Not in Breach

Refusal to broadcast advertisements for BT Sport channels

Sky Sports channels

Introduction

Background and legal framework

Following an apparent breakdown in negotiations between the parties, on 26 February 2013, British Telecommunications plc ("BT") submitted a complaint to Ofcom against British Sky Broadcasting Limited ("Sky") claiming that Sky had breached the Code on the Prevention of Undue Discrimination between Broadcast Advertisers ("the Code"). Rule 4.1 of the Code provides that "A television broadcaster must not unduly discriminate between advertisers that seek to have advertising included in its licensed service". All broadcasters licensed by Ofcom have to comply with the provisions of the Code under their licence.

The Code is the means whereby Ofcom has discharged its duty, under section 319 of the Communications Act 2003 ("the Act"), to set standards for the content of programmes to be included in television and radio services, and in particular, under section 319(2)(k), to secure that "there is no undue discrimination between advertisers who seek to have advertisements included in television and radio services".

Section 319(2)(k) has its origin in the Television Act 1954, which provided that "in the acceptance of advertisements, there must be no unreasonable discrimination either against or in favour of any particular advertiser". The provision was subsequently carried over into the Television Act 1964, the Broadcasting Act 1981, the Broadcasting Act 1990, and, finally, the Communications Act 2003 (at which point the prohibition on "unreasonable discrimination" became the prohibition on "undue discrimination").

Although information around the rationale for the no unreasonable discrimination rule as conceived in 1954 is limited, it seems to have sought to ensure that, in principle, advertising airtime on television was not reserved for a limited group of advertisers. The Television Act 1954 marked the start of commercial television. At that time, there was only one commercial channel, and Parliament seems to have wanted to give equal access to television advertising airtime on that channel[1].

Since 1954, the commercial television landscape has changed significantly with a proliferation of commercial television services. During this period, the no unreasonable/undue discrimination rule has been retained[2]. We consider that the rule needs to be understood against the backdrop of a changed television landscape. In particular, we

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[1] On 3 November 1954, during discussions of the 1954 Television Act, the following exchange took place in the House of Commons:
Q: "Will the Government give us an undertaking that no one financial backer who has large industrial or retail interest will have a monopoly for the advertisement of his own wares?"
R (from the Minister): "that is already provided for in the Act"
We understand this exchange to be a reference to the unreasonable discrimination rule in the Television Act 1954.

[2] However, we have not identified any discussion of the rule during the parliamentary debates since its inclusion in the Television Act 1954, and in particular, in the course of its adoption as part of the Communications Act 2003. The fact of its retention suggests Parliament saw continued value in the existence of the rule.

are conscious of the fact that in today's environment, advertisers have a range of opportunities to advertise their products on television, with different channels having different audiences both in terms of audience level and demographic mix.

Ofcom is not bound by decisions made by legacy regulators. We note however that the Independent Television Commission ("ITC") considered a complaint by BSkyB against ITV in 1999 for its refusal to accept a Sky Digital advertisement. ITV had refused to accept an advertisement for Sky Digital on the grounds that it included a reference to a particular day of the week by mentioning "...football on Monday nights". BSkyB believed it had been discriminated against unreasonably because some ITV companies had previously run an advertisement by ONdigital (the digital terrestrial television service provider) which contained an even more specific reference to a date of broadcast: *"Saturday January 16th live and free only with ONdigital"*. The ITC found in favour of BSkyB.

In addition, the ITC also noted generally in relation to competing broadcasters:

> "After consultation on whether it was acceptable for television companies to refuse to accept advertising for competing television broadcasting services, the ITC notified its licensees that it would be likely to regard a refusal to accept advertising of a generic kind from competing broadcasters as "unreasonable discrimination". However, it would not be unreasonable for ITC licensees to refuse advertisements which promote specific programmes at particular times on a competing service".

Advertisements which promote specific programmes at particular times on a competing service are known as "appointment to view" advertisements.

Keeping in mind the legislative background set out above, and in considering whether or not Sky has engaged in undue discrimination against BT in breach of Rule 4.1 of the Code, Ofcom has followed the steps set out in the Guidance accompanying the Code[3] which states that:

(i) Firstly, Ofcom will assess whether or not the licensee has discriminated between advertisers;

(ii) If it has, Ofcom will go on to consider whether such discrimination was undue.

Discrimination will not be undue where it can be objectively justified.

Ofcom's approach to handling the complaint

We considered that BT's complaint raised issues warranting investigation under Rule 4.1 of the Code.

In accordance with paragraph 5.12 of the Code, in investigating this matter, Ofcom applied its procedures for investigating breaches of content standards for television and radio ("the Procedures").

As set out in paragraph 1.22 of the Procedures, we therefore sought Sky's comments on the complaint. We provided Sky with a copy of the complaint on 18 March 2013, and Sky made representations responding to the complaint on 3 April 2013.

[3] http://stakeholders.ofcom.org.uk/binaries/broadcast/831190/undue-discrimination.pdf

On 3 May 2013, we provided the parties with our Preliminary View and invited representations in relation to the same. We also provided BT with a non-confidential copy of Sky's representations in response to the complaint.

On 20 May 2013, both parties provided us with their representations in response to the Preliminary View. This decision is our Final Decision and takes full account of all representations made by the parties, both as part of the complaint and response to the complaint, and as part of the representations to the Preliminary View.

BT's complaint and representations in response to the Preliminary View

BT explained in its complaint that it holds two Television Licensable Content Service (TLCS) licences and that August 2013 will see it launching two BT Sport channels, which will broadcast a range of premium sport content.

Sky holds TLCS licences for a number of services, including nine sports channels (the "Sky Sports channels" or "Sky Sports"). Sky also retails packages of pay television content to subscribers. Sky Media sells advertising airtime on Sky channels on behalf of Sky.

In January 2013, media buying agency Maxus UK (Maxus) approached Sky Media to request advertising airtime for a BT Sport campaign on the Sky Sports channels. Sky Media's offer to BT stated that Sky accepts most advertising on its channels, subject to a limitation that "Sky will not carry advertising from a sports TV retailer on Sky Sports".

BT complained to Ofcom under the Code, that by refusing to carry BT Sport advertising on its Sky Sports channels, Sky was behaving in an unduly discriminatory manner in breach of the Code. In particular, BT considered that Sky had discriminated: (a) between BT Sport and the Sky Sports channels because Sky carries self-promotions and cross-promotions advertising Sky's own sports channels; and (b) between BT Sport and the ESPN sports channels because the Sky Sports channels also carry, and have carried, advertising for the ESPN sports channel.

<u>Discrimination</u>

BT argued that Sky's reason for refusing BT Sport advertising, namely that Sky does not (currently) retail the BT Sport channels (whereas Sky does retail the ESPN channels), is irrelevant when assessing discrimination under the Code. In addition, BT argued that the characteristics of BT as a pay TV platform operator and any concern that Sky may have about inducing subscribers to the Sky Sports channels to switch from Sky Sports subscriptions to BT Sport subscriptions, are irrelevant for distinguishing between broadcast advertisers. Rather, BT Sport and the ESPN channel are both sports channels which compete with each of the individual TLCS licensed Sky Sports channels.

<u>Undue discrimination</u>

BT argued that Sky's discrimination is undue because Sky's conduct is not objectively justified. In particular, Sky's conduct does not pursue a legitimate aim, and, in any case, Sky's conduct is not proportionate to its aim.

Not a legitimate aim

In response to Sky's argument that it is seeking to protect the brand and the revenue of the Sky Sports channels, BT argued that any aim should be objective and of general application (as stated in Ofcom's guidance to the Code), i.e. it should not target directly or indirectly a particular company, in order to qualify as an objective justification. As Sky's refusal targets “competing sports pay TV retailers” and there is no other sports pay TV retailer with its own sports channel, Sky is effectively targeting BT. Sky’s alleged legitimate aims cannot therefore be legitimate.

BT also argued that Sky’s alleged legitimate aims should be considered in light of Sky’s market power in relation to the wholesale supply of Core Premium Sports Channels and argues that its incentives are therefore to defend and strengthen its market power, and limit the growth of the BT Sport channels and brand.

Finally, BT argued that legitimate aims should not include ordinary commercial motives, that any rationally operated channel is likely to pursue these aims and could therefore rely on these aims to refuse to carry a generic advert for a competing channel.

Specifically with respect to Sky’s argument that it is refusing advertising for the BT Sport channels because it is seeking to protect its brand, BT argued that such brand protection concerns are not valid in relation to the carrying of BT Sport advertising. In particular:

- It is disingenuous for Sky to rely on concerns that BT’s advertising would be denigratory, because Sky is already protected from this by (1) Sky’s media terms (which allow it to reject scripts or adverts at its discretion), (2) the BCAP Code; and (3) the Clearcast pre-clearance process.

- There is no reason to think BT’s advertising will lead to customer confusion or advertising clutter, because Sky advertisements and ESPN advertisements have run alongside each other for the last three years and have focussed on the same elements as Sky’s advertising, but this does not seem to have caused concern.

- In any case, BT has offered to address Sky’s concerns by giving it an undertaking (1) not to run BT Sport advertising on Sky Sports that would be denigratory to or mention the Sky Sports channels either collectively or individually; and (2) not to run BT Sport airtime at weights any greater than the average annual weights seen for ESPN on Sky Sports channels since ESPN’s launch.

BT also argued that Sky’s concerns in relation to brand protection would equally apply to ESPN. Sky is therefore unduly discriminating between ESPN and BT.

Specifically with respect to Sky’s argument that it is refusing advertising for the BT Sport channels because it is seeking to protect its revenue, BT argued that such revenue protection concerns are not valid in relation to the carrying of BT Sport advertising. In particular, there is no realistic prospect that the Sky Sports channels will lose significant wholesale subscription revenues because BT Sport is a largely complementary offering (in the same way as ESPN). Indeed Sky Sports customers are unlikely to cease their Sky Sports subscription in light of:

- the nature and content of BT Sport (Sky Sports has 116 Premier League and Champions League games whereas BT has 38 Premier League games and no Champions League coverage); and

- the price positioning of BT Sport (BT Sport is free to all broadband customers and £12/15 per month on a standalone basis), whereby BT is encouraging existing sports fans to take their broadband from BT and encouraging new customers to take a sports subscription, rather than encouraging large numbers of Sky Sports customers to cease their Sky Sports subscription. BT noted that it is seeking the wholesale supply of Sky Sports 1 and 2 in order to sell attractive bundles packages. This would tempt some Sky Sports pay TV subscribers away from Sky's satellite platform however this would not involve switching between Sky Sports and BT Sport.

BT also argued that Sky's concerns in relation to revenue protection equally apply to ESPN, if Sky is seeking to protect the subscription revenues of the Sky Sports channels as opposed to other Sky revenue sources. Sky is therefore unduly discriminating between ESPN and BT.

Not proportionate

BT argued that in assessing proportionality, we should consider whether Sky could have taken a less restrictive approach (i.e. was Sky's refusal the least onerous measure necessary to achieve its aims?). Instead of an outright ban on advertising for BT Sport, Sky could have agreed certain conditions regarding the nature, content and frequency of BT Sport advertising. BT noted that it has sought to address Sky's concerns by giving it a specific undertaking (as discussed above).

BT further argued that, in assessing the effect of Sky's refusal on BT, we should take account of both the "quantitative harm" to BT and the "qualitative harm" to BT.

- First, excluding BT Sport from advertising on Sky Sports channels excludes BT from reaching the biggest proportion of sports viewing on commercial television (it argues that Sky Sports channels carry c. 60% of sport viewing). If BT is unable to advertise BT Sport on the Sky Sports channels, either BT will be required to spend [✂]% more to achieve the same weight of advertising (measured by number of television viewership ratings (TVRs)) or BT will be faced with a decrease of [✂]% in its number of TVRs as against BT's advertising plan for BT Sport. BT further noted that the quantitative harm must be judged by reference to the broadcast advertising spend and not the total operational expenditure of a broadcaster such as the cost of sports rights, talent fees or running a customer call centre. BT considered that it would be an "absurd outcome" – rendering the Code redundant for all but the smallest of advertisers – if Ofcom were to take into account a company's total cost base when assessing impact on advertising spend.

- While there are many other ways for BT to advertise its sports channel, BT is seeking to access sports viewers in the most effective and targeted way, and therefore needs access to the key demographic of 60% of sport viewing on commercial TV that the Sky Sports channels represent.

- BT is entitled to target its campaign to the audience that it deems most relevant to its advertising needs. Indeed, a tightly defined target audience is critical to effective advertising, and BT's selection of a targeted audience ("men who watch sports") is entirely consistent with industry best practice.

- Even if judged against the broader demographic of "ABC1 Men" the Sky Sports channels still account for 43% of the top-reaching programmes within the Sky universe.

- That Sky accounts for very few of the overall top 100 programmes across all airtime is irrelevant.

- The programming environment is important to effective advertising, and BT has sought to place BT Sport adverts in sport programming.

- BT would be forced to redeploy on more expensive channels, and despite the redeployment, there is a loss over and above the additional advertising cost.

BT also submitted that excluding BT Sport from the Sky Sports channels not only prevents BT from reaching viewers of the channels on the Sky DTH satellite platform but also on all other platforms on which Sky Sports channels are carried.

BT further argued that Sky's refusal to carry BT Sport advertising is likely to reduce the number of subscribers to the BT Sport channel and is likely to have a detrimental impact on BT's ability to monetise its existing sports rights, and to compete effectively in the long term for sports rights.

Application of the Code

Generally in relation to the manner in which the Code should be applied, BT argued that if Ofcom were to accept brand protection and revenue protection as legitimate aims, the Code would become redundant, as practically any commercial channel could rely on such arguments to justify a discriminatory refusal.

BT further argued that it would be appropriate for the ITC's guidance in relation to unreasonable discrimination to be taken into account when assessing what constitutes undue discrimination under the Code, and that, applying the previous ITC guidance, Sky's refusal of BT's generic advertising is in breach of the Code.

Sky's representations in response to the complaint and in response to the Preliminary View

Sky argued (1) that Sky's treatment of BT is not discriminatory; and (2) that any discrimination would in any case not be undue.

No discrimination

Sky argued that there are relevant differences as between Sky and BT, and as between BT and ESPN. In particular, Sky argued that the "principal" relevant difference is that Sky retails both the Sky Sports and ESPN channels, whereas it does not currently retail the BT Sport channels. It argued that the broadcaster of a pay TV channel A will be less willing to carry advertisements from a competing pay TV channel B where that competing channel B is carried by different pay TV retailers, because the broadcaster of channel A risks losing subscribers if advertising for channel B induces consumers to switch to a retailer that does not carry channel A. Sky argued that differences in the relationships between pay TV broadcasters and retailers are differences that a pay TV broadcaster can legitimately take into account when deciding whether to carry advertising from rival broadcasters.

In relation to the alleged discrimination between Sky and BT, Sky further argued that its use of promotional airtime on the Sky Sports channels to promote Sky Sports cannot be relevant to Ofcom's assessment of the existence of discrimination in relation to the access granted to commercial airtime on Sky Sports.

In relation to the alleged discrimination between BT and ESPN, Sky further argued that

- BT is the retailer and broadcaster of its sport channels, and a "triple play" provider offering TV, telephony and broadband services, whereas ESPN is solely a broadcaster of its sport channels; and

- BT wishes to promote retail subscriptions to its sports channels from BT, primarily in combination with communications services (broadband, telephony and line rental) that it also retails, whereas ESPN's advertising focuses on the content of its sports channels and the availability of that content across all its appointed retailers.

No undue discrimination

Sky argued that any discrimination could in any case not be considered undue because (1) Sky's approach is objectively justified; and (2) any impact on viewers or on competition is immaterial. Sky added that the threshold for whether any discrimination could be considered "undue" should be a high one in the present case, because to compel Sky to grant access to commercial airtime on the Sky Sports channels would involve interference with the fundamental rights of a firm's freedom to contract and its ability to exploit its intellectual property rights, and because the law on undue discrimination requires that for discrimination to be undue, it must be capable of having a material impact on competition.

Sky submitted that it is objectively justified in not carrying advertising from BT Sport channels because of the risks posed to the Sky Sports channels and brands, and to Sky's substantial related investments and IP therein. In particular, Sky submitted that:

- It has employed significant expertise, taken significant risks and made substantial investments in creating the Sky Sports channels (in particular in acquiring sports rights). In doing so, it has generated substantial intellectual property in the Sky Sports channels, as reflected in the Sky Sports brand.

- Brand identity is a key asset in competition among broadcasters. They generate consumer loyalty, provide information about the types of programmes likely to be found on a channel, thereby driving audiences and, in the case of pay TV channels, subscribers.

- To advertise BT Sport channels on the Sky Sports channels could adversely impact the Sky Sports brand, in particular because:

    1. BT could seek to run advertisements that involve negative comparisons with Sky Sports and/or denigration of the Sky Sports brand; and

    2. BT's advertising for its sports channels is likely to reduce the clarity and effectiveness of Sky's own advertising of its sports channels. In order to ensure that Sky's own advertising is effective, it should be clearly separated from rivals' advertising. Indeed, it is to preserve the impact and value of advertising that, in relation to TV advertising, advertisers often seek a degree of exclusivity as against competing brands or products. In relation to advertising for BT Sport channels this is of particular concern because:

        (i) The similarity of the products being promoted, whereby BT advertising is likely to focus to a significant extent on sports or in some cases even events that are common both to Sky Sports and BT Sport channels; and

        (ii) The likely frequency of BT's sports channels advertisements in order to achieve adequate audience coverage (in light of the relatively small sizes and the nature of audiences, with a significant number of casual viewers who watch irregularly). In order to ensure that Sky Sports advertisements and promotions were not "crowded out" of viewers' attention, Sky would be likely therefore to increase the frequency with which its advertisements and promotions were shown.

There is therefore a risk of advertising "clutter", diminishing audience attention to advertisements and causing consumer confusions, as well as resulting in a poorer viewing experience.

- Sky submitted that it is further objectively justified in not carrying advertising from BT Sport channels, because there is a risk that by carrying competitor sports broadcaster advertising that seeks to encourage switching to the competing broadcaster's service, the "host" broadcaster would be worse off having taken the advertising revenues, if those were outweighed by the lost wholesale revenues. This is similar to the concern with appointment to view advertising.

- Sky further submitted that this approach is proportionate, because it is willing to carry advertising for the BT sport channels on non-flagship programming on Sky entertainment channels and on Sky Movies, and on all programming on non-core Sky branded channels, where the risk to Sky brands is reduced.

Sky further submitted that in treating BT differently from ESPN, Sky is not unduly discriminating because it faces relatively little risk of advertising by ESPN being of a type that would either damage Sky Sports brands or its revenues which it says has been borne out in practice. By contrast, Sky's view, which it said had also been borne out in practice, was that there would be a high risk of BT Sport advertising being of a type that would damage Sky Sports' brand or its revenues, for the following reasons:

- Differences in commercial objectives between ESPN and BT – ESPN acts solely as a pay TV channel broadcaster, whereas BT's principal interest in developing its BT Sport channels is in support of its efforts to attract and retain broadband and telephony subscribers.

- Differences in distribution channels – ESPN's channels are distributed broadly, with ESPN choosing to make them available via all main pay TV retailers in the UK, whereas BT is currently the exclusive retailer of its sports channels.

- Sky's commercial relationship with ESPN – Sky retails ESPN's channels on its DSat platform, and various obligations flow from this distribution agreement, including :

    - The distribution agreement appoints Sky as seller of commercial airtime on the ESPN channels.

    - The confidential terms of the distribution agreement provide for various obligations imposed on both ESPN and Sky in relation to the marketing and advertising of the ESPN channels. [✂]

Sky submitted that these factors have the following effect:

- In relation to the Sky Sports brand, ESPN's business objectives, its contractual relationship and the collaborative nature of that relationship gave Sky comfort that ESPN would not seek to denigrate Sky's sports channels or the Sky Sports brand.

- In relation to revenues, Sky's role as distributor of ESPN's channels and ESPN's platform neutral approach to the distribution of its channels, meant that the risk of ESPN advertising in such a way as to encourage Sky Sports subscribers to switch to distributors/platforms view which Sky Sports channels were not available, was low.

- In relation to advertising clutter, again Sky considered there was limited risk of ESPN advertising in such a way as to significantly reduce the clarity and effectiveness of Sky's own promotions [✂].

<u>Proportionate</u>

Sky submitted that in order for discrimination to be "undue" it should be capable of having a material impact on competition. In particular, it argued that an assessment of whether discrimination is undue should be undertaken consistently with established law and regulation, including competition law. Otherwise, Ofcom runs the risk of intervention that is disproportionate to any harm and likely to interfere unduly with the fundamental principle of a firm's freedom to contract and exploit its IP.

Sky submitted that BT has vastly overstated the likely effect of it not being able to advertise its sports channels on Sky Sports channels. As BT will be able to advertise BT Sport channels on all channels other than the Sky Sports channels, and given that Sky Sports channels account for less than 3% of commercial airtime (6.5% of impacts in relation to ABC1Men), over 97% of commercial airtime (over 93% of ABC1 Men impacts) remains available to BT.

Generally, Sky submitted that TV advertising accounts for only a small proportion of overall customer acquisition and retention costs, that the cost of TV advertising is also small in the context of rights costs and other costs associated with launching a sports channel, and that BT can reach its target audience via a wide range of advertising media of which TV is but one.

Sky further submitted that any assessment of the impact of Sky's approach to advertising of BT's sports channels on competition should be conducted with a frame of reference no narrower than "all TV advertising", and that anything narrower than that, including "men who watch sports" is artificial.

Sky also submitted that the audiences delivered by Sky Sports are readily replicable elsewhere. In particular:

- Sky Sports channels do not deliver, even collectively, the mass audiences that ITV1 individually does.

- The Sky Sports channels collectively account for only 9% of viewing by "men who watch sport" across all commercial TV channels. BT can therefore reach their target audience by other means.

- BT's analysis overstates the effect on BT's TVRs and costs of not being able to advertise on the Sky Sports channels. In particular:

    - Even an [✂]% reduction in TVRs (as claimed by BT) results in a less than 3% reduction in terms of coverage achieved with ABC1 Men;

    - The reduction in TVRs which BT claims to be [✂]% is in fact smaller, and is the result from the manner in which BT has re-allocated its spend across the other commercial channels (up-weighting on ITV and excluding all Sky Media channels).

  - Sky asked a third party media auditor to run two hypothetical campaigns aiming at delivering 500 TVRs in ABC1 Men for the same budget, one with Sky Sports and one without Sky Sports, and the auditor was able to plan a campaign that delivers ABC1 Men at a similar coverage level without Sky Sports than with Sky Sports.

- Targeting efficiency is also replicable via other channels and conversion rates demonstrate that for ABC1 Men, other channels can be more efficient than Sky Sports.

Sky therefore argued that Sky Sports airtime is not indispensable, or necessary to effectively advertise a sports channel. There is no material impact on BT, still less any material impact on competition.

Sky argued that the above arguments are valid both when considering discrimination between Sky and BT and between ESPN and BT. Sky has also noted that BT's offer of an undertaking would not address all of Sky's concerns and would be unlikely to be workable in practice.

Decision

Relevant facts

In assessing BT's complaint, we have taken account, in particular, of the following relevant, uncontested facts:

Sky is the holder of TLCS licences for a number of sports channels, namely Sky Sports 1, Sky Sports 2, Sky Sports 1 HD, Sky Sports 2 HD, Sky Sports 3 HD, Sky Sports 4 HD, Sky Sports F1 HD, Sky Sports News International and Sky Sports News HD (further referred to as a "Sky Sports channel" or the "Sky Sports channels"). It is in Sky's capacity as licence holder for these channels that Ofcom has considered the complaint (and not in its capacity of licence holder for other channels).

BT is the holder of two TLCS licences for two channels, Sailing 1 and Sailing 2, which BT intends to modify for the launch of two BT Sport channels. Our understanding is that BT is likely to "self-retail" the BT Sport channels on DSat. BT also operates its own retail platform.

ESPN is the holder of TLCS licences for its sports channels ESPN, ESPN America and ESPN Classic. The ESPN channels are retailed by Sky, as well as a number of other pay TV retailers. They are not, however, retailed by ESPN itself. We note that ESPN has recently sold sports channels to BT, and that the wholesale relationship between ESPN and Sky for sports channels will soon end.

Sky carries advertisements (albeit during promotional airtime) for the Sky Sports channels on Sky Sports channels. It also carries advertisements (during commercial airtime) for the ESPN sports channels on Sky Sports channels, or it has at least done so in the period during which BT requested advertising time on Sky Sports in order to advertise its sports channels (January/February 2013). However Sky has refused to carry advertising for the BT Sport channels on Sky Sports channels on the basis of Sky's advertising terms, which contains a general ban on "advertising from a sports TV retailer" on Sky Sports.

Analysis

As set out above, we first assess whether or not Sky has discriminated between advertisers, and, if it has, we go on to consider whether such discrimination was undue.

Discrimination

All broadcasters licensed by Ofcom have to comply with the provisions of the Code under their licence.

Sky Sports carries advertising for Sky Sports channels and for the ESPN sports channels. As a first step, Ofcom has assessed whether Sky, as the broadcaster, has discriminated between BT and other advertisers, and in particular (a) between BT and Sky; and (b) between BT and ESPN.

Discrimination in this context means that Sky does not reflect relevant similarities or differences in the circumstances of advertisers (i.e. Sky, ESPN and BT which are each advertisers) in deciding whether or not to include advertisements in its licensed service and the terms on which it agrees to broadcast the advertisements.

In order to assess whether Sky has treated BT in a different manner from other advertisers, the relevant question is whether the advertisers are in comparable positions.

BT Sport, ESPN and Sky are all operators of sports channels. In that respect they are in very similar positions as potential advertisers on Sky Sports channels, wishing to promote viewing of their respective channels. The “principal” difference identified by Sky in this instance is that Sky retails both the Sky Sports and ESPN channels on its DSat platform, whereas Sky does not retail the BT Sport channels. In addition, in considering discrimination between Sky and BT, Sky argued that its use of promotional airtime on the Sky Sports channels to promote Sky Sports cannot be relevant to Ofcom’s assessment of the existence of discrimination in relation to the access granted to commercial airtime on Sky Sports. Finally, in considering discrimination between ESPN and BT, Sky argued that BT is a retailer and broadcaster of its sports channels, whereas ESPN is solely a broadcaster, and BT wishes to promote retail subscriptions to its sports channels from BT, whereas ESPN’s advertising focuses on the content of its sports channels and the availability of that content across all its appointed retailers.

In considering whether a difference is relevant for the purposes of analysing the existence of discrimination we have focussed on the similarities and differences from the perspective of the advertisers and the product they want to advertise. We believe this is important because we are considering whether one advertiser (i.e. a person in his capacity as advertiser, and not, for example, in his capacity as broadcaster) is being disadvantaged relative to another.

Discrimination between Sky and BT

The difference identified by Sky, i.e. Sky retails the Sky Sports channels but does not retail the BT Sport channels, relates not to the characteristics of BT as an advertiser, but to the relationship which Sky, as the retailer of subscription sports channels, has / does not have with BT.

In relation to Sky’s argument that its use of promotional airtime on the Sky Sports channels cannot be relevant, we note that Rule 4.1 of the Code provides “A television broadcaster must not unduly discriminate between advertisers that seek to have advertising included in its licensed service” whereby “advertising” is defined as “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”.

Accordingly, promotions broadcast in promotional airtime can qualify as advertising, although this is not necessarily the case; we consider that this question turns on whether such promotions promote “the supply of goods or services (...) in return for payment”. In this case, neither Sky nor BT has made specific submissions in relation to the precise nature of Sky’s promotions for the Sky Sports channels, and in particular whether they promote Sky Sports channels “in return for payment”. However, we note that Sky promotes its Sky Sports channels both to viewers who already have access to such channels as well as to viewers who do not (for example, Sky Sports 1 may show promotions for Sky Sports 2 or Sky Sports F1 to viewers who do not already subscribe to Sky Sports 2 or Sky Sports F1). Sky therefore promotes those channels “in return for payment”. Those promotions therefore qualify as advertising under the Code, although, in accordance with Ofcom’s Cross-promotion Code, and Article 23(2) of the AVMS Directive, because these promotions are “announcements made by the broadcaster in connection with its own programmes”, they do not count as advertising for the purposes of calculating advertising minutage.

We therefore conclude that in not accepting advertising for the BT Sport channels, Sky is discriminating between Sky and BT.

Discrimination between ESPN and BT

As indicated above, the difference identified by Sky, i.e. Sky retails the ESPN channels but does not retail the BT Sport channels, relates not to the characteristics of BT as an advertiser, but to the relationship which Sky, as the retailer of subscription sports channels, has / does not have with BT.

In addition, the other difference identified by Sky, i.e. BT is a sports channel retailer whereas ESPN is not, similarly does not relate to the characteristics of BT as an advertiser of its sports channel. While Sky argued that this difference has consequences for the type of advertising each of BT and ESPN would wish to broadcast (namely, that BT would wish to promote retail subscriptions, whereas ESPN would focus on the content of its sports channel), this speculates as to the manner in which BT would advertise its BT Sport channel. We also note that Sky similarly is a retailer of sports channels.

We therefore conclude that Sky’s rejection of all advertising by BT for the BT Sport channels on the Sky Sports channels amounts to discriminatory behaviour. We therefore proceed to consider whether such discrimination is undue.

Undue discrimination

As a second step, Ofcom has assessed whether Sky’s discrimination against BT is undue within the context of the Code. As indicated above, paragraph 5.8 of the Guidance states that discrimination will not be undue where it can be objectively justified.

As set out above, the “no unreasonable discrimination” rule was enacted in 1954, when there was only one commercial channel on which advertisers were able to place their television advertisements. In the absence of competition law as it exists today, the “no unreasonable discrimination” rule ensured that the monopoly provider of television advertising airtime would not have been able to block access to advertising on television at will.

Today’s broadcasting landscape is different. With its multitude of commercial television channels, it provides advertisers with a large number of opportunities to place advertisements. In some cases, broadcasters themselves have become advertisers. We believe that the “no undue discrimination” rule as applied today should reflect these changed circumstances.

We have set out above that the ITC gave guidance that it would be likely to regard a refusal to accept advertising of a generic kind from competing broadcasters as "unreasonable discrimination". The ITC's guidance was given at a particular point in time, when commercial television was less developed, and against the background of a particular case. While on the particular facts of that case, we may well agree with the ITC's conclusions, in light of the changed television broadcasting landscape, we believe that not accepting advertising of a generic kind from competing broadcasters should not necessarily be seen as "unreasonable/undue discrimination".

We note BT's submission in response to our Preliminary View that our approach undermines the Code and, in its view, would leave it redundant. We do not agree with this view, but we recognise that the applicability of the Code in today's broadcasting landscape may be limited.

In assessing whether there is an objective justification, we consider firstly whether Sky has pursued a legitimate aim in its discrimination, and secondly, if so, whether its approach is proportionate to that aim.

Legitimate aim

Sky identified two main reasons for its position:

(a) Brand protection. Sky submitted that to advertise the BT Sport channels on Sky Sports could negatively impact the Sky Sports channels, in particular through the impact on the Sky Sports brand. In particular, Sky has submitted that BT could seek to run advertisements that involve negative comparisons with Sky Sports and/or denigration of the Sky Sports brand. It has also submitted that BT's advertising for its sports channels is likely to reduce the clarity and effectiveness of Sky's own advertising of its sports channels. In order to ensure that Sky Sports advertisements and promotions are not "crowded out" of viewers' attention, Sky would be likely therefore to need to increase the frequency with which its advertisements and promotions were shown, resulting in risk of advertising "clutter", diminishing audience attention to advertisements and causing consumer confusion, as well as resulting in a poorer viewing experience.

(b) Revenue protection. Sky has also submitted that there is a risk that by carrying competitor sports broadcaster advertising that seeks to encourage switching to the competing broadcaster's service, the "host" broadcaster would be worse off having taken the advertising revenues, if those were outweighed by the lost wholesale revenues.

BT on the other hand argued that legitimate aims should not include ordinary commercial motives, that any rationally operated channel is likely to pursue these aims and could therefore rely on these aims to refuse to carry a generic advert for a competing channel. In addition, in this particular case, BT's advertising for its sports channels could not give rise to concerns around brand protection and revenue protection because (1) Sky is in any case protected from denigratory advertising and there is no reason to think BT's advertising would lead to customer confusion or advertising clutter; and (2) there is no realistic prospect that the Sky Sports channels will lose significant wholesale subscription revenues because BT Sport is a largely complementary offering.

In assessing whether Sky was pursuing a legitimate aim, we consider below separately discrimination between (a) Sky and BT; and between (b) ESPN and BT.

Discrimination between Sky and BT

In assessing discrimination between Sky and BT, we accept that a broadcaster may in principle have legitimate commercial reasons to refuse advertising from a direct competitor on its own service. We consider that ordinary commercial motives can be a legitimate aim in considering discrimination between a broadcaster and its direct competitor.

In particular, we accept that brand identity can be an important asset for a broadcast channel, that brand protection is in principle a legitimate aim, and that a broadcaster may therefore decide to refuse advertising from a competitor with a channel in the same genre, if it perceives a threat to its brand from the presence of advertising by the competing channel.

We also accept that there may be a risk to a broadcaster's revenue in the existence of a competitor channel in the same genre, which a broadcast channel might legitimately seek to protect, and that a broadcaster may therefore make a judgement to refuse advertising from a competitor in order to avoid exacerbating such risk.

We therefore consider that in discriminating between Sky and BT, Sky is pursuing legitimate aims, requiring us to go on and consider whether Sky's approach is proportionate to those aims.

Discrimination between ESPN and BT

The position in relation to discrimination between BT and ESPN is different. Sky has taken a decision to allow advertising from ESPN, a competing sports channel. We therefore need to consider the basis on which Sky is distinguishing between BT and ESPN and whether that also reflects the pursuit of a legitimate aim.

We note in this respect that ESPN's commercial strategy was developed around a model whereby it would wholesale its channel to multiple platforms. The relationship between Sky and ESPN is thus affected by the fact that Sky retails the ESPN channels on its DSat pay TV platform. While we do not believe that such differences are sufficient to determine that there is no discrimination, they may affect a broadcaster's commercial incentives and as such affect our assessment as to whether any discrimination is undue.

Sky submitted to us that in distinguishing between BT and ESPN, it was pursuing a legitimate aim, because the risk to its brand and to its revenue that it faced in accepting ESPN advertising was different from the risk that it would face if it were to accept advertising for the BT Sport channels.

Sky submitted evidence demonstrating that ESPN's business model generally, and its commercial relationship with Sky specifically gave Sky a significant degree of comfort that ESPN would not damage the Sky Sports brand or its wholesale revenues. In particular, Sky informs us that the agreement between Sky and ESPN for the distribution of the ESPN channels on Sky's Dsat platform specifies a range of obligations which ensure that when accepting advertising from ESPN, Sky's brand and revenue are protected. [✂]

Sky further submitted that, by contrast, BT's advertising and public statements since the launch of the BT Sport channels, BT's business objectives and different approach to Sky means there is a high risk that the BT advertising will undermine Sky's brand and revenue. Sky also does not have a wholesale relationship with BT which further affects the risk assessment. Sky submitted that it made an assessment that it is not able to manage these risks to its commercial interests in the same way as it did for ESPN.

In light of the evidence which Sky has provided in relation to its relationship with ESPN, we accept that there is a difference between BT and ESPN, with differing consequences for the assessment, generally, of the risk to Sky's brand and revenue. We therefore consider that in discriminating between ESPN and BT, Sky is pursuing legitimate aims, requiring us to go on and consider whether Sky's approach is proportionate to those aims.

Finally, while the particular facts of this case may lead us to conclude that Sky is in principle pursuing legitimate aims, we emphasise that different factual circumstances may well lead to a different conclusion. As indicated above, we do not agree with BT's submission that legitimate aims should not be able to include "ordinary commercial motives" and that to accept such aims would render the Code meaningless. As in this instance, we believe that it is possible for "ordinary commercial motives" such as brand and revenue protection to be legitimate aims, and we do not consider that this would render the Code meaningless. In each instance, we will assess the commercial aims presented to us. It may be the case, depending on the particular facts, that we conclude that objectives presented as ordinary commercial motives are not legitimate.

Proportionality

BT has argued that in assessing proportionality, we should consider whether Sky could have taken a less restrictive approach. Instead of an outright ban on advertising for BT Sport, Sky could have agreed certain conditions regarding the nature, content and frequency of BT Sport advertising.

We accept BT's argument that a particular advertisement for the BT Sport channels may not involve negative comparisons with Sky Sports and/or denigration of the Sky Sports brand and may not lead to advertising clutter or cause consumer confusion. We also accept that the Sky Sports channels will not necessarily lose significant wholesale subscription revenues to the BT Sport channels. As such, we accept that it may be possible to negotiate and agree specific conditions around the nature, content and frequency of BT Sport advertising which could alleviate Sky's concerns with respect to the protection of its brand and revenue. However, in today's broadcasting landscape, where advertisers have a large number of opportunities to place advertisements on a range of broadcast channels, we consider that when assessing the proportionality of a refusal to advertise on a particular channel, it is more important to assess whether an advertiser is able to access its audience on other channels and can advertise its product with reasonably limited additional cost.

Acknowledging that Sky was pursuing a legitimate aim both when discriminating between itself and BT, and between ESPN and BT, we assess proportionality in relation to discrimination between Sky and BT and discrimination between ESPN and BT together, as we consider that the effect on BT would be the same.

With respect to the effect of Sky's refusal on BT, BT argued that:

- In the absence of advertising on the Sky Sports channels it has calculated that its TV advertising campaign costs will be [✂]% higher. It would purchase advertising impacts against the "ABC1 Men" demographic, but purchasing advertising on the Sky Sports channels would more efficiently target its desired narrower target audience of "men who watch sports". It commented that the Sky Sports channels provided 63% of the "top rated programming" for "men who watch sports". BT also argued that selecting a tightly defined target audience is critical to effective advertising and is consistent with industry practice.

- The programming environment is important to effective advertising, and BT has sought to place BT Sport adverts in sport programming; and

- BT would be forced to redeploy on more expensive channels, and despite the redeployment, there is a loss over and above the additional advertising cost.

Sky disputed the level of the potential additional costs to BT.

We are not able to reach a definitive conclusion on the likely additional cost but we consider on the basis of the information provided by BT that any additional cost to BT from purchasing ABC1 Men impacts as a result of the inability to advertise on Sky Sports channels is likely to be limited.

With regard to the increased efficiency of Sky Sports channels in targeting “men who watch sports”, we note that from information provided by BT that it originally intended to target no more than [✂]% of its expenditure on the Sky Sports channels, with the rest of its expenditure largely spread across programming on general entertainment channels. Sky Sports may therefore be well placed to target “men who watch sports”, but it is not unique in accessing such audiences and achieving such advertising impacts as required by BT to build its campaign, as shown by BT’s “revised plan” for advertising in the absence of access to the Sky Sports channels. To the extent that the Sky Sports channels do offer a more efficient means of targeting “men who watch sports” we therefore consider that this would itself have a limited impact on BT’s planned advertising campaign.

Underlying this assessment of the extent of the effects on BT is the wide availability on other commercial channels of airtime that can provide the advertising impacts sought by BT. The extent of the availability of advertising airtime on other channels has a key bearing on our assessment of proportionality.

As noted above, our view in relation to the discrimination between Sky and BT is that Sky is pursuing a legitimate commercial interest. We also consider, given the limited extent of the effects on BT, that Sky’s approach is proportionate to its aim. We therefore consider that Sky has not unduly discriminated against BT in that respect.

Not in breach of the Code on the Prevention of Undue Discrimination between Broadcast Advertisers