? If you responded to the 2009 Code Consultation you may wish to refer Ofcom to your 2009 response.*
- c) *If not, please explain why. Again, if you responded to the 2009 Code Consultation you may wish to refer Ofcom to your 2009 response.*
- d) *Do you agree with our approach to the issue of not-for-profit funders? If you responded to the 2009 Code Consultation you may wish to refer Ofcom to your 2009 response on the issue of Public Information Programming.*
- e) *Do you have any comments on the rule set for Option B. If so, please refer to any individual rules by reference to the proposed rule numbers. You may also wish to outline any further exemptions (to the separation between commercial communications and spot ads) beyond those referred to in the rule set above.*
- f) *Do you agree with our assessment of the impact, including in relation to equality issues, of Option B on listeners, the radio industry and any other parties?*
- g) *If not, please explain why, providing any evidence or data you have to support your answer.*

## **Alternative approaches**

- 5.50 We invite stakeholders to offer any alternative approaches to the regulation of commercial communications in radio programming.
- 5.51 Stakeholders should be aware that any alternative approaches must comply with relevant legislation including the Communications Act 2003, Article 10 of the European Convention on Human Rights, Schedule 1 of The Consumer Protection from Unfair Trading Regulations 2008.
- 5.52 In relation to alternative approaches, stakeholders are invited to respond to Question 2 at the close of Part 4 of this document.

## Part 6

# Option C: proposed revisions to the Broadcasting Code in relation to commercial communications in radio programming

*Option C: Allows the integration of commercial communications and programming (except in relation to spot ads).*

## Introduction

- 6.1 In this part of the consultation paper we set out an option which removes the principle of separation<sup>59</sup>, except in relation to spot advertisements.
- 6.2 In the light of the Government's announcement<sup>60</sup> on 9 February 2010 to allow product placement on television (i.e. to permit non-promotional broadcast references to products or services in return for payment in four genres of television programmes, discussed in Part 2 of this document and detailed in Annex 7), the regulatory landscape has changed significantly. Option C proposes an approach for radio that takes into account this shift in wider public policy on commercial communications and permits the integration of commercial communications within radio programming (except in relation to spot ads).
- 6.3 Currently, the promotion of products and services in radio programming is prohibited and references to products and services must not be unduly prominent. If the integration of commercial communications within radio programming is permitted, it challenges the purpose of restricting the promotion and/or undue prominence of the 'placed' products/services themselves.
- 6.4 On television, product placement (which is subject to the AVMS Directive discussed in Part 3) is to be ring-fenced by strict definition, signalled at junctures specified by the Act, and made subject to various additional requirements, thereby preventing it from becoming promotional or giving undue prominence to products or services.
- 6.5 However, in relation to radio programming (which is not subject to the AVMS Directive) the signalling of integrated commercial references on radio would virtually demand that, to some extent, products or services were promoted or, at the very least, given prominence that would currently be considered undue. (Please also see paragraphs 6.50 and 6.101). Under Option C, no broadcast references to products and services would therefore be unduly prominent.
- 6.6 Option C permits the integration of commercial communications and programming (except in relation to spot ads) and thereby reflects the key shift in public policy that has permitted product placement (subject to constraints discussed below) on television. Further, as radio is not subject to the AVMS Directive, and for the reason

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<sup>59</sup> Please see Footnote 8 above on separation.

<sup>60</sup> The announcement can be found at:

[http://www.culture.gov.uk/reference\\_library/minister\\_speeches/6624.aspx](http://www.culture.gov.uk/reference_library/minister_speeches/6624.aspx)

discussed in paragraph 6.5 above, Option C also permits the *promotion* of products and services in programming (which is not permitted in product placement on television).

## Key features of Option C

6.7 Under Option C Ofcom would remove the requirement for commercial communications (i.e. paid-for references to products or services) to be separate from programming except in relation to spot ads. Spot ads would be required to be separated from programming, as now. Stakeholders are invited to consider, at Annex 9, examples of output listeners could hear under Option C.

6.8 Transparency of commercial arrangements affecting programming would be central to this approach, in order to enable listeners to know when they were being sold to or promoted at. Under this option the separation between programming and spot ads would be one means of achieving this transparency and thereby ensuring adequate consumer protection.

6.9 Option C is therefore based on the regulatory principle of:

- **Transparency** – for all commercial communications, in order to ensure consumer protection (essentially, listeners expect, and should be able, to know when they are being sold to or promoted at, especially in return for payment).

This reflects, in part, regulation 3(4)(d) of the Consumer Protection From Unfair Trading Regulations 2008, which states that a commercial practice is unfair if it promotes “...a product where a trader has paid for the promotion without making that clear in the content or by ... sounds clearly identifiable by the consumer...” (Parts 2 and 3 of this document provide further discussion of this regulation).

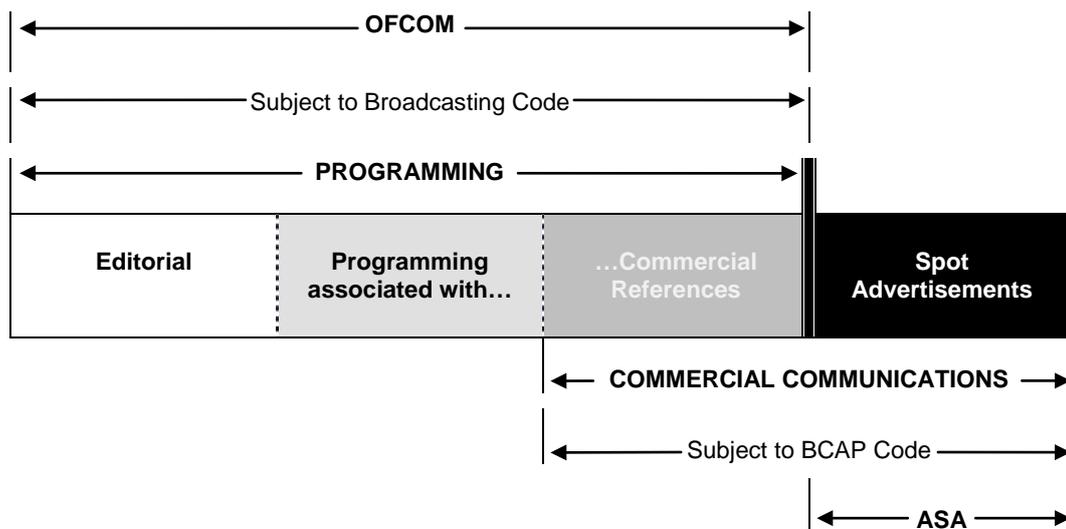
## Regulatory responsibility under Option C

6.10 As discussed above Option C removes the current requirement for commercial communications (i.e. paid-for references to products or services) to be separated from programming, except in relation to spot ads.

6.11 The following is a diagrammatic representation of how radio output would be classified and regulated under Option C (Figure 3):

- It identifies the areas of output which would fall under **Ofcom's** remit, and those areas which would fall under the **ASA's** remit;
- It explains which Code would apply to different areas of output (i.e. whether this would be the **Broadcasting Code** or the **BCAP Code**);
- It breaks down output into **programming** (sometimes referred to as ‘editorial’, programming comprises programmes (e.g. a Breakfast Show), music, and features (e.g. weather) and includes sponsorship, and programme trails **spot advertisements** (discussed in paragraph 6.17).
- It identifies key areas of programming: **editorial**, **programming associated with commercial references** and **commercial references**. Each of these terms is explained and discussed below at paragraphs 6.14 to 6.16. Please also see the Glossary at Annex 5.

Figure 3: Option C



6.12 Option C would represent considerable deregulation, and would allow the integration of commercial communications within all programming except news and programming primarily aimed at children (discussed below). It would also maintain a familiar regulatory framework, providing regulatory certainty for consumer and industry stakeholders.

6.13 From a listener's perspective, there would be two separated categories of output: Programming and Spot Advertisements. However from a regulatory perspective the relevant regulator, and applicable Code, would be tailored to the nature of the output as follows in paragraphs 6.14 to 6.17.

### Programming

6.14 Within programming there would be three sub-categories of output under Option C:

- **Editorial** – programming neither subject to any commercial arrangement with a third party (nor designed to promote station-related products/services).

Regulatory framework - As this programming would not be influenced by any commercial arrangement with a third party, Ofcom would continue to regulate it, with reference to the Broadcasting Code.

- **Programming subject to, or associated with, a commercial arrangement** - with a third party (e.g. a sponsored breakfast show or a sponsored competition) which may contain a commercial reference (explained below)..

Regulatory framework - Ofcom would regulate the content of material other than commercial references contained within such programming with reference to the Broadcasting Code (as now, in the case of sponsored programming).

- **Commercial references** – references integrated within programming to a brand, product and/or service, where such a reference is subject to a commercial arrangement between the broadcaster and a third party and/or promotes a station-branded/ related product or broadcaster-branded/related product and/or service (e.g. claims made about a sponsor's products/services during a sponsored competition).

Regulatory framework – As this material would be separated from spot advertisements and associated with material intended to entertain and/or provide ‘added value’ to the listening experience, Ofcom would continue to regulate it, as it currently does with regard to sponsorship credits. In doing so, Ofcom would refer to the BCAP Code as it currently does with regard to the clearance, content and scheduling of sponsorship credits.

- 6.15 We recognise that the proposed liberalisation under Option C would be likely to result in an increase in promotional messages other than spot advertisements. Recognising ASA/BCAP’s expertise in the area of advertising regulation, we would therefore intend to seek advice from it, as required, with regard to the interpretation of the BCAP Code.
- 6.16 To date, Ofcom has received few complaints concerning the content of sponsorship credits (currently, the only part of radio programming in which advertising messages can be placed). However, we would expect some increase in complaints concerning claims made in commercial references (at the very least, in line with the likely increase in the number of such messages broadcast) if Option C was implemented.

### Spot Advertisements

- 6.17 The other category of output under Option C is:

- **Spot advertisements** – these would be required to be clearly separated from programming.

Regulatory framework - As this output would be separated and intended to sell and/or promote brands, products or services, ASA would continue to regulate it, with reference to the BCAP Code.

### Overview of the impact of these proposals

- 6.18 As discussed under Part 2 (Introduction), the consultation document does not contain a separate impact assessment document. Instead the consultation document as a whole assesses the impact of the proposed changes on stakeholders (including consumers and radio broadcasters).
- 6.19 In considering issues relating to impact, Ofcom has noted both the responses to the 2009 Consultation<sup>61</sup>, research on consumer attitudes conducted as part of that Consultation, and views expressed in informal pre-consultation discussions with industry and consumer stakeholders in 2010.
- 6.20 Responses to this Consultation, including responses to specific questions on impact, will further inform our considerations. Stakeholders are invited to respond to the proposals on Option C in ‘Questions for Stakeholders’ below.

### Consumer stakeholders

- 6.21 While it is likely there would be a more seamless listening experience for listeners, this would also be likely to entail more promotional references in programming (although this may be in line with listener expectations reflected in Ofcom’s consumer research discussed below).

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<sup>61</sup> <http://www.ofcom.org.uk/consult/condocs/bcode09/responses/>

- 6.22 Only the editorial independence of news would be guaranteed under Option C (please see below under 'News'). Under Option C it would be for broadcasters to decide how they retain listener trust, loyalty and interest in programming as a whole. For example research indicates that listeners dislike promotional references that serve no editorial purpose.
- 6.23 Option C could offer relevant and entertaining programming, paid for by additional revenue streams (discussed above) and providing consumers with transparent commercial messaging and, over time, possibly less reliance on spot advertising (which is unpopular with consumers).
- 6.24 However, consumer protection would require safeguarding in relation to commercial arrangements. Transparency would be key to ensuring this (see proposed Rule 10.1 under 'Proposed new Section Ten of the Code' below which requires transparency from the outset of programming subject to, or associated with, a commercial arrangement). Appropriate signalling would be likely to be established over time, as the scope and nature of commercial references becomes apparent. In relation to spot advertising, separation would be the key to achieving transparency.
- 6.25 Ofcom notes, from pre-consultation discussions with stakeholders groups in 2010, concern from some consumers about an increase in commercial references integrated within radio programming.
- 6.26 However, as discussed in Part 2 of this document, the 2009 research<sup>62</sup>, which accompanied the Code Review and focused specifically on commercial radio and its listeners, was specifically commissioned to understand listener tolerance of promotional activity within editorial content (i.e. the degree to which radio listeners are prepared to accept references that are subject to commercial arrangements being included *within* programming).
- 6.27 The research indicated that consumers would be receptive to liberalisation. This was based on an expectation that "commercial radio" is, by nature, commercial. Transparency, listener trust and the quality of the listening experience were identified as being key to listeners who expected to be 'sold to', preferred sponsor credits to traditional spot ads and had a clear appetite for some liberalisation. (Please see paragraphs 2.62 to 2.66 for further details).
- 6.28 Based on this research we might expect consumers to be comfortable with Option C subject to the views and concerns discussed above.
- 6.29 We make certain proposals specifically in relation to children. These are discussed under 'Additional prohibitions and restrictions' and 'Programming primarily aimed at children' below. We invite stakeholders' comments on the impact of our proposals.

### **Industry stakeholders**

- 6.30 Significant de-regulation under Option C would offer the opportunity for broadcasters to further develop commercial radio as an advertising medium. It is therefore likely that the economic benefit for industry would be greater under Option C than under Option B. One industry estimate forecasts the delivery of incremental annual benefits

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<sup>62</sup> The published research report 'Commercial references within radio programming', can be found at: <http://www.ofcom.org.uk/consult/condocs/bcode09/radioresearch.pdf>

to the commercial radio industry of around £25m (see also Part 5 of this document). This is, however, a rough estimate based on one broadcaster's sector knowledge<sup>63</sup>.

- 6.31 The maintenance of a familiar regulatory framework indicates that compliance costs would be unlikely to change significantly. However, there would be a greater onus on radio broadcasters to manage the retention of listener trust, loyalty and/or interest in their programming.
- 6.32 It is difficult to estimate the economic benefits to industry that might accrue from Option C, largely because it is possible that some revenue might be diverted from spot advertising. However, Ofcom considers that Option C could potentially facilitate the creation of innovative promotional mechanics that would appeal to a wider range of advertisers. In pre-consultation discussions, radio broadcasters suggested that, currently, such advertisers approach the commercial radio sector, alongside competing media, but, when faced with regulatory constraints placed on the radio sector, divert their spend to other media. This option would therefore be likely to have the effect of securing additional revenue for the radio sector.

### **Advertising stakeholders**

- 6.33 From a promotional perspective, Option C would provide more opportunity for advertisers to experiment than is offered under Option B.

### **Regulatory impact**

- 6.34 In our view, Option C would be consistent with our duty to reduce unnecessary regulatory burden while providing adequate consumer protection, both through the proposed rules (below) and accompanying guidance. Nevertheless, it is possible that some increase in the volume of complaints could arise as new programming and regulations became familiar to listeners and broadcasters.
- 6.35 Overall, it is likely that Option C would afford greater financial benefits to industry than Option B but potentially greater compliance risks, at least in the short term. However, we believe such risks could be managed. On the other hand Option C offers more limited potential risks in relation to regulatory change than Option D (please see Part 7).

### **Equality considerations**

- 6.36 As discussed in Part 2 of this document, Ofcom is required by statute to have due regard to any potential impacts its proposals may have on race, disability and gender equality, as well as the other groups protected by legislation in Northern Ireland<sup>64</sup>.
- 6.37 In relation to equality issues we consider that our proposals would be unlikely to involve any adverse effect with regard to the above equality groups. Our view is set out further in our Equality Impact Assessment Screening at Annex 6.
- 6.38 Ofcom research has shown that listeners expect commercial references on commercial radio and they generally understand that this is the way in which commercial radio is funded. Our research did not bring to light any particular considerations in relation to equality groups, in this respect.

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<sup>63</sup> Source: UTV Media (GB)

<sup>64</sup> In addition to race, disability and gender, equality legislation in Northern Ireland also covers age, sexual orientation, carers, marital status, religious belief and political opinion.

- 6.39 However, we do consider that the proposals may benefit some radio listeners from diversity groups.
- 6.40 Many radio stations (some community, some commercial) serve members of diversity groups through the type and range of programmes they transmit. We consider that the proposed regulatory liberalisations under Option C will offer the potential for such stations to develop fresh revenue streams and thereby strengthen their radio operations and financial viability. This could offer the possibility of enriching these stations, and their offering to varied groups within the community, at a time of difficult trading conditions.
- 6.41 We also make particular proposals in relation to age which are referred to under the impact on consumer stakeholders above.
- 6.42 There is further discussion of 'Equality Impact Issues' under Part 2 above and stakeholders are invited comment on our approach under 'Questions to stakeholders' below.

### Issues arising from the proposed option

- 6.43 As discussed in Part 2 of this document, in considering Option C we have identified a number of further issues which arise from it.

### Additional prohibitions or restrictions under Option C

- 6.44 We have considered the issue of whether additional prohibitions or restrictions should be put in place for commercial communications in relation to potentially harmful products or services in radio programming i.e. whether the public should be afforded further protections. (Part 2 of this consultation document explains this further).
- 6.45 Currently, the BCAP Code prohibits the promotion of tobacco products, prescription medicines, infant formula and smoking accessories. With regard to alcoholic drinks, gambling, other medicines and follow-on formula, the BCAP Code has rules (e.g. on scheduling) to ensure that their promotion is appropriately limited and/or presented, so as to avoid consumer harm. Alcohol and gambling brands have regularly sponsored programming features on radio (subject to these restrictions). Ofcom currently requires that such sponsorship adheres to the clearance, content and scheduling requirements in place for radio advertising. To date, such sponsorship has not raised issues under the Code.
- 6.46 With regard to foods and drinks high in fat, salt or sugar ("HFSS foods and drinks"), Ofcom introduced new rules in April 2007 prohibiting the advertising of such products on television in and around children's programmes and programmes for which the child audience is disproportionately high<sup>65</sup>. Such restrictions were considered for radio but found unnecessary, given its audience profile and the nature of radio output and listening. Nevertheless, in relation to children, the BCAP Code includes a rule making clear that radio advertisements must avoid anything likely to condone or encourage poor nutritional habits or an unhealthy lifestyle, especially in children.
- 6.47 As discussed earlier in this document (at paragraph 2.12), the nature of radio output differs from television, as do its audiences and the restrictions and prohibitions placed on radio which are not as extensive as those for television. However it is

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<sup>65</sup> [http://www.ofcom.org.uk/consult/condocs/foodads\\_new/statement/statement.pdf](http://www.ofcom.org.uk/consult/condocs/foodads_new/statement/statement.pdf)

useful to consider developments in public policy concerns, which underpin the prohibitions in television regulation, by way of background to this issue.

- 6.48 The AVMS directive, as set out in Part 2 of this document, prohibits product placement (discussed under 'Introduction', above) of tobacco products and prescription medicines on television. In addition, the UK Government has decided to prohibit the placement of further products and services (these are in the categories of alcoholic drinks; HFSS foods and drinks; gambling; smoking accessories; over-the-counter medicines; infant formula and follow-on formula). In reaching this decision the Government said it had health and welfare, especially children's health and welfare, particularly in mind.
- 6.49 Under Option C Ofcom would apply to commercial references the content and scheduling advertising restrictions (and advertising script clearance requirements) that apply to radio under the BCAP Code. This would ensure that those individuals or organisations prohibited from advertising on radio would not be able to pay for commercial references (in radio programming) and would prohibit references in association with, for example, the following:
- tobacco products and non-tobacco products or services that share a name, emblem or other feature with a tobacco product;
  - rolling papers and filters;
  - medicinal products available only on prescription; and
  - infant formula.
- 6.50 As discussed in paragraphs 6.4 to 6.6 above, signalling requirements differ for television product placement and for commercial references within radio programming under Option C. Effectively, commercial references on radio would have to be 'up front', with commercial references signalled as such, as they occur (whereas in television signalling would occur at specific junctures around programmes). This is set out at paragraphs 6.104 and 6.105 below.
- 6.51 Given the prohibitions and other restrictions provided in the BCAP Code, and the fundamental differences between radio and television audiences, programming and consumption of output, we do not consider it currently necessary to include additional consumer protections with regard to specific products and/or services in commercial references on radio. (Note: please also see below, under 'Programming aimed at children').
- 6.52 However we are aware that public policy in relation to certain potentially harmful products, and in relation to certain potentially vulnerable groups including children, may develop over time.
- 6.53 In this context we also recognise that integrated commercial references within radio programming (proposed under Option C) may raise concerns which have not surfaced in the current regulatory environment where commercial references and programming are separated. In addition Ofcom acknowledges that the future scope and nature of commercial references would be uncertain under Option C (as it would be under Option D) and that developments over time would be likely to affect industry's relative reliance on advertisements for revenue generation.

- 6.54 We therefore propose that Ofcom should keep a watching brief on this matter, including a targeted monitoring exercise to assess levels of compliance, and any developments which might be relevant. We would propose to consider a review of the appropriateness and effectiveness of the regulations, in relation to potential additional restrictions or prohibitions, after a period of up to two years (or sooner if required) at which time the scope and nature of commercial references on radio are likely to be more apparent.
- 6.55 The criteria that might determine that such a review was required could include the following:
- developments in public policy related to the issue of additional constraints or prohibitions discussed above;
  - developments in radio output (if any) that raise concerns over consumer protection (in particular, child audiences);
  - complaints and issues raised by stakeholders.
- 6.56 Stakeholders are invited to comment on this approach, and on the proposed criteria for any future review, in 'Questions for stakeholders' below.

### **Programming primarily aimed at children**

- 6.57 Considerations in relation to child audiences are discussed above under 'Additional prohibitions or restrictions' in relation to particular, potentially harmful, products and services. In addition we have considered whether, arising from the proposed integration of commercial communications within editorial under Option C, further protections are required for child listeners.
- 6.58 By way of background we note wider broadcasting public policy in this area. In relation to television product placement, as discussed above at paragraph 2.32, the Government, in its Ministerial Statement on product placement of 9 February 2010<sup>66</sup>, acknowledged that the AVMS Directive "contains a ban on product placement in 'children's programmes'<sup>67</sup>" and confirmed that UK legislation "will enact that".
- 6.59 It also expressed additional concerns about child audiences and took into particular account the issue of the potential effects on children's health and welfare, when it prohibited the placement of the particular categories of products and services discussed above. It described this decision as "an important aspect of the cautious approach that we need to take".
- 6.60 In paragraph 6.51 above, we concluded that it is not currently necessary to include additional consumer protections with regard to specific products and/or services in commercial references on radio, but our proposed criteria for a possible review of this position includes considerations relating to child audiences.
- 6.61 Turning to programming primarily aimed at children (for which we propose a definition at paragraph 6.64 below), we consider that the *integration* of commercial

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<sup>66</sup> The full statement can be found at:

[http://www.culture.gov.uk/reference\\_library/minister\\_speeches/6624.aspx](http://www.culture.gov.uk/reference_library/minister_speeches/6624.aspx)

<sup>67</sup> These are programmes made for a television programme service or an on-demand programme service, and for viewing primarily by persons under the age of sixteen (Schedule 11A, paragraph 3(2), of the Act)

communications within radio programming, proposed under Option C, does not afford child listeners the protection provided by the current *separation* between editorial and commercial messages. We also take into account the particular vulnerabilities of children, recognised in wider broadcasting public policy discussed above, and the requirement under the Act “that persons under the age of eighteen are protected”.

- 6.62 We consider that in view of these factors, where radio programming is primarily aimed at children, appropriate safeguards in relation to commercial references must be in place.
- 6.63 We therefore propose, under Option C (within proposed Rule 10.3) to prohibit commercial references, or material that implies a commercial arrangement, *integrated within* programming primarily aimed at children.
- 6.64 We propose providing guidance to this rule which would explain that ‘programming primarily aimed at children’ is any programming that:
- is primarily listened to by persons under the age of sixteen; or
  - actively solicits the participation of persons under the age of sixteen.
- 6.65 We invite stakeholders’ views on this proposed guidance.
- 6.66 Associated guidance would also clarify that specific programming (i.e. identifiable programmes or features) primarily aimed at children may be sponsored, as long as it complies with the proposed Rule 10.3 requirement that no commercial reference is permitted within such programming. This could be achieved by placing sponsor credits *around, or in the course of,* the relevant programming (as is currently permitted) but not *integrated within* it. Broadcasters would need to ensure that such sponsor credits are clearly identifiable and distinct from the associated programming.
- 6.67 In relation to impact we note that, currently, few commercial radio stations offer a significant amount of programming primarily aimed at children. However, we acknowledge that this rule would prohibit the integration of commercial references within such programming. Nevertheless it is our view that the particular vulnerabilities of children (recognised in wider broadcasting public policy), in relation to integrated commercial references within programming primarily aimed at them, warrant this prohibition.
- 6.68 It should also be noted that the proposed prohibition does not reduce current commercial opportunities, since the integration of commercial communications within editorial is not currently allowed.
- 6.69 Stakeholders are invited to comment on this approach in ‘Questions for stakeholders’ below.

### **Consumer affairs programming**

- 6.70 Consumer affairs programming is an area of output where integrated commercial communications within editorial could raise particular concerns about the independence of observations and comments made within programming, and whether these may have been affected by commercial arrangements.
- 6.71 By way of background we again note wider broadcasting public policy in this area. The ‘Written Ministerial Statement on Television Product Placement’, published on 9

February 2010<sup>68</sup>, acknowledged concern about the possibility of product placement in consumer affairs programming on television and concluded that it was important that legislation ensured that product placement was specifically prohibited in this area of programming.

- 6.72 We recognise the prohibitions and other restrictions provided by the BCAP Code, and the fundamental differences between radio and television discussed at paragraph 6.51, above.
- 6.73 In addition, we take into account the difference between the signalling requirements for product placement on television (at specific junctures around programmes discussed at paragraph 6.4), and the signalling requirements for commercial references on radio under Option C (required at the outset of each commercial reference, as discussed at paragraph 6.104, below). The 'up front', immediate nature of the signalling of commercial communications on radio provides additional protections for listeners.
- 6.74 We do not therefore consider it necessary to place additional safeguards in relation to consumer affairs programming. However in the rule set at 6.108 below we make clear (under 'Transparency') that broadcasters should ensure that broadcast material appearing to provide any independent assessment of products or services is genuinely independent and not subject to a commercial arrangement. Therefore, signalling commercial references in, for example, consumer advice/affairs programming requires particular care, as it is essential that the broadcast of paid-for promotions of goods and services is not presumed to be independent observations/comment.

## **News and political and controversial matters**

### *News*

- 6.75 As discussed in Part 2 of this document a further issue arises in relation to each of the Options over whether current safeguards and prohibitions in relation to news on commercial radio should be maintained.
- 6.76 In order to safeguard the impartiality of news under Option C, and for the reasons discussed in Part 2, we would elect to prohibit the integration of commercial communications in news (except to the extent that is already permitted – e.g. the sponsorship of integrated sports news or weather bulletins). During 2010 pre-consultation discussions held by Ofcom, industry showed no appetite for commercial references in or around news broadcasting.

### *Political and controversial matters*

- 6.77 Rules in relation to political and controversial matters under Section Seven of the BCAP Code and Section Five of the Broadcasting Code remain unchanged under Option C.
- 6.78 As discussed in Part 2, in addition to the safeguards in relation to news, there are further safeguards and rules in relation to political and controversial matters:

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<sup>68</sup> The full statement can be found at:  
[http://www.culture.gov.uk/reference\\_library/minister\\_speeches/6624.aspx](http://www.culture.gov.uk/reference_library/minister_speeches/6624.aspx)

- Advertising scheduling and content rules including Section Seven of the BCAP Code on political and controversial matters, which requires, among other things, that no advertisement may:
  - be inserted by or on behalf of a body whose objectives are wholly or mainly of a political nature;
  - be directed towards a political end.

Objectives of a political nature and political ends include:

- influencing the outcome of elections or referendums;
- bringing about changes of the law or otherwise influencing the legislative process;
- influencing the policies or decisions of local, regional or national governments;
- influencing the policies or decision of persons on whom public functions are conferred by or under law or international agreements;
- influencing public opinion that, in the United Kingdom, is a matter of public controversy; and
- promoting the interests of a party or other group of persons organised for political ends.

(These rules do not apply to the party political and election campaign broadcasts that the Act obliges broadcasters to carry).

- The provisions of other sections of the Broadcasting Code:
  - Section Five: Due impartiality rules on matters of political or industrial controversy and matters relating to current public policy; and
  - Section Two: Factual programmes or items must not materially mislead the audience (Rule 2.2).

## Religious programming

6.79 Since the following protections apply to religious programming we do not consider that any further safeguards are required:

- Section Four of the Broadcasting Code (Religion); and
- Section Fifteen of the BCAP Code (Faith, Religion and Equivalent Systems of Belief).

6.80 In addition, proposed rules 10.10 and 10.11 (set out below at paragraphs 6.101) relate to appeals.

## Not-for-profit funders

6.81 An issue arises, in relation to Option C, over whether there is a distinction between commercial and non-commercial/not-for-profit funders of commercial arrangements. The Code currently treats such funding arrangements as sponsorship and they are therefore subject to the rules currently set out in Section Nine of the Code. These rules prohibit sponsored programmes promoting the interests of the funder. The rules ensure that a separation is maintained between programmes and advertising, and

reinforce the UK's prohibition (prior to April 2010), on product placement (discussed in Part 2 and above under 'Introduction').

- 6.82 As part of our consultation on the review of the Code in 2009 , as discussed in Part 2 of this document, we sought respondents' views on potential new rules for consideration in relation to Public Information Programming ("PIPs") on radio and on television. This was defined as programming that seeks "to educate or inform the audience on matters in the public interest, that are funded by non-commercial, not-for-profit entities and that may refer to the interests and/or activities of the funder.
- 6.83 Under Option C all programming subject to, or associated with, a commercial arrangement must be signalled as such at the outset (and then at appropriate intervals), regardless of whether it has a straightforwardly commercial purpose or, for example, a public information purpose.
- 6.84 Therefore under Option C no distinction is made between different funders (i.e. whether the funder is a commercial or non-commercial entity). The proposed new rules simply apply to programming when a commercial arrangement is in place, regardless of whether the third party paying for the commercial arrangement is a 'for profit' or 'not for profit' organisation. Particular concerns may be raised where funding for a commercial arrangement is by government or certain not-for-profit organisations. However all programming, whatever the funder, would be subject to a range of safeguards outlined at paragraph 6.78 above.
- 6.85 Stakeholders are invited to comment on our approach, including the safeguards referred to above, in 'Questions for stakeholders' below.

## Music

- 6.86 As discussed in Part 2 of this document we recognise that if speech-based commercial references are integrated within programming, Option C raises the possibility that commercial arrangements might be introduced in relation to the selection or rotation<sup>69</sup> of music for broadcast.
- 6.87 Until now such arrangements have not been permitted, due to the prohibition of product placement. In addition there have been public policy concerns, for example in relation to the diversity of music played. As explained in Part 2 of this document, however, the wider regulatory and broadcast landscape has undergone considerable development, both in relation to product placement on television and wider radio regulation set out in paragraph 2.23.
- 6.88 The proposed new Section Ten of the Code under Option C, set out below at paragraph 6.101, makes a distinction (under "Commercial arrangement") between commercial references and the selection or rotation of music for broadcast.
- 6.89 Music tracks could be promoted, or sold as products, within programming (which would then need to be transparent to listeners as commercial references). In addition, broadcast commercial references may be associated with the tracks. Where a third party associates itself with the broadcast of a specific music track or string of tracks (for example by sponsoring a 'Hit of the Hour' or 'The Golden Hour') this would be a commercial reference and transparent broadcast signalling would be required.

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<sup>69</sup> Rotation involves the recurrence of music tracks broadcast within a specified period

- 6.90 However, as part of general music output, the tracks themselves would not be considered commercial references; rather, they would be considered part of a pool of editorial content that already exists (i.e. 'raw material'), from which they were selected for a playlist and/or specific broadcast. Nevertheless, Ofcom recognises that the *selection* or *rotation* of this music may be subject to a commercial arrangement.
- 6.91 All commercial arrangements (including both those relating to the selection or rotation of music for broadcast, and those which are commercial references) would be subject to proposed new Rule 10.1, which requires that programming subject to, or associated with, a commercial arrangement must be signalled at the outset and at appropriate intervals.
- 6.92 The proposed signalling required in relation to the commercial arrangements governing the selection or rotation of music tracks is discussed below at paragraphs 6.96 to 6.99. This would be different to the signalling required for commercial references associated with the tracks themselves (which would be the same as the signalling requirements for all commercial references, discussed at paragraphs 6.104 and 6.105 below).

#### *Public File*

- 6.93 Under existing licence conditions, broadcasters are required to make available on their website, and keep up-to-date, a Public File<sup>70</sup> containing information about the provision of their service in accordance with Ofcom guidelines. The Public File was originally created as a device for making information relating to a licence format publicly available. We suggest that the function of the Public File could be expanded under Option C, and that it would be an appropriate place for publishing information to deliver transparency of commercial arrangements relating to the selection or rotation of music.
- 6.94 We would propose updating guidelines to state that commercial arrangements in relation to playlists must be recorded in stations' Public Files – i.e. stations would be obliged to maintain in the Public File an up-to-date list of all individuals or organisations with whom/which such commercial arrangements are in place (and make this available on their websites).
- 6.95 This proposed amendment is set out in Annex 8. Stakeholders are invited to comment on it in 'Questions for Stakeholders' below.

#### *Code Guidance*

- 6.96 In order to adhere to the signalling requirements of proposed new Rule 10.1, we would propose guidance to that rule in relation to programming in which the selection or rotation of music for broadcast is subject to a commercial arrangement.
- 6.97 The proposed Code guidance would explain that, where such arrangements are in place (and listed in the Public File as detailed above), listeners should be informed of the availability of this information on stations' websites, through broadcast messages at appropriate intervals. For example, it may be appropriate to say, "*For information on commercial arrangements that affect how we select our music please go to our website*".

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<sup>70</sup> <http://www.ofcom.org.uk/radio/ifi/rbl/car/analoguelicence.pdf>

- 6.98 We would propose that guidance would explain that adequate transparency was likely to be achieved by broadcasting the message during relevant programmes/programming on no less than four occasions each day, spread reasonably across daytime (i.e. between 06:00 and 19:00).
- 6.99 Stakeholders are invited to comment on the guidance we propose, including the issue of appropriate intervals for, and content of, broadcast messages, in 'Questions for Stakeholders' below.
- 6.100 Stakeholders are also invited to comment on the issue of whether the selection or rotation of music in programming aimed at children should be subject to further safeguards. In doing so stakeholders are invited to consider our proposed approach under 'Programming primarily aimed at children' above.

## **Proposed new Section Ten of the Code under Option C: Commercial communications in radio programming**

- 6.101 We propose the following draft Principle plus slim set of rules for Option C:

### **(Draft) Section Ten: Commercial Communications on Radio**

(Relevant legislation includes, in particular, sections 319(2)(f), (i) and (j) and 319(4)(e) and (f) and 321 of the Communications Act 2003, regulation 3(4)(d) of the Consumer Protection From Unfair Trading Regulations 2008, section 21(1) of the Financial Services and Markets Act 2000, paragraph 3 of the Investment Recommendation (Media) Regulations Act 2005, and Article 10 of the European Convention on Human Rights.)

This section of the Code does not apply to BBC services funded by the licence fee, which are regulated on these matters by the BBC Trust.

**This section of the Code concerns radio only.** Section Nine of the Code concerns television only. Commercial communications on the two media are subject to varying legislative requirements. Therefore terminology common to each medium is not necessarily consistent in meaning between Sections Nine and Ten.

#### **Principle**

To ensure the transparency of commercial communications as a means to secure consumer protection

#### **Rules**

##### **General Rules**

10.1 Programming that is subject to, or associated with, a commercial arrangement between the broadcaster (or any agent or employee of the broadcaster), and a third party (or third parties), must be clearly signalled at the outset and at appropriate intervals.

10.2 Spot advertisements must be clearly separated from programming.

10.3 No commercial reference, or material that implies a commercial arrangement between the broadcaster (or any agent or employee of the broadcaster) and a third party (or third parties), is permitted:

- in or around news bulletins or news desk presentations. This requirement does not apply to:
  - news suppliers as a news source;
  - specialist factual strands that are not news bulletins or news desk presentations, but may be featured in such programming;
  - the use of premium rate services (e.g. for station/broadcaster surveys); and
  - the promotion of the station/broadcaster's own products and services (e.g. the programme/station/broadcaster's website or a station/broadcaster's event); or
- in programming primarily aimed at children. This requirement does not apply to:
  - the use of premium rate services (e.g. for broadcast competition entry); and
  - the promotion of the station/broadcaster's own products and services (e.g. the programme/station/broadcaster's website or a station/broadcaster's event).

10.4 No programming may be subject to a commercial arrangement with a third party that is prohibited from advertising on radio.

10.5 Programming subject to a commercial arrangement with a third party (or third parties) must comply with the advertising scheduling rules that apply to radio broadcasting.

10.6 Commercial references in programming must comply with the advertising content and scheduling rules that apply to radio broadcasting.

10.7 Commercial references that require confirmation or substantiation prior to broadcast (for example, special offer prices or comparative claims) must be cleared for broadcast in the same way as advertisements.

### **Programming**

Programming comprises all broadcast material other than spot advertisements.

### **Spot advertisements**

Spot advertisements comprise advertising broadcast as commercial breaks.

### **Commercial arrangement**

A commercial arrangement is a contract or any other formal understanding between a broadcaster (or any agent or employee of the broadcaster), and a third party (or third parties). It will generally include payment and/or the provision of some other valuable consideration:

- in return for a commercial reference (whether promotional or not) – examples of a commercial arrangement include: programming sponsorship; competition prize donation; premium rate service provision; or

- to influence the purposeful selection or rotation of music for broadcast.

Where a payment and/or the provision of some other valuable consideration is made to influence the purposeful selection or rotation of music for broadcast, advice on appropriate transparency is detailed in associated guidance to Rule 10.1.

Where it is made in return for a commercial reference, the following notes apply (in addition to associated guidance):

#### **Commercial reference**

For the purposes of this section of the Code, a commercial reference is a reference in programming to a brand, trademark, product and/or service that is either subject to a commercial arrangement between the broadcaster (or any agent or employee of the broadcaster), and a third party (or third parties) or promotes the station/broadcaster's own products or services.

#### **Specialist factual strands**

Specialist factual strands in news bulletins or news desk presentations include, but are not limited to, travel, sport, finance and weather.

#### **Transparency**

Listeners should know when material is broadcast in return for payment or other valuable consideration. Signalling is the means by which transparency is achieved.

Transparency of a commercial arrangement should be achieved through the appropriate signalling of a brand, trademark, product and/or service of a third party (or third parties) that has paid for broadcast exposure – for example: by including a sponsorship credit; by reference to the donor of a prize; by the promotion of a premium rate number for listener interaction in programming.

A commercial reference made as part of a commercial arrangement (whether or not it is clearly promotional) may require further signalling as such (for example a paid-for reference to a hotel, within a feature sponsored by a travel company, may need to be specifically signalled as paid for).

Broadcasters should ensure that broadcast material appearing either to be a station campaign or to provide any independent assessment of products/services is genuinely independent and not subject to a commercial arrangement. Signalling commercial references in, for example, consumer advice/affairs programming therefore requires particular care, as it is essential that the broadcast of paid-for promotions of goods and services is not presumed to be independent observation/comment.

#### **Signalling**

Broadcasters are required to give, at appropriate times, clear information within programming to inform listeners of any commercial arrangement affecting that programming.

Appropriate signalling is essential in complying with Rule 10.1 and broadcasters are directed to associated guidance to this rule.

#### **Factual programming, including matters of political or industrial**

**controversy and matters relating to current public policy**

Broadcasters should note that all programming must comply with Section Five of the Code. Commercial references broadcast under such an arrangement are also subject to Section 7 of The Broadcasting Committee of Advertising Practice UK Code of Broadcast Advertising. In addition, broadcasters are reminded that Rule 2.2 applies to all factual programming (i.e. factual items must not materially mislead the audience).

**Premium rate services**

10.8 Any use of premium rate services in programming must comply with the Code of Practice and any additional broadcast-related requirements issued by PhonepayPlus.

10.9 The cost to listeners for using premium rate services must be made clear to them and broadcast as appropriate.

**Charity appeals**

10.10 Charity appeals are allowed in programming if:

- they are broadcast free of charge;
- they do not contain commercial references (other than premium rate services); and
- the broadcaster has taken reasonable steps to satisfy itself that:
  - the organisation concerned can produce satisfactory evidence of charitable status, or, in the case of an emergency appeal, that a responsible public fund has been set up to deal with it; and
  - the organisation concerned is not prohibited from advertising on radio.

**Appeals for funds for programming or services**

10.11 Broadcasters may broadcast appeals for donations to make programming or fund their service. The audience must be told of the purpose of the donation and how much has been raised as a result of the appeal. All donations must be separately accounted for and used for the stated purpose.

**Financial promotions and investment recommendations**

10.12 When broadcasting financial promotions and investment recommendations broadcasters must comply with the relevant provisions in Appendix 4 to this Code.

**Financial promotion**

A financial promotion is an invitation or inducement to engage in investment activity (in accordance with section 21(1) of the Financial Services and Markets Act 2000 (Restrictions on financial promotion)).

**Investment recommendation**

An investment recommendation occurs when someone directly recommends a

particular investment decision, for example, buying or selling a particular share or underwriting a particular share offer.

## Guidance to General Rules

6.102 Ofcom recognises the significant liberalisation that would be afforded by the implementation of Rules 10.1 to 10.8, above. This would be accompanied by updated published guidance<sup>71</sup> (in addition to the Rule notes shaded in dark grey, above), to ensure stakeholders' full understanding of our intended interpretation of these rules.

### *Proposed Rule 10.1*

6.103 In relation to Rule 10.1 we would propose guidance which would explain what is meant by: "commercial arrangements"; a "station/broadcaster's own products or services"; programming "subject to" a commercial arrangement; programming "associated with" a commercial arrangement; transparency and third parties.

6.104 In relation to signalling we would propose guidance on "at the outset" and "at appropriate intervals":

#### *"at the outset"*

Whenever any programming is subject to a commercial arrangement – whether it is an isolated commercial reference, an entire programme/feature or a commercial reference within that programme/feature – guidance would make clear that signalling of that arrangement would be required under Rule 10.1 at the outset of (i.e. at or near the start of) *each instance*.

#### *"at appropriate intervals"*

In longer output it would be reasonable to expect signalling "at appropriate intervals" – for example, sponsorship credits might appear within programming about every 20 minutes (however, circumstances may demand otherwise – e.g. live concert coverage).

6.105 Also in relation to signalling, we would propose to explain in guidance that, in order to achieve transparency of a commercial arrangement it may be appropriate to signal:

- general third party involvement in programming (normally sponsorship) with such statements as "...sponsored by..." or "...with our friends at..." or "...in association with...";
- prize donors by stating that prizes are "...donated by..." or "...courtesy of..." or "...with thanks to...";
- venue-sponsored outside broadcasts by reference(s) to being "here with our friends at...";

<sup>71</sup> <http://www.ofcom.org.uk/tv/ifi/guidance/bguidance/>

- the direct offer of a product or service (on behalf of a third party) by acknowledging that the promotion is "...by/with/from our friends at...".

6.106 Please also see above, under paragraphs 6.96 to 6.97, in relation to proposed guidance concerning programming in which the selection or rotation of music for broadcast is subject to a commercial arrangement.

6.107 Guidance would clarify that premium rate services featured in programming would not generally require signalling beyond PhonepayPlus' requirements for the promotion of such services. It would also detail which commercial communications would contribute towards Community Radio broadcasters' commercially-sourced funding limits and would clarify when Ofcom would refer to the Broadcasting Code and/or the BCAP Code concerning matters of political or industrial controversy and matters relating to current public policy and other factual programming.

#### *Proposed Rule 10.2*

6.108 In relation to Rule 10.2 we would propose guidance on the issues that need to be considered in order to ensure that spot advertisements were clearly separated from programming.

6.109 In addition, guidance would clarify that broadcasters must ensure advertising featured as part of programming (e.g. to examine, in editorial, the way a particular product type has been advertised) does not appear to be spot advertisements (which must be kept separate from programming).

#### *Proposed Rule 10.3*

6.110 We would propose to explain the purpose of prohibiting "material that implies a commercial arrangement" (to avoid the unjustified prominence of products and services in news) in relation to Rule 10.3.

6.111 In relation to programming aimed primarily at children, we would propose providing guidance to this rule defining 'programming primarily aimed at children' as any programming that:

- is primarily listened to by persons under the age of sixteen; or
- actively solicits the participation of persons under the age of sixteen.

6.112 Proposed guidance would also make clear that Ofcom recognises that particular protection issues may arise from the integration of commercial communications within programming primarily aimed at children (and therefore commercial references in such programming are prohibited). However, programming primarily aimed at children may be sponsored, with sponsor credits *around*, or *in the course of*, the relevant programming. In allowing this, Ofcom recognises the discrete nature of sponsor credits as commercial references that are clearly distinct from the programming itself (i.e. not integrated into it). Please see paragraph 6.66 above.

#### *Proposed Rule 10.4*

6.113 In relation to Rule 10.4 we would propose guidance to cross-refer to the BCAP Code and highlight the issue of political advertising.

#### *Proposed Rules 10.5 and 10.6*

6.114 We would propose to emphasise the need for robust consumer protection in relation to Rules 10.5 and 10.6, and to detail when Ofcom would generally refer to the Broadcasting Code and/or the BCAP Code. We would also refer to significant issues, such as scheduling, brand-related characters featured in programming, and material that sounded like a commercial reference but was not paid-for.

#### *Proposed Rule 10.7*

6.115 In relation to Rule 10.7 we would propose guidance to explain that this rule is intended to provide adequate consumer protection while also permitting 'natural' (not paid-for) references to brands, products and/or services (e.g. as incidental presenter comment).

### **Other rules and proposed amendments**

6.116 Proposed Rules 10.8 and 10.10 to 10.12 would reflect the requirements of current Code rules that Ofcom considered essential to the maintenance of adequate consumer protection. The wording of proposed Rule 10.12 (Financial promotions and investment recommendations) would remain as it is at present<sup>72</sup>. However, having taken into account both the scope of proposed Rules 10.1 to 10.7 and the fact that Section Ten is now radio-specific, current Code requirements under Rules 10.8 (concerning premium rate services), 10.10 (concerning charity appeals) and 10.11 (concerning appeals for funds for programmes or services) have been abridged or amended accordingly<sup>73</sup>.

6.117 Rule 10.9, which requires appropriate cost transparency of premium rate services, was consulted upon in the 2009 Code Review. One (industry) stakeholder was concerned that this requirement could lead to double jeopardy, as PhonepayPlus' Code of Practice (with which broadcasters must comply, under proposed Rule 10.8) sets criteria under which cost information must be provided. However, to achieve consistent consumer protection at all times and across all commercial radio broadcasting, Rule 10.9 will ensure that listeners are made appropriately aware of the cost of premium rate services used in programming, even when PhonepayPlus' criteria for disclosure is not met (it's Code being applicable to all premium rate services, not only those used in commercial broadcasting). A number of industry stakeholders sought clarification concerning references on the Rule to how costs should be "made clear" and "broadcast as appropriate", which we intend to include in guidance to the Rule.

### **Questions for stakeholders**

6.118 We are consulting on each of Options A, B, C and D (please see also Parts 4, 5 and 7).

6.119 Stakeholders are invited to consider each of the options, to comment on them and to offer any alternative.

6.120 In relation to Option C stakeholders should note that if Option C is adopted, Ofcom would intend to keep a watching brief on developments in commercial

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<sup>72</sup> See current Rule 10.16, at: <http://www.ofcom.org.uk/tv/ifi/codes/bcode/commercial/>

<sup>73</sup> Current requirements are reflected in Rules 10.9 to 10.10 (Premium rate numbers), 10.13 to 10.14 (Charity appeals) and 10.15 (Appeals for funds for programmes or services), at: <http://www.ofcom.org.uk/tv/ifi/codes/bcode/commercial/>

communications under it, and further consideration could be given to Option D in the future. Option D is discussed at Part 7 of this document.

6.121 Stakeholders are invited to respond to the following questions:

*Question 4*

- a) *Do you consider that Option C should be adopted by Ofcom?*
- b) *If not, please explain why.*
- c) *Do you agree with our approach to the issue of additional prohibitions or restrictions? Do you agree with our approach to a proposed review period? In particular do you wish to comment on the criteria which could govern a future review?*
- d) *Do you agree with our proposed approach prohibiting commercial references in programming primarily aimed at children and the related guidance we propose.*
- e) *Do you agree with our proposed approach to consumer affairs; news and political and controversial matters; and religious programming?*
- f) *Do you agree with our approach to the issue of not-for-profit funders? In particular do you wish to comment on the range of safeguards which would be in place?*
- g) *Do you agree with our approach to the issue of the selection or rotation of music? In particular do you wish to comment on our proposed approach in relation to the Public File guidelines; and our proposed approach to related Code Guidance, including the issue of appropriate intervals for, and content of, broadcast messages directing listeners to the Public File on stations' websites? You are also welcome to provide comments in relation to the selection or rotation of music in programming primarily aimed at children.*
- h) *Do you have any comments on the rule set for Option C (above)? If so, please refer to any individual rules by reference to the proposed rule numbers set out above.*
- i) *Do you have any comments on the discussion on guidance for Option C (above)?*
- j) *Do you agree with our assessment of the impact, including in relation to equality issues, of Option C on listeners, the radio industry and any other parties?*
- k) *If not, please explain why, providing any evidence or data you have to support your response.*

### **Alternative approaches**

6.122 We invite stakeholders to offer any alternative approaches to the regulation of commercial communications in radio programming.

6.123 Stakeholders should be aware that any alternative approaches must comply with relevant legislation including the Communications Act 2003, Article 10 of the European Convention on Human Rights, Schedule 1 of The Consumer Protection from Unfair Trading Regulations 2008.

6.124 In relation to alternative approaches, stakeholders are invited to respond to Question 2 at the close of Part 4 of this document.

## Part 7

# Option D: proposed revisions to the Broadcasting Code in relation to commercial communications in radio programming

*Option D: Allows the integration of commercial communications and programming (including in relation to spot ads).*

## Introduction

- 7.1 In this part of the consultation paper we set out an option which removes the principle of separation<sup>74</sup>, including in relation to spot advertisements.
- 7.2 Option D proposes an approach that reflects the shift in public policy outlined in Part 2 of this document (in relation to the Government's decision on product placement in television) and strips regulation of commercial communications on radio back to the bare minimum of statutory requirements.
- 7.3 In this section we set out the approach under Option D and invite stakeholders to provide broad comments. However if Option D were to be adopted we would re-consult, giving consideration to, the regulatory approach and accompanying rule set(s). No proposed rule set is therefore included for this option.

## Key features of Option D

- 7.4 Option D would remove all requirements for commercial communications (i.e. paid-for references to products or services, including spot ads) to be separate from programming, and allow their seamless integration within programming. Stakeholders are invited to consider, at Annex 9, examples of output listeners could hear under Option D.
- 7.5 Under this option spot ads need no longer exist as a separate form of commercial communication. Although broadcasters could continue to broadcast spot ads (and spot ad-like material). For all commercial communications, consumer protection would be achieved through transparency (with no specific separation requirement), together with additional content and scheduling safeguards.
- 7.6 Option D is based on the regulatory principle of:
- **Transparency** – of all commercial communications, in order to ensure consumer protection (essentially, listeners expect, and should be able, to know when they are being sold to or promoted at).

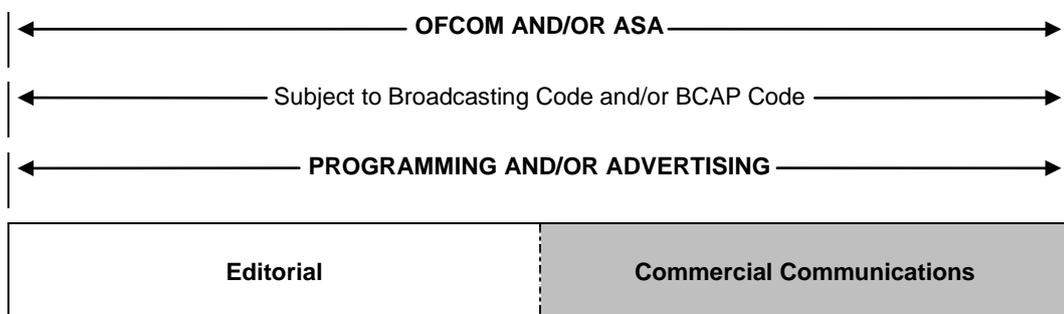
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<sup>74</sup> Please see Footnote 8 above on separation.

## Regulatory responsibility under Option D

- 7.7 The absence of a requirement for broadcasters to separate programming from advertising means there would be no distinction between advertisements and other commercial communications in programming under Option D.
- 7.8 The following is a diagrammatic representation of how radio output would be classified and regulated under Option D (Figure 4). It reflects the following:
- **Ofcom** and/or **ASA** could be responsible for the regulation of Option D;
  - the **Broadcasting Code** and/or the **BCAP Code** could be the applicable Code;
  - the seamless integration of **programming (editorial)** and **advertising (commercial communications)** under Option D. Please also see the Glossary at Annex 5.

Figure 4: Option D



- 7.9 As discussed above, from a regulatory perspective there would be no difference between a spot ad and any other type of commercial message – as if spot ads no longer existed. This raises the question of how consumer protection would be best ensured.
- 7.10 Option D could include a requirement that, where commercial communications included claims about a product or service, there would be additional safeguards and requirements on broadcasters to ensure adequate consumer protection. This would require consideration of what output, if any, should be subject to the content and scheduling requirements of the BCAP Code.
- 7.11 The issue of who would regulate what and with reference to which Code(s) is a complex matter under Option D and, as discussed in paragraph 7.3 above, if Option D were to be adopted this would be considered in a separate consultation document.

## Overview of the impact of these proposals

- 7.12 As discussed under Part 2 (Introduction), the consultation document does not contain a separate impact assessment document. Instead the consultation document as a whole assesses the impact of the proposed changes on stakeholders (including consumers and radio broadcasters).

- 7.13 In considering issues relating to impact, Ofcom has noted both the responses to the 2009 Consultation<sup>75</sup>, research on consumer attitudes conducted as part of that Consultation, and views expressed in informal pre-consultation discussions with industry and consumer stakeholders in 2010.
- 7.14 Responses to this consultation, including responses to specific questions on impact, will further inform our considerations. Stakeholders are invited to respond to the approach under Option D in 'Questions for Stakeholders' below.
- 7.15 Stakeholders should note that, as discussed at paragraph 7.3, should Option D be adopted a further period of consultation on the appropriate regulatory framework and associated rule set would be required. This would result in an impact, i.e. a delay, in relation to the introduction of the new Code Section Ten.

### Consumer stakeholders

- 7.16 Consumers may welcome an increase in the scope of creativity afforded by increased revenue to industry but this is subject to factors outlined below.
- 7.17 Under Option D there is the potential for a negative impact on listeners, not least from the removal of the separation requirement which is key to achieving transparency for spot ads under Option C.
- 7.18 During the 2009 Consultation some consumers did not support Ofcom's proposed liberalisation, and based this view on a belief in maintaining the then prohibition on product placement in radio programming<sup>76</sup> and the maintenance of clear separation of programming and advertising.
- 7.19 Ofcom notes, from pre-consultation discussions with stakeholders groups in 2010, concern from some consumers about an increase in commercial references within radio programming.
- 7.20 On the other hand deliberative research, conducted for Ofcom as part of its 2009 Code Review process, and focused specifically on commercial radio and its listeners, indicated that consumers would be receptive to liberalisation. This was based on an expectation that "commercial radio" is, by nature, commercial. Listeners showed an appetite for integrated commercial references within programming (with transparency as the key principle behind ensuring adequate consumer protection). Spot advertisements were clearly associated by consumers with commercial radio but tended to be viewed negatively, however there also appeared to be no appetite for the integration of promotional messages that served no editorial purpose<sup>77</sup>.

### Industry stakeholders

- 7.21 Option D offers the most flexible regulatory possibilities (as discussed above).
- 7.22 The potential for revenue generation under Option D is similar to that for Option C (see Part 6 of this document), since it offers similar opportunities for commercial development. One industry estimate forecasts the delivery of incremental annual benefits to the commercial radio industry of around £25m (see also Part 5 of this

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<sup>75</sup> <http://www.ofcom.org.uk/consult/condocs/bcode09/responses/>

<sup>76</sup> <http://www.ofcom.org.uk/consult/condocs/bcode09/responses/mlv.pdf>

<sup>77</sup> The published research report 'Commercial references within radio programming', can be found at: <http://www.ofcom.org.uk/consult/condocs/bcode09/radioresearch.pdf>

document). This is, however, a rough estimate based on the broadcaster's sector knowledge<sup>78</sup>.

- 7.23 There is potential for revenue to be diverted from spot advertising. Nevertheless, Ofcom considers that Option D would facilitate the creation of innovative promotional mechanics that would appeal to a wider range of advertisers. Evidence suggests that, currently, such advertisers approach the commercial radio sector, alongside competing media, but, when faced with regulatory constrained mechanics from the radio sector, divert their spend to other media. This option would, in our view, be likely to secure additional revenue for the radio sector.

### Advertising stakeholders

- 7.24 Option D would provide the greatest opportunity for advertisers to experiment with what works from a promotional perspective, without additional or different regulation of material separated as spot ads (as under Option C). However, more opportunities to integrate promotional messages within programming may not be a benefit if overall changes (e.g. in relation to the regulatory framework) did not make radio a more attractive advertising medium.

### Regulatory impact

- 7.25 In our view, Option D is consistent with our duty to reduce unnecessary regulatory burden while providing adequate consumer protection but, again, consideration should be given to the factors outlined above and immediately below.
- 7.26 It is useful to consider the similarities and differences between Options C and D. As with Option C, the reliance of Option D on transparency alone, represents considerable liberalisation in relation to the principles and rules currently governing radio output. Unlike Option C, Option D would also represent a radical change to the regulatory structure (whether regulatory responsibility ultimately lay with Ofcom, the ASA or in combination) and the appropriate rule set would require further consultation.
- 7.27 We acknowledge the logic of Option D as a simpler, less prescriptive regime than any of the other options. However, in our view, to implement *both* Code liberalisation and structural change (discussed in paragraph 7.26 immediately above) simultaneously would be likely to raise considerable industry concern about regulatory certainty and listener concerns about consumer protection. In essence, Option D would not allow for a period of transition, during which the concept of integrated commercial references within radio programming could bed down under a familiar regulatory framework (however at the close of Part 6 of this document we raise the possibility of Option D as a future step from Option C).
- 7.28 Given the issues raised immediately above, it is our view that immediate introduction of Option D (subject to further consultation) could give rise to uncertainty and the potential for confusion amongst both listeners and broadcasters (than under each other option), and a consequent impact on Ofcom resourcing. However, where the investigative workload would fall would depend on the regulatory structure considered most appropriate (ASA- or Ofcom-centred).
- 7.29 It appears that Option D would raise issues over how the level of consumer protection, required under legislation, would be achieved and maintained. Without a

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<sup>78</sup> Source: UTV Media (GB)

period of transition, it is likely that consumer media literacy in relation to integrated commercial references within programming would not be given an opportunity to become established (within a familiar framework of programming separated from advertisements). Particular attention would need to be paid to those commercial communications in which claims about a product or service were made.

### **Equality considerations**

- 7.30 As discussed in Part 2, Ofcom is required by statute to have due regard to any potential impacts its proposals may have on race, disability and gender equality, as well as the other groups protected by legislation in Northern Ireland<sup>79</sup>.
- 7.31 Ofcom research has shown that listeners expect commercial references on commercial radio and they generally understand that this is the way in which commercial radio is funded. Our research did not bring to light any particular considerations in relation to equality groups, in this respect.
- 7.32 We consider that the proposed regulatory liberalisation would be unlikely to involve any adverse effect with regard to gender, disability or ethnicity in the UK or Northern Ireland. However, we do consider that the proposed regulatory relaxations may benefit some diversity groups who are radio listeners and this is discussed under 'Equality Impact Issues' in Part 2.

### **Issues arising from the proposed option**

- 7.33 As discussed in Part 2 of this document, in considering Option D we have identified a number of issues which arise from it.

### **Additional prohibitions or restrictions under Option D**

- 7.34 As explained in Part 2 of this consultation document, we have considered whether additional prohibitions or restrictions should be put in place in relation to commercial communications integrated within radio programming i.e. whether the public should be further protected from potentially harmful products or services on radio, over and above Ofcom's specific statutory responsibilities.
- 7.35 Our approach to whether any additional prohibitions or restrictions should be included under Option D is the same as that for Option C. Please see 'Additional prohibitions' under Part 6 of this document.

### **Programming primarily aimed at children**

- 7.36 As discussed in Part 2 of this document we recognise that particular issues arise in relation to the protection of children<sup>80</sup> from the integration of commercial communications within programming. This is because child listeners would not be afforded the protection currently provided by the separation between editorial and commercial communications.

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<sup>79</sup> In addition to race, disability and gender, equality legislation in Northern Ireland also covers age, sexual orientation, carers, marital status, religious belief and political opinion.

<sup>80</sup> In this context 'children' are persons under the age of sixteen which is consistent with Schedule 11A, paragraph 3(2), of the Act in relation to television.

- 7.37 The appropriate rule set for Option D would be subject to further consultation, but would be likely to reflect the same (or similar) argument/issues to those raised under 'Programming primarily aimed at children' in Part 6 of this document.

### **Consumer affairs programming**

- 7.38 Part 2 of this document acknowledges that consumer affairs programming is an area of output where integrated commercial communications within editorial may raise particular concerns about the independence of observations and comments made within programming, and whether these may have been affected by commercial arrangements.
- 7.39 As discussed above the appropriate rule set for Option D would be subject to further consultation, but would be likely to reflect the same (or similar) argument/issues to those raised under 'Consumer Affairs programming' in Part 6 of this document.

### **News and political and controversial matters**

- 7.40 As discussed in Part 2 of this document a further issue arises in relation to each of the Options over whether current safeguards and prohibitions in relation to news on commercial radio should be maintained.
- 7.41 In order to safeguard the impartiality of news under Option D we would prohibit the integration of commercial communications in news (except to the extent that is already permitted – e.g. the sponsorship of integrated sports news or weather bulletins). During 2010 pre-consultation discussions held by Ofcom, industry showed no appetite for commercial references in or around news broadcasting.
- 7.42 The safeguards in relation to political and controversial matters under Section Seven of the BCAP Code and Section Five of the Broadcasting Code would continue to apply.

### **Religious programming**

- 7.43 Since the following protections apply to religious programming we do not consider that any further safeguards are required:
- Section Four of the Broadcasting Code (Religion); and
  - Section Fifteen of the BCAP Code (Faith, Religion and Equivalent Systems of Belief).

### **Not-for profit funders**

- 7.44 An issue arises, in relation to Option D, over whether there is a distinction between commercial and non-commercial, not-for-profit funders of commercial arrangements.
- 7.45 Previously, as discussed in Part 2 of this document, as part of our consultation on the review of the Code in 2009 we sought respondents' views on potential new rules for consideration in relation to Public Information Programming ("PIPs") on radio and on television. This was defined as programming that seeks "to educate or inform the

audience on matters in the public interest, that are funded by non-commercial, not-for-profit entities and that may refer to the interests and/or activities of the funder”<sup>81</sup>.

- 7.46 The Code currently treats such funding arrangements as sponsorship and they are therefore subject to the rules set out in Section Nine of the Code. These rules prohibit sponsored programmes promoting the interests of the funder. The rules ensure that a distinction is maintained between programmes and advertising, and reinforce the UK’s prohibition (prior to 2010), on product placement.
- 7.47 Under Option D (as with Option C) no distinction is made between different funders (i.e. whether the funder is a commercial or non-commercial entity). The appropriate rule set would be subject to further consultation, but would be likely to reflect the same (or similar) argument/issues to those raised under ‘Not-for-profit funders’ in Part 6 of this document.

## Music

- 7.48 As discussed in Part 2 of this document, we recognise that if speech-based commercial references are integrated within programming, Option D raises the possibility that commercial arrangements might be introduced in relation to the selection or rotation of music for broadcast.
- 7.49 The appropriate rule set for Option D would be subject to further consultation, but would be likely to reflect the same (or similar) argument/issues to those raised under ‘Music’ in Part 6 of this document.

## Proposed new Section Ten of the Code under Option D: Commercial communications in radio programming

- 7.50 As discussed above, one principle (transparency) underpins Option D.
- 7.51 Broadly, under Option D, the requirements of the BCAP Code would be applicable. This can be found at <http://www.cap.org.uk/The-Codes/BCAP-Code/.aspx>.
- 7.52 As discussed above we are not including a rule set for Option D, instead, stakeholders are invited to consider, and provide preliminary views, on the broad approach of Option D (please see ‘Questions for stakeholders’ below).

## Questions for stakeholders

- 7.53 We are consulting on each of Options A, B, C and D (please see also Parts 4 to 6).
- 7.54 Stakeholders are invited to consider the broad approach to Option D. As discussed above further consultation would be required in relation to the detailed rule set(s) for Option D.

### Question 5

- a) *Do you consider that Option D should be adopted by Ofcom?*
- b) *If not, please explain why.*
- c) *If so, do you wish to make any comments about our approach to Option D?*

<sup>81</sup> <http://www.ofcom.org.uk/consult/condocs/bcode09/main.pdf> (p100-103)

- d) *Do you agree with our assessment of the impact, including in relation to equality issues, of Option D on listeners, the radio industry and any other parties?*
- e) *If not, please explain why, providing any evidence or data you have to support your answer.*

## **Alternative approaches**

- 7.55 We invite stakeholders to offer any alternative approaches to the regulation of commercial communications in radio programming.
- 7.56 Stakeholders should be aware that any alternative approaches must comply with relevant legislation including the Communications Act 2003, Article 10 of the European Convention on Human Rights, Schedule 1 of The Consumer Protection from Unfair Trading Regulations 2008.
- 7.57 In relation to alternative approaches, stakeholders are invited to respond to Question 2 at the close of Part 4 of this document.

## Annex 1

# Responding to this consultation

## How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on Friday, 17 September 2010**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <https://www.ofcom.org.uk/consult/condocs/bcrradio2010/howtorespond/form>, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email [BCR.Radio@ofcom.org.uk](mailto:BCR.Radio@ofcom.org.uk) attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted to the address below
- Julia Richards  
BCR: Commercial Communications in RADIO programming  
Ofcom  
Content and Standards  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA
- A1.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A1.6 It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex 4. It would also help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

## Further information

- A1.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Daniel Maher on 020 7981 3891.

## Confidentiality

- A1.8 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk), ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.

- A1.9 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.10 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/accoun/disclaimer/>

## Next steps

- A1.11 Following the end of the consultation period, Ofcom intends to publish a statement at the end of 2010.
- A1.12 Please note that you can register to receive free mail Updates alerting you to the publications of relevant Ofcom documents. For more details please see: [http://www.ofcom.org.uk/static/subscribe/select\\_list.htm](http://www.ofcom.org.uk/static/subscribe/select_list.htm)

## Ofcom's consultation processes

- A1.13 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.14 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at [consult@ofcom.org.uk](mailto:consult@ofcom.org.uk) . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.15 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Vicki Nash, Director Scotland, who is Ofcom's consultation champion:

Vicki Nash  
Ofcom  
Sutherland House  
149 St. Vincent Street  
Glasgow G2 5NW

Tel: 0141 229 7401  
Fax: 0141 229 7433

Email [vicki.nash@ofcom.org.uk](mailto:vicki.nash@ofcom.org.uk)

## Annex 2

# Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

### Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

### During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened Plain English Guide for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will consult for up to 10 weeks depending on the potential impact of our proposals.

A2.6 A person within Ofcom will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. Ofcom's 'Consultation Champion' will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why.

### After the consultation

A2.8 We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website. In our statement, we will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

## Annex 3

# Consultation response cover sheet

- A3.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk).
- A3.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at [www.ofcom.org.uk/consult/](http://www.ofcom.org.uk/consult/).
- A3.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your personal details to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

## Cover sheet for response to an Ofcom consultation

### BASIC DETAILS

**Consultation title:** BCR: Commercial Communications in RADIO programming



**To** (Ofcom contact): Julia Richards

**Name of respondent** (if you are responding as an individual, write your own name. If you are responding on behalf of an organisation, write your organisation's name):

**Address** (only complete if you submitted your response by post):

### CONFIDENTIALITY

Please indicate how you would like Ofcom to treat your response:

A: I am happy for you to publish my response and my name or my organisation's name.

B: I am happy for you to publish my response but I do not want you to publish my name or my organisation's name.

C: I would like you to take account of my response but I do not want you to publish my response or my name or my organisation's name.

D: I have special confidentiality requirements, which I have detailed below:

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If you are happy for Ofcom to publish your response, when can we do this?

A: On receipt

B: After the consultation has closed.

### DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked above as not to be disclosed, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Name:

Signed (if hard copy):

Date:

## Annex 4

# Consultation questions

### Option A: 'Do nothing' and maintain the principle of separation

#### Question 1

- a) Do you consider that Option A should be adopted by Ofcom?
- b) If so, do you wish to comment on Option A?
- c) If not, please explain why. You may wish to respond to this under Question 2 below under 'Alternative approaches'.
- d) Do you have any comments on the rule set for Option A above? If so, please refer to any individual rules by reference to their current rule numbers.
- e) Do you agree with our assessment of the impact, including in relation to equality issues, of Option A on listeners, the radio industry and any other parties?
- f) If not, please explain why, providing any evidence or data you have to support your answer.

### Alternative approaches

#### Question 2

- a) Do you wish to suggest an alternative approach in relation to the regulation of commercial communications on radio?
- b) If so please outline your proposals, which should comply with relevant legislation (including the Communications Act 2003, Article 10 of the European Convention on Human Rights and Schedule 1 of The Consumer Protection from Unfair Trading Regulations 2008).

### Option B: Maintains the principle of separation but provides a defined set of exemptions

#### Question 3

- a) Do you consider that Option B should be adopted by Ofcom?
- b) If so, do you wish to comment on Option B? If you responded to the 2009 Code Consultation you may wish to refer Ofcom to your 2009 response.
- c) If not, please explain why. Again, if you responded to the 2009 Code Consultation you may wish to refer Ofcom to your 2009 response.
- d) Do you agree with our approach to the issue of not-for-profit funders? If you responded to the 2009 Code Consultation you may wish to refer Ofcom to your 2009 response on the issue of Public Information Programming.

- e) Do you have any comments on the rule set for Option B. If so, please refer to any individual rules by reference to the proposed rule numbers. You may also wish to outline any further exemptions (to the separation between commercial communications and spot ads) beyond those referred to in the rule set above.
- f) Do you agree with our assessment of the impact, including in relation to equality issues, of Option B on listeners, the radio industry and any other parties?
- g) If not, please explain why, providing any evidence or data you have to support your answer.

**Option C: Allows the integration of commercial communications and programming (except in relation to spot ads)**

**Question 4**

- a) Do you consider that Option C should be adopted by Ofcom?
- b) If not, please explain why.
- c) Do you agree with our approach to the issue of additional prohibitions or restrictions? Do you agree with our approach to a proposed review period? In particular do you wish to comment on the criteria which could govern a future review?
- d) Do you agree with our proposed approach prohibiting commercial references in programming primarily aimed at children and the related guidance we propose.
- e) Do you agree with our proposed approach to consumer affairs; news and political and controversial matters; and religious programming?
- f) Do you agree with our approach to the issue of not-for-profit funders? In particular do you wish to comment on the range of safeguards which would be in place?
- g) Do you agree with our approach to the issue of the selection or rotation of music? In particular do you wish to comment on our proposed approach in relation to the Public File guidelines; and our proposed approach to related Code Guidance, including the issue of appropriate intervals for, and content of, broadcast messages directing listeners to the Public File on stations' websites? You are also welcome to provide comments in relation to the selection or rotation of music in programming primarily aimed at children.
- h) Do you have any comments on the rule set for Option C (above)? If so, please refer to any individual rules by reference to the proposed rule numbers set out above.
- i) Do you have any comments on the discussion on guidance for Option C (above)?
- j) Do you agree with our assessment of the impact, including in relation to equality issues, of Option C on listeners, the radio industry and any other parties?
- k) If not, please explain why, providing any evidence or data you have to support your response.

**Option D: Allows the integration of commercial communications and programming (including in relation to spot ads)**

**Question 5**

- a) Do you consider that Option D should be adopted by Ofcom?
- b) If not, please explain why.
- c) If so, do you wish to make any comments about our approach to Option D?
- d) Do you agree with our assessment of the impact, including in relation to equality issues, of Option D on listeners, the radio industry and any other parties?
- e) If not, please explain why, providing any evidence or data you have to support your answer.

## Annex 5

# Glossary

The following is a glossary of broadcasting terms used in this document<sup>82</sup>:

<b>ASA</b>	Advertising Standards Authority – the UK's independent regulator of advertising across all media, including radio and television. Its role is to ensure that advertising is legal, decent, honest and truthful (by applying advertising codes).
<b>AVMS Directive</b>	Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services [including television].
<b>BCAP</b>	Broadcast Committee of Advertising Practice – responsible for writing and reviewing the <b>BCAP Code</b> , which is applied by the <b>ASA</b> .
<b>BCAP Code</b>	The UK Code of Broadcast Advertising (issued by <b>BCAP</b> ).
<b>Commercial arrangement</b>	A contract or other formal understanding between a broadcaster and a third party that generally includes payment in return for a <b>commercial reference</b> .
<b>Commercial Communication</b>	A broadcast reference (generally, paid-for) to a product or service. Such communications currently comprise <b>spot advertisements</b> and <b>sponsor credits</b> .
<b>Commercial reference</b>	A reference in <b>programming</b> , to a product/service that is subject to a <b>commercial arrangement</b> or promotes a station/broadcaster's own product/service.
<b>Editorial</b>	See <b>programming</b> .
<b>Editorial Independence</b>	(A current regulatory <b>principle</b> ) To ensure that <b>programming</b> is not distorted for commercial or other purposes. To this end, the broadcaster must maintain editorial control over <b>all programming</b> (i.e. including <b>sponsored programming</b> ).
<b>Ident</b>	See <b>station ident</b>
<b>Outside broadcast</b>	Generally abbreviated to 'OB', an outside broadcast is <b>programming</b> broadcast from a remote location. It is

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<sup>82</sup> Note: some of the meanings are specific to radio only

usually live and is characterised by the lead presenter(s) hosting it from a venue other than the studio.

**Principles**

Ofcom's regulatory principles are enforced through current rules. The current principles concerning **commercial references in programming** (including **sponsored programming**) are **transparency, separation and editorial independence**.

**Product placement**

The inclusion in **programming** of a paid-for reference to a product, service or trade mark.

**Programming**

Sometimes referred to as 'editorial', programming comprises programmes (e.g. a Breakfast Show), music, and features (e.g. weather) and includes **sponsorship**, and programme trails etc. – it is therefore all radio output apart from spot advertisements.

**RACC**

Radio Advertising Clearance Centre – UK commercial radio's advertising clearance body (and part of **RadioCentre**). It approves advertising and **sponsor credits** prior to broadcast, as the **BCAP Code** requires advance central clearance of "special categories" of advertisement and **sponsorship**.

**Radio**

Radio services licenced by Ofcom.

**RadioCentre**

The trade body representing the majority of UK commercial radio broadcasters and incorporating Radio Advertising Bureau (RAB), Joint Industry Commercial Radio I.T. (JICRIT), Aerials Foundation and **RACC**.

**Rotation**

Rotation involves the recurrence of music tracks broadcast within a specified period.

**Separation**

(A current regulatory **principle**) Advertising should be kept separate and distinct from **programming**. To this end, **sponsor credits** should also be clearly identifiable as such around (and sometimes within) **programming**.

**Signalling**

The means by which **transparency** is achieved (e.g. in the case of broadcast **sponsorship**, the inclusion of **sponsor credits** provides appropriate signalling).

**Sponsor**

Any body that gives payment (or equivalent) to the broadcaster to be associated with specific **programming**, with a view to promoting itself through that association.

**Sponsor credit**

Sometimes referred to as a '**sponsorship credit**', this is currently a brief branding statement that lets the listener know a **sponsor** has a commercial association with specific **programming** (i.e. a specific show or a specific feature). A **sponsor credit** may include phrases such as "brought to you by....." or "in association with..." to identify the **sponsorship** arrangement.

<b>Sponsored competition</b>	Sometimes referred to as a 'radio promotion' (by the radio industry), this is an example of <b>sponsored programming</b> . Generally, the <b>sponsor</b> not only pays to be associated with the competition but also donates the prize(s) on offer.
<b>Sponsored programming</b>	A programme (or set of programmes) or a feature (or set of features) that has received funding for its production from a <b>sponsor</b> .
<b>Sponsorship</b>	A <b>commercial arrangement</b> under which an individual or organisation funds specific <b>programming</b> (or a radio station) with a view to promoting itself through association with it.
<b>Spot Advertisement</b>	Sometimes referred to as a 'commercial' or 'spot ad', this is an advertisement found in a commercial break.
<b>Station ident</b>	A radio station's identification jingle, which identifies the radio station (or network) on air.
<b>Transparency</b>	(A current regulatory <b>principle</b> ) Any commercial association with <b>programming</b> (currently broadcast <b>sponsorship</b> ) should be made clear to listeners. Transparency is achieved through the broadcast of appropriate <b>signalling</b> .

**Annex 6**

# Equality Impact Assessment

## Initial Screening form

<b>Broadcasting Code Review (2010): Commercial References in Radio Programming</b>	
<p>An overview of our approach in this consultation to Equality Impact Assessment can be found in Part 2, at paragraphs 2.74 to 2.81.</p>	
<p><i>1. Briefly describe the aims, objectives and purpose of this policy/project</i></p>	<p>This review of the Broadcasting Code (“the Code”) is designed to ensure that it remains fit for purpose specifically in relation to commercial communications in radio programming. It explores a range of options from retaining current regulation through to the possibility of providing much greater liberalisations including integrating commercial communications within editorial programming.</p> <p>This project originally began in 2009, when a consultation was conducted on these rules. However, this took place before the UK Government announced that it was minded to permit product placement on television.</p> <p>In light of this announcement, the review of commercial communications on radio was extended in order to take into account the wider regulatory and broadcast policy landscape. This consultation paper represents the recommencement of that review.</p> <p>The proposed Code Rules are subject to a twelve-week public consultation.</p>
<p><i>2. Who is expected to benefit from the policy/project and in what way?</i></p>	<p>The main stakeholders who are likely to benefit from this project are broadcasters and listeners.</p> <p>Each option will provide different benefits and these are discussed under ‘Impact’ in each of Parts 4 to 7 of this document.</p> <p>In relation to those options which propose liberalisations, we would anticipate that the sector’s stakeholders (radio station operators/groups) would be likely to benefit: firstly in revenue terms through greater flexibility in the selling and subsequent broadcasting of commercial references; secondly through greater clarity of regulatory rules. Listeners would be likely to benefit from relevant and entertaining programming paid for by these additional revenue streams; and less reliance on spot advertising (which is unpopular with consumers). At the same time our proposals seek to ensure that consumer protection would be maintained.</p>

<p>3. What are the desired outcomes of this policy/ project?</p>	<p>To further Ofcom’s principles of a bias against intervention and on consumer protection. For regulation to be proportionate through the implementation of revised fit-for-purpose Code rules relating to commercial references on radio.</p>
<p>4. Who are the main external stakeholders in relation to this policy/ project?</p>	<p>The main external stakeholders are:</p> <ul style="list-style-type: none"> <li>• all UK commercial radio stations: local, regional and national (analogue and digital);</li> <li>• all community radio and Restricted Service Licence (RSL) stations;</li> <li>• all commercial and community radio listeners.</li> </ul>
<p>5. <i>Who is responsible for the project and who will be responsible for implementing the policy?</i></p>	<p>The Broadcasting Code Review project team in Ofcom’s Content and Standards Group is responsible for this part of the Code Review project.</p> <p>Once the consultation has closed and the responses have been taken into account a new Broadcasting Code will be issued, containing the final revised rules relating to commercial references on radio, and the review project will be complete.</p> <p>The Commercial &amp; Consumer Protection team (Standards) will then be responsible for implementing these rules through its ongoing enforcement work.</p>
<p>6. <i>Is this likely to have any relevance to equality and what evidence do you have to come to this conclusion?</i></p>	<p>Ofcom is required by statute to have due regard to any potential impacts its proposals may have on race, disability and gender equality, as well as the other groups protected by legislation in Northern Ireland<sup>83</sup>.</p> <p>Ofcom research has shown that listeners expect commercial references on commercial radio and they generally understand that this is the way in which commercial radio is funded. Our research did not bring to light any particular considerations in relation to the above equality groups, in this respect.</p> <p>We consider that the proposed regulatory liberalisation would therefore be unlikely to involve any adverse effect with regard to the above equality groups.</p> <p>However, we do consider that the proposed regulatory liberalisations may benefit some radio listeners from diversity groups for example different ethnic communities and visually impaired audience members and religious groups.</p> <p>Many radio stations (some community, some commercial) serve members of different groups within the community through the type and range of programmes they transmit. We consider that the proposed regulatory liberalisations will be likely to offer the potential for such stations to develop fresh revenue streams and thereby strengthen their radio operations and financial viability. This would have the effect of enriching these stations, and their offering to varied groups within the community, at a time of difficult trading conditions.</p>

<sup>83</sup> In addition to race, disability and gender, equality legislation in Northern Ireland also covers age, sexual orientation, carers, marital status, religious belief and political opinion.

<p><i>7. Do you have any early indications of possible adverse impact on equality?</i></p>	<p>None</p>
<p><i>8. What are the next steps? Will a Full EIA now be conducted?</i></p>	<p>In Parts 4 to 7 of the consultation document, we seek respondents' views on potential impacts in relation to matters of equality. This will ensure we have not failed inadvertently to consider any possible equality impacts resulting from each option proposed.</p> <p>Equality legislation in Northern Ireland covers age, and in addition to the equality groups discussed above, we raise issues about the particular protection of children (whether in Northern Ireland or the rest of the UK). These issues arise from the proposal to integrate commercial communications within editorial (in Parts 6 and 7 of the consultation). In particular we request stakeholder responses, in appropriate sections of the consultation, on whether additional prohibitions or restrictions should apply to promoting certain products which may have relevance to vulnerable groups including children. We propose consideration of a review of this issue and set out proposed criteria for such a review. We also set out our approach to programming primarily aimed at children.</p> <p>Following completion of the consultation and consideration of stakeholder responses, we will review whether, on the basis of stakeholder responses received, there are in fact, equality impacts and/or considerations which we had not, to date, accounted for. Should we find evidence to support this we will proceed to a full Equality Impact Assessment. Our published statement representing the conclusion of this consultation process will detail whether Ofcom did progress with a full Equality Impact Assessment and if so the conclusions drawn from this assessment. Such considerations will inform our final revisions to the Code.</p>

## Annex 7

# Consultation background chronology

- A7.1 This Annex sets out the relevant chronology leading up to the present Consultation.
- A7.2 As part of its duties and functions in relation to broadcasting under the Communications Act 2003 (“the Act”), Ofcom is required to draw up and, from time to time, revise a code for television and radio services, covering standards in programmes (which include the protection of people under the age of 18 and the application of generally accepted standards to protect the public from the broadcast of offensive and harmful material), sponsorship and fairness and privacy.
- A7.3 **On 25 July 2005** the Ofcom Broadcasting Code (“the Code”) came into effect following extensive public consultation and research during 2004<sup>84</sup>.
- A7.4 **Since then, the** consumer, industry and regulatory environments in which it operates have undergone many changes and Ofcom made a commitment in the 2008/9 Annual Plan to further develop the Code according to these changes. This was to ensure that the Code remains fit for purpose: providing both adequate protection for citizen-consumers, and a consistent and robust regulatory framework for broadcasters. In addition, by 19 December 2009, Ofcom was required to give effect to a number of requirements arising from the UK’s implementation of the Audiovisual Media Services (AVMS) Directive.
- A7.5 **On 15 June 2009** in response to these commitments, Ofcom launched its Consultation on the Broadcasting Code Review<sup>85</sup>. As part of this consultation, Ofcom proposed revised rules relating to sponsorship and commercial references in television and radio programming (Sections Nine and Ten of the Code).
- A7.6 The rules proposed in the 2009 Code Review had been drafted in light of the Government’s stated intention to maintain the prohibition on product placement – i.e. to continue to prohibit broadcast references to products or services in programming, in return for payment. To date, product placement has been prohibited in programmes produced by, or on behalf of, broadcasters that are licensed by Ofcom.
- A7.7 **On 16 September 2009**, the Government announced<sup>86</sup> its intention, subject to a consultation<sup>87</sup>, which closed on 8 January 2010, to permit product placement in UK produced television programmes. In light of this announcement, Ofcom evaluated its 2009 Review proposals to revise Sections Nine and Ten, and decided to extend the review. This extension would enable Ofcom to take into account not only the outcome of the Government’s consultation on product placement, but also the potential wider implications of any change in this area on other rules relating to commercial references in television and radio programming, including the rules relating to sponsorship.

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<sup>84</sup> The Code has been revised subsequently in October 2008 and December 2009.

<sup>85</sup> <http://www.ofcom.org.uk/consult/condocs/bcode09/main.pdf>

<sup>86</sup> [http://www.culture.gov.uk/reference\\_library/minister\\_speeches/6194.aspx](http://www.culture.gov.uk/reference_library/minister_speeches/6194.aspx)

<sup>87</sup> [http://www.culture.gov.uk/reference\\_library/consultations/6421.aspx](http://www.culture.gov.uk/reference_library/consultations/6421.aspx)

- A7.8 **On 9 October 2009** Ofcom announced<sup>88</sup> that, following the outcome of the Government's consultation on product placement, Ofcom would then consult as appropriate on new proposals for amendments to Sections Nine and Ten of the current the Code. (This statement also explained that in addition to Ofcom's further consultation on these sections, we would also take account of responses to the 2009 Consultation in relation to those rules which, in Ofcom's view, would be unaffected by the Government's eventual decision on product placement).
- A7.9 **On 16 December 2009** Ofcom published its revised Code<sup>89</sup>, including revised rules on sexual material and competitions and voting.
- A7.10 **On 9 February 2010** the Government announced its decision in relation to product placement<sup>90</sup>. The Government explained that the AVMS Directive requires that Member States prohibit product placement, but may decide to permit it in the four separate genres of 'cinematographic works, films and series made for television or audiovisual media services, sports programmes, and light entertainment programmes'.
- A7.11 It said its legislation would therefore follow this approach, by permitting product placement in these four broadcasting genres. It also stated that, while the AVMS Directive prohibits the placement of particular products such as tobacco products and prescription medicines, its legislation would prohibit further categories in UK-Produced programmes: alcoholic drinks; foods and drinks high in fat ("HFSS products"), salt or sugar; gambling; smoking accessories; over-the-counter medicines; infant formula and follow-on formula (please see paragraphs 2.32 to 2.33 regarding the Ministerial Statement on this).
- A7.12 It also confirmed that product placement in UK-produced programmes would be prohibited from current affairs, consumer and religious programming (to the extent that such programming could be defined as falling within the permitted series genres specified by the Directive). Further, legislation would specify that product placement should not affect editorial independence, be unduly prominent, or directly encourage the purchase of products or services.
- A7.13 **On 16 April 2010** the Audiovisual Media Services (Product Placement) Regulations 2010<sup>91</sup> ("the Regulations") came into force. The Regulations amended the Act to enable such product placement on television. However the Government made clear that television product placement would not become permissible until Ofcom had consulted on detailed changes to the Code. Ofcom is separately consulting on this<sup>92</sup>.

<sup>88</sup> <http://www.ofcom.org.uk/consult/condocs/bcode09/extension/>

<sup>89</sup> <http://www.ofcom.org.uk/tv/ifi/codes/bcode/>

<sup>90</sup> [http://www.culture.gov.uk/reference\\_library/minister\\_speeches/6624.aspx](http://www.culture.gov.uk/reference_library/minister_speeches/6624.aspx)

<sup>91</sup> The regulations are available at: [http://www.opsi.gov.uk/si/si2010/uksi\\_20100831\\_en\\_1](http://www.opsi.gov.uk/si/si2010/uksi_20100831_en_1).

<sup>92</sup> <http://www.ofcom.org.uk/consult/condocs/bcrtv2010>

## Annex 8

# Ofcom Public File

**All (commercial) local sound broadcasting service licensees were sent the following in a letter on 15 February 2010, explaining the background to the Ofcom Public File and what it must show. The text in bold is the proposed amendment to reflect the obligation for transparency of commercial arrangements around music playlists. All other aspects of Public Files are standing policy, and we are not consulting on them.**

### Background

Scrutiny of the Public File, along with content sampling, forms a mainstay of Ofcom's move from input to output regulation.

Ofcom carries out both 'spot' and planned monitoring of output and the Public File.

Ofcom's processes with regard to content and Public File scrutiny are designed solely to confirm that stations are operating within their Format with particular regard to localness and music obligations.

Any other compliance problems which emerge will be dealt with via the normal complaints process.

Given the different nature of individual Formats there is no one template against which to judge stations' performance.

The purpose of the Public File is to provide a snapshot of localness and musical output and it is likely to be an Ofcom monitor's first port of call, as it should act as signpost to features and characteristics of a station, helping to form an idea of station character before output sampling is begun.

As with localness, it may be that particular important elements of music content are delivered outside monitored times. This can be ascertained through dialogue with the licensee. It might also be that Public File content could provide additional context with regard to music content.

Failure to allow public access to the Public File will be seen as a compliance failure. The seriousness with which this is viewed will depend entirely on which elements are missing/unsatisfactory, and the circumstances. A serious compliance failure could result in the triggering of the process as set out above.

As with output monitoring, we select stations for arranged inspections of Public File content in order to traverse the radio landscape over a period of time. Given that much of the information required by the Public File is already both to hand and on many station websites Ofcom does not feel the obligation is an onerous one, but one that moves the industry further towards self-regulation.

The Public File should have its own specific and clear link from a station's homepage. It should explain the purpose of the Public File and should contain either the information or clear links to the information required (below). An explanation of the purposes of a Public

File should be along the lines that *“Each local commercial station in the UK has obligations with regard to its programmes, including its music and local content. These obligations are set out in the station Format which forms part of this station’s Public File. The Public File is also available in hard copy by post upon request by any member of the public, and serves as one indicator of each station’s output. Comment on the contents of the Public File should be made to the station or to the industry regulator, Ofcom.”*

Ofcom also urges stations to make the existence of the Public File known to its listeners through occasional on-air mentions.

What the Public File must show

The Public File must include all the following unless the station’s specific Format indicates that particular areas might be irrelevant. The Format, too, must appear in the Public File:

<ul style="list-style-type: none"> <li>• News Bulletin Schedule including which bulletins provide local news and which provide only UK-wide bulletins (together with a note of extended bulletins where relevant to Format)</li> </ul>
<ul style="list-style-type: none"> <li>• Recent News stories covered on air (this could be today’s news, a formal archive or recent examples)</li> </ul>
<ul style="list-style-type: none"> <li>• The News team</li> </ul>
<ul style="list-style-type: none"> <li>• The programme schedule</li> </ul>
<ul style="list-style-type: none"> <li>• The average number of hours of automated programming within weekday daytimes and within daytimes on Saturdays and Sundays *</li> </ul>
<ul style="list-style-type: none"> <li>• The amount of local programming per day produced by the station</li> </ul>
<ul style="list-style-type: none"> <li>• Ofcom Localness Guidelines (<a href="http://www.ofcom.org.uk/radio/ifi/rbl/car/localness">www.ofcom.org.uk/radio/ifi/rbl/car/localness</a>)</li> </ul>
<ul style="list-style-type: none"> <li>• Station Contact details</li> </ul>
<ul style="list-style-type: none"> <li>• Events/ charities support or coverage</li> </ul>
<ul style="list-style-type: none"> <li>• Recent programme and/or news highlights</li> </ul>
<ul style="list-style-type: none"> <li>• Any other issues or areas of interest likely to impact on localness</li> </ul>
<ul style="list-style-type: none"> <li>• The station’s playlist (core tracks or specific output)</li> </ul>
<ul style="list-style-type: none"> <li>• The Station Format</li> </ul>
<ul style="list-style-type: none"> <li>• How to complain to the station or to Ofcom (with a link to Ofcom’s website)</li> </ul>
<ul style="list-style-type: none"> <li>• <b>Any commercial arrangements around music playlists</b></li> </ul>

*\* Note that more precise detail of automated programming will be sought privately by Ofcom on a regular basis (given security concerns raised by licensees during the consultation)*

What the Public File looks like – both in hard copy or on the web - is entirely up to individual stations. However, a link to the Public File must be included on the station’s homepage.

## Annex 9

# Example of broadcast material under Options A to D

- A9.1 The table on the following page outlines examples of output listeners could hear under Options A to D (in each relevant column).
- A9.2 It provides stakeholders with the opportunity to compare, across each column, similarities and differences in the output associated with each option.
- A9.3 Please refer to Annex 5 for the Glossary of terms used.
- A9.4 The table identifies where there are requirements for particular material (i.e. spot advertisements and sponsorship credits) to be separated from editorial.
- A9.5 In the table on the next page (under Options A to C) we have highlighted where spot advertisements must be separated from editorial, as follows:

Pre-recorded advertisement for a product  
Pre-recorded station ident (A radio station's identification jingle, which identifies the radio station (or network) on air commonly used to separate an advertisement from programming that follows it)

- A9.6 In the table on the next page (under Options A and B) we have highlighted the requirement for sponsor credits to be separated from programming when broadcast during the course of it, as follows:

Sponsor credit (for example for a traffic bulletin)

- A9.7 Option D offers the opportunity for the seamless integration of editorial and commercial communications, therefore there are no requirements for the separation of advertisements or sponsor credits within this column.
- A9.8 Stakeholders should note that all material broadcast under Options A to D must comply with transparency requirements discussed in Parts 4 to 7 of this document.

**A typical sequence of broadcast material under:**

<p align="center"><b>Option A</b></p> <p align="center"><i>'Do nothing' and maintains the principle of separation</i></p>	<p align="center"><b>Option B</b></p> <p align="center"><i>Maintains the principle of separation but provides a defined set of exemptions</i></p>	<p align="center"><b>Option C</b></p> <p align="center"><i>Allows the integration of commercial communications and programming (except in relation to spot ads)</i></p>	<p align="center"><b>Option D</b></p> <p align="center"><i>Allows the integration of commercial communications and programming (including in relation to spot ads)</i></p>
<ul style="list-style-type: none"> <li>programme presenter talks to phone-in guest;</li> <li>programme presenter introduces a traffic bulletin;</li> </ul>	<ul style="list-style-type: none"> <li>programme presenter talks to phone-in guest;</li> <li>programme presenter introduces a traffic bulletin;</li> </ul>	<ul style="list-style-type: none"> <li>programme presenter talks to phone-in guest;</li> <li>programme presenter introduces a traffic bulletin;</li> </ul>	<ul style="list-style-type: none"> <li>programme presenter talks to phone-in guest;</li> <li>programme presenter introduces a traffic bulletin;</li> </ul>
<ul style="list-style-type: none"> <li>• sponsor credit for traffic bulletin;</li> <li>• sponsored traffic bulletin;</li> <li>• programme presenter talks about what record is coming up next (no promotion permitted in programming);</li> </ul>	<ul style="list-style-type: none"> <li>• sponsor credit for traffic bulletin;</li> <li>• sponsored traffic bulletin;</li> <li>• programme presenter talks about what record is coming up next (no promotion permitted in programming);</li> </ul>	<ul style="list-style-type: none"> <li>• sponsor credit for traffic bulletin;</li> <li>• sponsored traffic bulletin;</li> <li>• programme presenter talks about what record is coming up next; and...</li> </ul>	<ul style="list-style-type: none"> <li>• sponsor credit for traffic bulletin;</li> <li>• sponsored traffic bulletin;</li> <li>• programme presenter talks about what record is coming up next; and...</li> </ul>
<ul style="list-style-type: none"> <li>• pre-recorded advertisement for a product;</li> <li>• pre-recorded station id;</li> </ul>	<ul style="list-style-type: none"> <li>• pre-recorded advertisement for a product;</li> <li>• pre-recorded station id;</li> </ul>	<p>...seamlessly promotes a product; and ...</p>	<p>...seamlessly promotes a product; and ...</p>
<ul style="list-style-type: none"> <li>• presenter introduces the track;</li> <li>• track is broadcast;</li> <li>• programme presenter acknowledges the track title;</li> </ul>	<ul style="list-style-type: none"> <li>• presenter introduces the track;</li> <li>• track is broadcast;</li> <li>• content-related promotion (pre-recorded drop-in) promotes track availability as a download;</li> <li>• programme presenter acknowledges the track title and singer;</li> </ul>	<p>...introduces the track;</p> <ul style="list-style-type: none"> <li>• track is broadcast;</li> <li>• programme presenter acknowledges the track title and singer; and...</li> </ul> <p>...directly promotes the track's availability as a download and clearly states that promotion is "by/with our friends at [third party]";</p>	<p>...introduces the track;</p> <ul style="list-style-type: none"> <li>• track is broadcast;</li> <li>• programme presenter acknowledges the track title and singer; and...</li> </ul> <p>... directly promotes the track's availability as a download and clearly states that promotion is "by/with our friends at [third party]";</p>
<ul style="list-style-type: none"> <li>• pre-recorded advertisements;</li> <li>• pre-recorded station id;</li> </ul>	<ul style="list-style-type: none"> <li>• pre-recorded advertisements;</li> <li>• pre-recorded station id;</li> </ul>	<ul style="list-style-type: none"> <li>• pre-recorded advertisements;</li> <li>• pre-recorded station id;</li> </ul>	<ul style="list-style-type: none"> <li>• presenter-read advertisement for an MP3 player; and...</li> </ul>
<ul style="list-style-type: none"> <li>• presenter introduces another caller/topic/record...</li> </ul>	<ul style="list-style-type: none"> <li>• presenter introduces another caller/topic/record...</li> </ul>	<ul style="list-style-type: none"> <li>• presenter endorses one of the products just advertised;</li> <li>• presenter interviews producer of the product and... ...introduces another caller/topic/record...</li> </ul>	<ul style="list-style-type: none"> <li>• presenter endorses the MP3 player just advertised;</li> <li>• presenter interviews producer of the product and... ...introduces another caller/topic/record...</li> </ul>