

Channel 4 submission to Ofcom on the Proposed Code on the Prevention of Undue Discrimination between Broadcast Advertisers

1. Channel 4 welcomes the opportunity to provide comments on Ofcom's proposed Code on the Prevention of Undue Discrimination between Broadcast Advertisers ("the proposed Code").
2. Channel 4 is a publicly-owned, commercially-funded public service broadcaster, with a statutory remit to deliver high-quality, innovative, experimental and distinctive content across a range of platforms. TV advertising, which accounts for over 90% of Channel 4's total revenue, is central to enabling Channel 4 to fulfil its public service remit and functions—financing investment in a diverse range of high-quality UK-originated content. In 2010, Channel 4 invested £362 million in UK-originated content across all its services, supporting over 350 independent production and digital media companies across all parts of the UK.
3. Channel 4 notes that Ofcom proposes this Code in accordance with its powers under section 319 of the *Communications Act 2003* ("the Act"), which requires Ofcom to set, and from time to time review and revise, such standards for the content of programmes to be included in television and radio services as appear to Ofcom best calculated to secure certain "standards objectives". The standards must be contained in one or more codes.
4. Under the Act, one of the "standards objectives" is to ensure "that there is no undue discrimination between advertisers who seek to have advertisements included in television and radio services". This objective has never been secured in a Code, so Ofcom is putting forward the proposed Code to fulfil its statutory obligation.
5. Channel 4 believes that the advertising market is highly efficient and competitive, and delivers significant benefits to advertisers and viewers. The market currently operates effectively, responding to changes in demand and supply to ensure that advertisers' needs are met, generally resulting in bespoke pricing of airtime according to the demands of advertisers and broadcasters. Channel 4 therefore questions whether there is any evidence of detriment that the proposed Code is seeking to address, or whether concerns have been raised that there has been undue discrimination between advertisers who seek to have advertisements included in broadcasting services.
6. Channel 4 understands, however, that Ofcom is under a statutory duty to produce a Code, and in this context responds to the questions set out in the consultation document.

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

7. Channel 4 agrees that Ofcom's proposed Rule for television broadcasting (reproduced below) reflects closely the wording of its statutory obligation to introduce a Code in this area:
 - **"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’).

8. Channel 4 has no comment on the proposed Rule for radio broadcasting.

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

9. Channel 4 welcomes the guidance set out in the proposed Code, as effective guidance can be helpful for all parties in interpreting and applying the Rules in practice.
10. Channel 4 notes the draft guidance set out by Ofcom in its consultation document, which provides a good starting point for consideration of whether a broadcaster has engaged in undue discrimination.
11. As noted above, television advertising is a highly-competitive and demand-led market, with the different needs of advertisers and the specific circumstances of advertising campaigns requiring bespoke pricing. Given this competitive dynamic and the nature of the market, Channel 4 in particular welcomes draft clauses 5.4 and 5.5 of the proposed guidance, which state that “not all forms of different treatment will amount to discrimination since advertisers may not be in comparable positions” and that “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” but that “in order for a breach of a Rule to have occurred, any discrimination must be ‘undue’”.
12. However, Channel 4 believes that the proposed guidance needs to go further to recognise the specific features of the advertising market and reflect the inter- and intra-industry dynamics that characterise this highly competitive market. To this end, Channel 4 recommends that the proposed guidance should be amended and expanded to provide greater clarity for licensees and advertisers.
13. First, Channel 4 believes that the word “necessarily” should be deleted from clause 5.6 of the proposed guidance. Channel 4 believes that the starting point in consideration of the relationship between licensees and advertisers should be that these groups negotiate terms and conditions on a case-by-case basis, as circumstances demand. The presumption should therefore be that licensees do not have single tariff practices for advertising, and the removal of the word “necessarily” from the draft clause would make this clear.
14. On the remainder of proposed clause 5.6, Channel 4 supports the draft guidance that “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”.
15. Second, Channel 4 believes that the guidance should be expanded to provide greater clarity as to the range of practices which would be permitted under the proposed Code. This would provide licensees and advertisers with greater clarity that current recognised industry dynamics, which deliver benefits for both

advertisers and licensees, will continue to be permitted in future. Draft clause 5.8 sets out a non-exhaustive list of examples illustrating where discrimination can be objectively justified and therefore not “undue”, and Channel 4 believes this list should be expanded to also include:

- “Where the inter- and intra-industry dynamics of supply and demand mean that advertising is priced at different rates. This could include, for example, situations where there is a high demand to advertise a particular product category at certain times of year, where there is low demand for advertising at certain times of the day (eg. daytime compared to peak), where the advertisement of product categories is time restricted (eg. alcohol or HFSS), where there is a high degree of competition in a particular product category (eg. car advertising), or where an advertisement is booked late and subject to a late booking fee.”

16. In Channel 4’s view, this amendment would provide advertisers and broadcasters with greater confidence that they can continue to have the flexibility to agree bespoke arrangements to the benefits of both parties.

17. Channel 4 hopes this response is of assistance to Ofcom and would be happy to discuss any of the points raised in this submission in further detail.

2 December 2011