



Proposed Code on the Prevention of Undue Discrimination between Broadcast Advertisers

Consultation

Publication date: 2 November 2011

Closing Date for Responses: 2 December 2011

Proposed Code on the Prevention of Undue
Discrimination between Broadcast Advertisers

Contents

Section		Page
1	Summary	1
2	Background to the Consultation	2
3	Ofcom's proposals	3
4	Next steps	4
Annex		Page
1	Proposed Code	5
2	Consultation Questions	9
3	Responding to this consultation	10
4	Ofcom's consultation principles	12
5	Consultation response cover sheet	13

Section 1

Summary

- 1.1 Under section 319 of the Communications Act 2003 (“the Act”) Ofcom has a duty to set standards, in a code, to secure that, amongst other things, “there is no undue discrimination between advertisers who seek to have advertisements included in television and radio services.”
- 1.2 Ofcom proposes to implement this standards objective through the proposed Code on the Prevention of Undue Discrimination between Broadcast Advertisers (“the proposed Code”), set out at Annex 1.
- 1.3 The Rules contained in the proposed Code require that:
 - a television broadcaster must not unduly discriminate between advertisers that seek to have advertising included in its licensed service; and
 - a radio broadcaster must not unduly discriminate between advertisers that seek to have any commercial communication included in its licensed service.
- 1.4 The proposed Code includes guidance, which is intended to assist broadcasters in interpreting and applying it. This would replicate the approach taken by Ofcom when it implemented the Cross-promotion Code, as an addendum to the Ofcom Broadcasting Code, on 10 July 2006.¹ Such guidance would be subject to review from time to time.

Next steps

- 1.5 The following sections of this document set out Ofcom’s proposals and invite stakeholders’ views. Following its consideration of responses, Ofcom intends to publish a statement and Code on the Prevention of Undue Discrimination between Broadcast Advertisers before the end of 2011.

¹ Ofcom’s statement concerning the introduction of a Cross-promotion Code, as an addendum to the Ofcom Broadcasting Code, can be found at:

<http://stakeholders.ofcom.org.uk/binaries/consultations/promotion/statement/statement.pdf>

Section 2

Background to the Consultation

Ofcom's statutory duties

- 2.1 Under section 319(1) of the Act, Ofcom is required to set, and from time to time to review and revise, such standards for the content of programmes to be included in television and radio services as appear to it best calculated to secure the standards objectives set out at section 319(2) of the Act.
- 2.2 Section 319(2) includes a standards objective that "there is no undue discrimination between advertisers who seek to have advertisements included in television and radio services."
- 2.3 Section 319(3) of the Act requires that the standards be contained in one or more codes.
- 2.4 All the standards objectives set out at section 319(2) of the Act, except for 319(2)(k), principally concern broadcast content² and have therefore been reflected in:
 - The Ofcom Broadcasting Code, which can be found at: <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/>; and/or
 - The UK Code of Broadcast Advertising (BCAP Code), which can be found at: <http://bcap.org.uk/The-Codes/BCAP-Code.aspx>. (A number of Ofcom's functions under section 319 of the Act (concerning broadcast advertising) have been contracted out to the Broadcast Committee of Advertising Practice (BCAP) and the Advertising Standards Authority (ASA). However, the standards objective set out at section 319(2)(k) was specifically excluded in the Authorisation dated 31 October 2004, executed under The Contracting Out (Functions relevant to broadcast Advertising) and Specification of Relevant Functions Order 2004.³)
- 2.5 Ofcom has not currently secured in a Code the standards objective at section 319(2)(k) of the Act and therefore proposes to implement the Code at Annex 1.

² Some standards objectives set out at section 319(2) of the Act may concern additional matters. For example, with regard to section 319(2)(i), television advertising scheduling requirements set out in EC Directive 2007/65/EC (Audio Visual Media Service Directive) are reflected in Ofcom's Code on the scheduling of television advertising.

³ Ofcom has concurrent jurisdiction with BCAP and/or the ASA for the regulatory functions that have been contracted out to them.

Section 3

Ofcom's proposals

- 3.1 Ofcom proposes to implement the standards objective contained in section 319(2)(k) through the proposed Code. The proposed Code will contain rules that broadcasters are obliged to follow and will be accompanied by guidance setting out Ofcom's likely interpretation of such rules.
- 3.2 Generally, products, services and trade marks may be promoted on television only within advertising, while commercial radio broadcasters may also promote them as commercial communications within programming. This difference is reflected by the fact that Ofcom regulates television and radio separately in this area, under Sections Nine and Ten of its Broadcasting Code, respectively. Since 20 December 2010, Section Ten of the Code has enabled radio broadcasters to promote products and services in programming in exactly the same way as they would in spot advertisements.
- 3.3 Ofcom therefore proposes to reflect the standards objective at section 319(2)(k) of the Act under separate rules for radio and television. This would ensure that undue discrimination between advertisers is prohibited with regard to all broadcast material in which the promotion of products, services or trade marks is currently permitted.
- 3.4 The proposed Rules in the proposed Code are therefore:
- **A television broadcaster must not unduly discriminate between advertisers that seek to have advertising included in its licensed service** (where 'advertising' is "any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking or natural person in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment"⁴); and
 - **A radio broadcaster must not unduly discriminate between advertisers that seek to have any commercial communication included in its licensed service** (where a 'commercial communication' is a spot advertisement or a commercial reference, as defined in Section Ten of the Broadcasting Code⁵).

Question 1: Do you agree with Ofcom's proposal for the Rules to be contained in the proposed Code? If not, please explain why.

- 3.5 Ofcom is also proposing to issue guidance on the application of the Code, which is included in Annex 1.

Question 2: Do you agree with the proposed Rules and guidance in the proposed Code? If not, please explain why.

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

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

⁵ Section Ten of the Broadcasting Code can be found at:

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

Section 4

Next steps

4.1 Ofcom invites stakeholders to comment on the proposals set out in this consultation. (Annex 2). As:

- Ofcom is required under section 319(3) of the Act to reflect the standards objective at section 319(2)(k) of the Act in a Code; and
- the proposed Rules follow closely the statute's wording (see paragraphs 2.2 and 3.2-3.4, above);

Ofcom is conducting a one month public consultation⁶ on the proposed Code (at Annex 1), as an addendum to the Ofcom Broadcasting Code.

4.2 Following its consideration of responses, Ofcom intends to publish a statement and implement a Code on the Prevention of Undue Discrimination between Broadcast Advertisers by the end of 2011.

⁶ This is a 'Category 3' consultation, as defined in Ofcom Consultation Guidelines November 2007, at: <http://stakeholders.ofcom.org.uk/consultations/how-will-ofcom-consult>

Annex 1

Proposed Code

Code on the Prevention of Undue Discrimination between Broadcast Advertisers

Introduction

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

Purpose of this Code

- 2.1 Under section 319 of the Communications Act 2003 Ofcom has a duty to set standards for the content of programmes to be included on television and radio services, in one or more codes. Under section 319(k) one of the standards objectives Ofcom must secure through such codes is that “there is no undue discrimination between advertisers who seek to have advertisements included in television and radio services”.⁷

Enforcement of this Code

- 3.1 Section 325 of the Act requires Ofcom to include conditions in licences issued under the Broadcasting Acts 1990 and 1996 to ensure the observance of the standards set in any Code.
- 3.2 This Code represents a Code for the purposes of section 319 and holders of broadcast licences are required to comply with the terms of this Code under the conditions of their licences.
- 3.3 Broadcasters should bear in mind the legislative background that has informed the Rules, the principles that apply to each section, the meanings given by Ofcom and the guidance issued by Ofcom, in this Code and in the Ofcom Broadcasting Code, all of which may be relevant in interpreting and applying the Rules in this Code. Broadcasters should be similarly mindful of the purpose and requirements of the BCAP Code.

Rules

- 4.1 **A television broadcaster must not unduly discriminate between advertisers⁸ that seek to have advertising included in its licensed service.**

Advertising

This is “any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking or natural person in connection with a trade, business, craft or

⁷ See sections 319(1), 319(2)(k) and 319(3) of the Act.

⁸ For the sake of clarity, an ‘advertiser’ includes, but is not restricted to, any commercial or non-commercial entity.

profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment”.⁹

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

Commercial Communication

On radio, this is a spot advertisement or a commercial reference.¹⁰

Guidance

- 5.1 The Rules prevent broadcasters from exercising undue discrimination between advertisers that seek to have their advertisements included in a television service or commercial communications included in a radio service.
- 5.2 Any consideration of whether or not a broadcaster that is licensed by Ofcom has engaged in undue discrimination will be a two-stage process. Firstly, Ofcom will assess whether or not the licensee has discriminated between advertisers. If it has, Ofcom will go on to consider whether such discrimination was undue.
- 5.3 In this context, discrimination means that the licensee does not reflect relevant differences between (or does not reflect relevant similarities in) the circumstances of advertisers in deciding whether or not to include advertisements in their licensed service and the terms on which a licensee agrees to broadcast the advertising in question. Discrimination can occur both where a licensee treats one third party advertiser in a different manner to another and where it offers more favourable terms to itself or an associated company.
- 5.4 Not all forms of different treatment will amount to discrimination since advertisers may not be in comparable positions. Ofcom will therefore need to consider on a case-by-case basis whether or not the licensee has, in fact, discriminated between advertisers.
- 5.5 However, it should be noted that the fact that a licensee has discriminated between advertisers does not of itself lead to a breach of the Code. In order for a breach of a Rule to have occurred, any discrimination must be “undue”.
- 5.6 The Rules do not therefore necessarily mean that licensees are required to have single tariff practices for advertising and Ofcom does not consider this Code should prevent bespoke pricing according to the needs of broadcasters and advertisers, if such contracts are necessary to ensure that advertising needs are met.
- 5.7 We also note that many advertisers use media buyers to negotiate with broadcasters on their behalf. As a result many advertisers’ contracts are with media buyers rather than directly with licensees. This Code does not cover commercial relationships between media buyers and advertisers.

⁹ This definition is derived from the definition of “television advertising” at Article 1(i) of the Audiovisual Media Services Directive, at:

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

¹⁰ ‘Spot advertisement’ and ‘commercial reference’, as defined in Section Ten of the Broadcasting Code, at: <http://stakeholders.ofcom.org.uk/binaries/broadcast/831190/section10RADIOpdf.pdf>.

- 5.8 Discrimination will not be undue where it can be objectively justified. There may be various reasons why terms and conditions and access to airtime may differ between advertisers. Some examples of potential objective justifications are as follows:
- Where a licensee chooses to include the advertisements of one charity free of charge and will only carry the advertisements of another charity for remuneration, this may be discrimination where the nature and purpose of the advertisements are similar. This may however be objectively justified where, for example, the channel or station has chosen to support a particular charity for a period as part of a social responsibility policy.
 - Where a licensee refuses advertising they do not wish to carry for legal or moral reasons, this may not amount to undue discrimination with respect to other advertisers. For example, a licensee may choose not to carry advertisements for gambling services on moral grounds and accordingly, may be entitled to refuse to carry such advertising.
 - Other forms of objective justification may include situations in which there is a doubt over the creditworthiness of a particular advertiser which may justify additional guarantees or the refusal of advertising space altogether.
 - It may be objectively justified for a licensee to make specific technical adjustments in order to carry an advertising campaign for one advertiser where the campaign is significant in duration and expenditure but not to undertake similar technical adjustments for an advertisement of short duration and low value.
- 5.9 Ofcom also has powers and duties in relation to competition issues. Concerns raised by advertisers in relation to discrimination may require Ofcom to consider whether an arrangement or conduct is prejudicial to fair and effective competition. Ofcom is required before exercising any enforcement powers under the Code to protect fair and effective competition to consider whether it would be more appropriate to proceed under the Competition Act 1998. Depending on the circumstances, it may be the case that concerns which relate directly to, for example, abuse of market power or agreements designed to distort competition, are more appropriately dealt with under the Competition Act.

Complaints

- 5.10 If an advertiser believes it has been unduly discriminated against and has been unable to negotiate a settlement with the broadcaster, the advertiser may submit a complaint to Ofcom in respect of the alleged undue discrimination.
- 5.11 Ofcom would expect advertisers and broadcasters to attempt to settle any dispute between themselves prior to any complaint being submitted.
- 5.12 If Ofcom receives a complaint under the Code in relation to undue discrimination, Ofcom will generally apply its procedures for investigating breaches of content standards for television and radio. These are available on Ofcom's website.¹¹
- 5.13 However, if Ofcom receives a complaint under the Code in relation to undue discrimination which we consider may require us to consider whether an arrangement or conduct is prejudicial to fair and effective competition, we will contact the

¹¹ <http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/>

complainant to discuss how the complaint should be handled. In such cases, it may be more appropriate for Ofcom to apply its procedures under Ofcom's Enforcement Guidelines for the handling of competition complaints.¹²

- 5.14 This guidance will be reviewed from time to time to reflect Ofcom's experiences with individual cases.

¹² Available at: <http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/complaints-disputes/>. These Guidelines are currently being reviewed.

Annex 2

Consultation Questions

Question 1: Do you agree with Ofcom's proposal for the Rules to be contained in the proposed Code? If not, please explain why.

Question 2: Do you agree with the proposed Rules and guidance in the proposed Code? If not, please explain why.

Annex 3

Responding to this consultation

How to respond

- A3.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 2 December 2011**.
- A3.2 Ofcom strongly prefers to receive responses using the online web form at <https://stakeholders.ofcom.org.uk/consultations/prevention-undue-discrimination/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 5), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A3.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email susan.naisbitt@ofcom.org.uk, attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A3.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Susan Naisbitt
Standards
Content, International and Regulatory Development Group
Ofcom
Riverside House
2a Southwark Bridge Road
London SE1 9HA
- Fax: 020 7981 3806
- A3.5 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.
- A3.6 It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex 2. It would also help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

Further information

- A3.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Susan Naisbitt on 020 7981 3271.

Confidentiality

- A3.8 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, 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.

- A3.9 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.
- A3.10 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

- A3.11 Following the end of the consultation period, Ofcom intends to publish a statement in December 2011.
- A3.12 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.

Ofcom's consultation processes

- A3.13 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 4.
- A3.14 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. 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.
- A3.15 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Graham Howell, Secretary to the Corporation, who is Ofcom's consultation champion:

Graham Howell
Ofcom
Riverside House
2a Southwark Bridge Road
London SE1 9HA

Tel: 020 7981 3601

Email: Graham.Howell@ofcom.org.uk

Annex 4

Ofcom's consultation principles

A4.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

A4.2 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

A4.3 We will be clear about who we are consulting, why, on what questions and for how long.

A4.4 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.

A4.5 We will consult for up to 10 weeks depending on the potential impact of our proposals.

A4.6 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.

A4.7 If we are not able to follow one of these principles, we will explain why.

After the consultation

A4.8 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 5

Consultation response cover sheet

- A5.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, www.ofcom.org.uk.
- A5.2 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.
- A5.3 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.
- A5.4 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/.
- A5.5 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 name, address, other contact details, or job title 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:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing	<input type="checkbox"/>	Name/contact details/job title	<input type="checkbox"/>
Whole response	<input type="checkbox"/>	Organisation	<input type="checkbox"/>
Part of the response	<input type="checkbox"/>	If there is no separate annex, which parts?	

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

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 as confidential, 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.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)