



## Response to consultation on the Proposed Code on the Prevention of Undue Discrimination between Broadcast Advertisers

1. **It is not clear why it is necessary or appropriate to implement the ‘no undue discrimination standards objective’**
  - 1.1. Under s. 319 (1) of the Communications Act 2003 (the “Act”), “It shall be the duty of Ofcom to set...***such standards for the content of programmes as appear to them best calculated to secure the standards objectives***” (emphasis added), including the objective in s. 319 (2) (k) “*that there is no undue discrimination between advertisers who seek to have advertisements included in television and radio services.*” (the “no undue discrimination standards objective”).
  - 1.2. It would appear that Ofcom has previously interpreted s. 319 (1) as conferring a discretion as to whether to set such standards as appear to it best calculated to secure the no undue discrimination standards objective, as Ofcom has not sought to give effect to that objective since the Act came into force in 2003. Ofcom should explain why it is now seeking to exercise its discretion to give effect to the no undue discrimination standards objective. To note simply that Ofcom is now acting to secure it<sup>1</sup>, without further explanation, is insufficient.
  - 1.3. This is particularly the case in light of the fact that Ofcom already has existing powers under s. 316 of the Act and under competition law which are apt to deal with undue discrimination between advertisers which results in harm to competition. As Ofcom recognises, the no undue discrimination standards objective is different to the other standards objectives in s. 319 (2) in that it does not relate to “broadcast content”<sup>2</sup>; indeed it is not a standard “*for the content of programmes*” (per s. 319 (1)), a view reinforced by the fact that the matters set out in s. 319 (4) to which Ofcom must have regard when setting any of the standards all relate to programmes/content. Given the likely purpose, as per the draft guidance<sup>3</sup>, of governing the conduct of broadcasters in deciding whether or not to accept broadcast advertising or the terms on which to do so, the no undue discrimination standards objective appears to contemplate economic regulation of matters that are already within the remit of s.316 and the Competition Act.
  - 1.4. There is therefore a fundamental issue of why, when there are existing rules, it is necessary, or appropriate, to introduce further regulation in this area against a backdrop

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<sup>1</sup> Paragraph 2.5 of the consultation document “Proposed Code on the Prevention of Undue Discrimination between Broadcast Advertisers” of 2 November 2011 (the “condoc”). Paragraph references throughout are to the condoc, unless otherwise stated.

<sup>2</sup> Paragraph 2.4.

<sup>3</sup> Paragraph 5.3.

of the Government's deregulatory agenda<sup>4</sup>. It is not sufficient for Ofcom simply to note<sup>5</sup> that it will, when considering a claim of undue discrimination, consider first whether it is more appropriate to assess whether an arrangement or conduct is prejudicial to fair and effective competition under s. 316, or is contrary to the Competition Act 1998.

- 1.5. In such circumstances, prior to implementation, Ofcom should explain why it now considers it appropriate to implement the proposed Code. At the same time, Ofcom should make clear what policy objective it is seeking to secure and how the Code sits with existing rules. Ofcom should also clarify what it considers is the likely impact on the market of introducing the Code. Respondents should then be given a further opportunity to comment on these matters, prior to Ofcom deciding whether or not to give effect to the no undue discrimination standards objective via the proposed Code.

## **2. The proposed timing of implementation is inopportune**

- 2.1. If, on the other hand, Ofcom now considers that it has a duty under s. 319 to secure the no undue discrimination standards objective, Ofcom must at least consider it has discretion as to the timing of its implementation, having exercised discretion in this regard thus far. Accordingly, Ofcom should explain why it has not sought to give effect to the no undue discrimination standards objective to date and why it now seeks to do so (for example making clear whether this is due to a change in market conditions or whether Ofcom has identified a particular concern which it wishes to address but cannot address using other powers).
- 2.2. Sky considers that Ofcom's proposal to introduce the Code during the present 'deal season', when advertisers, agencies and sales houses alike are negotiating their deals, and in uncertain and difficult economic conditions, is inopportune. Market participants should have regulatory certainty and clarity as to the terms of engagement before negotiations are commenced. Accordingly, Sky submits that, should Ofcom be minded to proceed, it would be preferable to defer implementation to the start of the trading season 2013 (i.e. after the trading season 2012 is concluded, the deals for which are currently being negotiated). This would allow parties to continue to negotiate and to trade with certainty in the present deal and forthcoming trading season, with a view to the Code coming into force for the trading season 2013.

## **3. The draft guidance is not fit for purpose**

- 3.1. The draft guidance accompanying the proposed Code is unfit for purpose as it provides very little clarity as to how the proposed Code is likely to be applied and interpreted in practice and what Ofcom's enforcement priorities will be under it. It is peculiar that Ofcom has not provided more guidance when it is looking to introduce potentially significant new regulation.

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<sup>4</sup> In an open letter dated 16 May 2011 entitled 'A Communications Review for the Digital Age' (see [http://www.culture.gov.uk/images/publications/commsreview-open-letter\\_160511.pdf](http://www.culture.gov.uk/images/publications/commsreview-open-letter_160511.pdf)), Jeremy Hunt stated that in reforming the communications sector, a "deregulatory approach" is the government's objective.

<sup>5</sup> Paragraph 5.9.

- 3.2. The draft guidance is, in Sky's view, deficient in two material respects: first, it gives no explanation at all of the meaning of 'undue'; and second, it adopts an unduly narrow view of what can constitute objective justification.
- 3.3. As to the first point, Sky notes that the concept of 'undue discrimination' is well established in competition law and regulation and has been considered on many occasions, including by Ofcom, as being 'undue' only where it has resulted in a material adverse effect on competition.
- 3.4. By way of example, Ofcom interpreted the principle of 'undue discrimination' in condition 5 of Sky's licence for the provision of CA services (regulation of which does not require a prior finding of SMP) as applying only where such discrimination was capable of having a material adverse impact on competition. Similar interpretations have been applied in cases where a prior finding of market power is necessary, under Chapter II of the Competition Act<sup>6</sup> and under access regulation<sup>7</sup>, with materiality also a prerequisite under s.316<sup>8</sup>. In other areas, there is strong support for the proposition that there is unlikely to be a material effect on competition where market presence is below 25%. For instance, in the merger context, in considering the possible risk of 'input foreclosure' in relation to advertising, the European Commission recently concluded that the merged entity would be unlikely to be able to foreclose competitors from advertising their services effectively on the basis that the share in TV advertising was below 25%<sup>9</sup>.
- 3.5. The principle of no undue discrimination should be interpreted consistently with precedent, with discrimination considered 'undue' only where it is likely to result in a material adverse effect on competition. Ofcom should therefore extend its guidance to cover the meaning of undue and clarify what its enforcement priorities are likely to be in this respect. Otherwise, Ofcom runs the risk of intervention that is disproportionate to any harm and likely to unduly interfere with the fundamental principle of a firm's freedom to contract.
- 3.6. In so far as Ofcom provides guidance on potential objective justifications, this is insufficient, as the set of justifications identified are rather limited and unduly narrow. Ofcom does not make it clear, for example, whether a refusal to take specific

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<sup>6</sup> Where discrimination is only likely to be considered abusive where it has an appreciable effect on competition.

<sup>7</sup> For example, in its 2010 "Review of the wholesale broadband access markets", Ofcom defined undue discrimination as arising if a dominant provider "*unfairly favours **to a material extent** an activity carried on by it so as to place at a competitive disadvantage persons competing with the Dominant Provider*" (emphasis added).

<sup>8</sup> In relation to the application of s. 316 of the Act, Ofcom has previously adopted the test that there is, or might be expected to be, "*a material impact on the competitive process*": see for example Ofcom's statement on the cross-promotion rules, at paragraph 5.33.

<sup>9</sup> See paragraph 276 of decision COMP/M.5932 *NewsCorp/BskyB*, available at [http://ec.europa.eu/competition/mergers/cases/decisions/m5932\\_20101221\\_20310\\_1600159\\_EN.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m5932_20101221_20310_1600159_EN.pdf). Also, in its recent decision on wholesale mobile voice call termination rates, Ofcom decided to impose a requirement not to unduly discriminate on the four national mobile communications providers, stating that, "*The size and scale of the four national MCPs is such that we are concerned about the resultant impact of any discriminatory practices on the retail market. Whilst the other designated MCPs could also potentially engage in discriminatory practices, **their smaller size and scale means that we have fewer grounds for concern in this respect.***" (emphasis added).

‘appointment to view’ advertising would be objectively justified (on the basis that such advertising is likely to lead to a loss of viewing to the broadcaster), a previously recognised exception to the former ITC rule on unreasonable withholding of advertising<sup>10</sup>. There is similarly no recognition of a channel owner’s legitimate interests in preserving the value of and investment in its brand, a particularly important feature of competition in the broadcasting sector. Again, to avoid the risk that regulation is disproportionate to any harm, the concept of objective justification should be interpreted flexibly enough to accommodate a broader set of objective justifications, taking account of broadcasters’ legitimate interests and other efficiency justifications.

#### **4. Conclusion**

- 4.1. In light of the above, Ofcom should defer implementation of the Code and provide further clarity as to the purpose and role of seeking to secure the standards objective of no undue discrimination between advertisers in light of Ofcom’s existing powers. Ofcom should also properly explain how it intends to interpret and enforce the Code, via the guidance, including an explanation of Ofcom’s policy objectives and enforcement priorities. Deferral would also avoid introducing regulatory uncertainty during the current deal season and difficult trading conditions, and allow stakeholders a proper opportunity to comment on more particularised proposals.

**Sky 9 December 2011**

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<sup>10</sup> See the ITC notes on Television Advertising Control which state that “*it would not be unreasonable for ITC licensees to refuse advertisements which promote specific programmes at particular times on a competing service*” at [http://www.ofcom.org.uk/static/archive/itc/itc\\_publications/itc\\_notes/view\\_note64.html](http://www.ofcom.org.uk/static/archive/itc/itc_publications/itc_notes/view_note64.html).