



Code on the Prevention of Undue Discrimination between Broadcast Advertisers

Statement

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Section 1

Summary

Background

- 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 In November 2011 Ofcom issued a consultation that proposed to implement this standards objective through a Code on the Prevention of Undue Discrimination between Broadcast Advertisers¹. The proposed Code contained draft rules and guidance intended to assist broadcasters in interpreting and applying the Rules. Stakeholders were invited to comment on this approach and the content of the proposed Code.

Conclusion

- 1.3 Following consideration of stakeholders’ responses to the consultation², Ofcom has decided to include a Code on the Prevention of Undue Discrimination between Broadcast Advertisers (“the Code”), as an addendum to the Ofcom Broadcasting Code³.
- 1.4 The Rules in the 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.
- 1.5 Ofcom has amended its guidance, which forms part of the Code, to take account of issues raised by stakeholders. Full details of Ofcom’s consideration of the issues raised by stakeholders can be found in Section 3 of this Statement.

Implementation

- 1.6 The Code applies with immediate effect (i.e. from 27 February 2012).

¹ The consultation can be found at:

<http://stakeholders.ofcom.org.uk/consultations/prevention-undue-discrimination/>

² Responses to the consultation can be found at:

<http://stakeholders.ofcom.org.uk/consultations/prevention-undue-discrimination/?showResponses=true>

³ The Ofcom Broadcasting Code can be found at:

<http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/>

Section 2

Background

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 at paragraph (k) 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 content⁴ 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>⁵.

The November 2011 consultation

- 2.5 As Ofcom had not secured in a Code the standards objective at section 319(2)(k) of the Act, in November 2011 it published a consultation proposing to secure that objective through the implementation of a Code on the Prevention of Undue Discrimination between Broadcast Advertisers⁶. The proposed Code contained draft rules that broadcasters would be obliged to follow and were accompanied by guidance setting out Ofcom's likely interpretation of such rules.
- 2.6 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

⁴ Some standards objectives set out at section 319(2) of the Act concern additional matters. For example, with regard to section 319(2)(i), television advertising scheduling requirements set out in EC Directive 2007/65/EC (Audiovisual Media Services Directive) are reflected in Ofcom's Code on the scheduling of television advertising.

⁵ 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 relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004. Ofcom has concurrent jurisdiction with BCAP and/or the ASA for the regulatory functions that have been contracted out to them.

⁶ The consultation can be found at:
<http://stakeholders.ofcom.org.uk/consultations/prevention-undue-discrimination/>

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.

- 2.7 Ofcom therefore proposed 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.
- 2.8 Ofcom sought stakeholders' views on both the proposed Rules being contained in the proposed Code, as an addendum to the Broadcasting Code, and the proposed Code's content (i.e. the Rules themselves and their associated guidance).

Section 3

Consultation Responses

Introduction

- 3.1 In this Section we summarise the responses to the consultation, our consideration of the issues raised and the conclusions we have reached.
- 3.2 We received twelve responses to the consultation. Five respondents requested that their responses be kept confidential, although Independent News & Media (Northern Ireland) Limited confirmed that it could be identified as a respondent and that its answer to the two consultation questions (see below) is in the affirmative. Non-confidential responses were received from Bauer Media, BT, Channel 4, Channel 5 Broadcasting Ltd ("Channel 5"), Radio Advertising Clearance Centre ("RACC"), RadioCentre and Sky⁷.

Consultation Question 1

- 3.3 We asked stakeholders: *Do you agree with Ofcom's proposal for the Rules to be contained in the proposed Code? If not, please explain why.*

Stakeholder responses

- 3.4 Eleven respondents agreed with Ofcom's proposal. Of these, one respondent (RACC) also considered that it will fill the gap left by the deletion of the 'unreasonable discrimination' rule from the BCAP Code. One respondent disagreed with Ofcom's proposal.
- 3.5 While agreeing with the proposal, Channel 4 questioned 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. Channel 4 did, however, note that it understood that Ofcom is under a statutory duty to produce a code.
- 3.6 Again, while agreeing with the proposal, one confidential respondent noted that the Broadcasting Code had been subjected to numerous changes in recent months and, although the respondent did not have particularly strong feelings on the issue, suggested that it may be considered practical for these Rules to be contained in a new document, rather than making further changes to the Broadcasting Code.
- 3.7 Sky disagreed with Ofcom's proposal, arguing that it was unclear why it was necessary or appropriate to implement the 'no undue discrimination standards objective'. In particular, Sky argued that the fact that Ofcom had not previously sought to set this standard in a Code meant that Ofcom had previously interpreted section 319(1) as giving it discretion as to whether to set such standards as appear to Ofcom best calculated to secure the no undue discrimination standards objective. Sky also argued that Ofcom's powers under section 316 were able to deal with undue discrimination

⁷ The non-confidential responses can be found, in full, at:
<http://stakeholders.ofcom.org.uk/consultations/prevention-undue-discrimination/?showResponses=true>

between broadcast advertisers and that, in light of the government's deregulatory agenda, such further regulation was not appropriate.

- 3.8 Sky further argued that the proposed timing of implementation was inopportune. Sky argued that Ofcom should explain why it sought to implement the Code now. Sky considered the timing to be particularly poor, as it was in the middle of the 2012 'deal season', and asked Ofcom to delay implementation until the end of the current trading season, to ensure regulatory certainty.

Ofcom's position

- 3.9 Having considered all responses received, Ofcom has decided to implement the Code on 27 February 2012.
- 3.10 As set out in Section 2 above, Ofcom is under a duty 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 us best calculated to secure the standards objectives set out at section 319(2). Section 319(3) requires that the standards set be contained in one or more codes. The fact that we have not secured the standards objectives set out at section 319(2)(k) sooner does not imply that we have interpreted section 319 as giving us a discretion. Rather, it was an oversight on the part of Ofcom, which we are now seeking to rectify through the implementation of the Code. In addition, Ofcom has recently become aware of a number of issues around the treatment of advertisers that have highlighted the issue of the status of section 319(2)(k).
- 3.11 Ofcom also notes that the duty under section 319 is a separate duty to that contained in section 316 of the Act and must therefore be implemented as required by section 319, rather than relying on the existence of section 316.
- 3.12 With regard to Sky's concern about the implementation of the Code during the current 'deal season', we understand that the majority of negotiations for this season will have taken place in November/December 2011. The Code comes into effect on 27 February 2012 and will apply to alleged undue discrimination behaviour occurring after this time.

Consultation Question 2

- 3.13 We asked stakeholders: *Do you agree with the proposed Rules and guidance in the proposed Code? If not, please explain why.*
- 3.14 The responses to this question are best dealt with in two parts: responses relating to the proposed Rules and responses relating to the proposed guidance.
- 3.15 Ofcom proposed that the following Rules be included in the 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

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

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”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 reference¹⁰.

Rules

Stakeholder responses

- 3.16 Nine respondents agreed with the proposed Rules and two respondents did not comment on them. In addition Sky did not make any specific comments on the wording of the proposed Rules but, as noted above, disagreed with the implementation of the Code.
- 3.17 In agreeing with the proposed Rules, Channel 4 noted that the proposed Rule for television advertising reflects closely Ofcom’s statutory duty in this area.
- 3.18 Although Channel 5 agreed with the proposed Rule, it was concerned that there may be a broader interpretation of the legislation which is that it seeks to prevent not only undue discrimination *by* broadcasters but also undue discrimination *between* broadcasters. Channel 5 believed that “such a broader interpretation would create considerable problems for broadcasters, as they would not only have to make their own decisions about what advertisements to accept but also to ensure they were not discriminating unduly against advertisements accepted by one or more other broadcasters.”

Ofcom’s position

- 3.19 Ofcom considers the wording of the proposed Rules and the legislation from which they derive to be clear, in that they require that a broadcaster must not unduly discriminate between advertisers that seek to have advertisements included in licensed services. Channel 5 was not correct to suggest that there was a possible broader interpretation.
- 3.20 Ofcom has therefore decided to implement the Rules in the Code, as proposed.

Guidance

- 3.21 The remainder of this Section provides an overview of the key comments made by respondents about the proposed guidance in the consultation document. We first

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>

outline general comments made about the guidance and then review comments about specific elements of the guidance. In each case we provide Ofcom's position in response to the comments made.

Stakeholder responses: general

- 3.22 Although most respondents supported Ofcom's proposed Rules, several commented on the level of detail contained in the guidance.
- 3.23 All respondents accepted the need for guidance on the Rules to be included in the proposed Code. Nine respondents requested further clarification of how the Code would apply / be interpreted in specific situations.
- 3.24 Subject to its overall objections with the Code, Sky argued that the accompanying guidance was not fit 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 would be under it.

Ofcom's position

- 3.25 The guidance is not intended to provide an exhaustive list on how the Code will apply in specific circumstances. However, having considered the responses received to the consultation, Ofcom has noted a number of common themes that have arisen and we have dealt with these, in turn, below. Further, Ofcom has made minor amendments to the Code for the purpose of general clarification.
- 3.26 As a general point, however, we have not dealt with how the Code will apply in specific circumstances set out by respondents. As set out in sections 5.4 and 5.8 of the revised guidance at Annex 1, all complaints will be considered on a case-by-case basis, taking account of the particular circumstances of each case and considering all information provided by the advertiser and the broadcaster and, where relevant, third parties. To clarify this we have added the following text to the proposed guidance at section 5.8: "...every complaint will be dealt with on a case-by-case basis, taking account of the individual circumstances of each case".

Stakeholder responses: meaning of 'undue'

- 3.27 A number of respondents sought further clarification on the meaning of 'undue'.
- 3.28 Sky argued that the concept of undue discrimination was well established in competition law and regulation, and had been considered on many occasions, including by Ofcom, as being undue only where it resulted in a material adverse effect on competition. It argued that this should be made clear in the guidance.

Ofcom's position

- 3.29 Ofcom notes that the legislation does not make any reference to a material adverse effect on competition being necessary and cannot therefore read it into the provision. However, Ofcom is not obliged to deal with every complaint we receive and, as is our usual practice, we intend to use our gating criteria (i.e. administrative priorities for competition based complaints¹¹ and the process set out in the procedures for investigating breaches of content standards in television and radio¹² for content standards based complaints) in deciding whether to investigate a complaint. We will decide on a case-by-case basis which of the gating procedures is appropriate, depending on the nature of the complaint submitted.
- 3.30 Both the processes for investigating competition based complaints and breaches of content standards in television and radio involve some consideration of the likely impact of the conduct. For example, the procedures for investigating breaches of content standards in television and radio provide that Ofcom will consider whether the complaint raises potentially substantive issues that warrant investigation by Ofcom. It will do so by reference to the gravity and/or extent of the matter complained of, including, for example, whether it involves ongoing harm and/or financial harm. Depending on the circumstances of the individual case, materiality / market impact is likely to be a consideration in the assessment.

Stakeholder responses: objective justification

- 3.31 Sky argued that, in so far as the Code provides guidance on potential objective justifications, the guidance is insufficient, as the set of justifications identified are rather limited and unduly narrow. Sky was specifically concerned with whether Ofcom would consider a refusal to take specific "appointment to view" advertising to be objectively justified (on the basis that such advertising is likely to lead to a loss of viewing to the broadcaster), which was a previous exception to the former Independent Television Commission's (ITC) rule on unreasonable discrimination. This referred to a situation in which an ITC licensee refused to accept advertisements that promoted specific programmes at particular times on a competing service¹³.
- 3.32 Channel 5's response to the consultation also noted this issue and requested specific guidance. The broadcaster argued that it would not be unduly discriminatory to refuse to carry another broadcaster's advertisement if it included a call to immediate action (i.e. "turn over now to watch...") or to promote a different series or episode of the programme about to begin, in progress or just ended (e.g. "the next series of XX is on Channel Y at 10pm/tomorrow/next week"). Channel 5 noted that the ITC had guidance on the issue and, although they were not suggesting explicit rules should be introduced or that Ofcom should adopt guidance as far reaching as the ITC rules, they would welcome some additional guidance from Ofcom on the matter.

¹¹ Ofcom's administrative priorities are contained in its Draft Enforcement Guidelines published for consultation in October 2011. The consultation, which has now closed and concerning which a final statement is expected in the coming months, can be found at:

<http://stakeholders.ofcom.org.uk/binaries/consultations/draft-enforcement-guidelines/summary/condoc.pdf>

¹² Available at:

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

¹³ See ITC Notes on Television Advertising Control, at:

http://www.ofcom.org.uk/static/archive/itc/itc_publications/itc_notes/view_note64.html

- 3.33 A confidential respondent also suggested that Ofcom should draw on its experience from previous ITC guidance in, for example, the area of competitive advertising and in particular the circumstances in which a broadcaster might discriminate against its direct competitors and those which compete against its wider interests.
- 3.34 RadioCentre broadly supported Ofcom's proposed guidance. However, while it welcomed "the acknowledgement within the guidance that broadcasters may require flexibility regarding the commercial terms and treatment of different advertisers", it considered that "it must be possible for different approaches to advertisers to be 'objectively justified' and not be considered as 'undue discrimination' in a number of different circumstances", which may include:
- the treatment of an advertiser with a more appropriate or desirable brand association for a particular radio station; or
 - taking action to prevent a clash between products and/or advertisers in the scheduling and broadcast of commercial messages, especially where either would be too similar, appear inappropriate when broadcast in close proximity and/or could confuse the audience.
- 3.35 Two other confidential respondents raised similar points, seeking clarification that certain practices resulting from specific scheduling issues, advertising regulatory requirements, moral decisions, editorial decisions (in response to audience reaction) or its advertising 'clash' policy did not constitute undue discrimination.

Ofcom's position

- 3.36 As noted above at paragraph 3.26, Ofcom does not consider it possible to set out exhaustive guidance listing all circumstances in which discrimination would be objectively justified. Given the bespoke nature of contracts, and indeed advertising campaigns, negotiated between advertisers and broadcasters, all complaints about discriminatory behaviour would have to be considered on a case-by-case basis, taking account of all relevant circumstances.
- 3.37 We recognise however that when following a standard industry practice, such as avoiding advertising clashes between similar products, a broadcaster may often be pursuing valid commercial objectives. We also recognise that, although we are not bound by the ITC's previous approach, appointment to view advertising represents a distinct category of advertising, given that it may give rise to specific commercial concerns impacting directly upon the broadcaster's own product and its presentation to the broadcaster's viewers. If a broadcaster was not offering appointment to view advertising at all, discrimination between advertisers may be unlikely to arise. In addition, in the event that a broadcaster did appear to discriminate in relation to the provision by it of appointment to view advertising, it should be noted that we may be more likely to address any resulting complaint as a competition matter, as envisaged in section 5.13 of the guidance (at Annex 1).

Stakeholder responses: media buyers

- 3.38 BT appreciated Ofcom's understanding of the widespread use of intermediaries such as media buyers in the commercial relationship between broadcasters and advertisers and noted that it is their understanding that broadcasters can use media sellers rather than selling direct. BT said it would therefore like Ofcom to specify how the Code would actually operate in such a situation, in addition to the current statement that "The Code does not cover commercial relationships between media buyers and

advertisers.” In particular, BT considered it would seem logical to ensure that the responsibilities of the broadcaster with regard to the Code are made absolutely clear whether media buyers and/or media sellers are involved or not.

Ofcom’s position

- 3.39 Ofcom considers that the Rules are intended to prevent undue discrimination between advertisers by broadcasters. The Rules are not intended to apply to the relationship between media buyers and their advertiser clients. As a result, an advertiser would not be able to bring a complaint about the terms of their contract with a media buyer (e.g. compared to another advertiser), unless they believed that the source of any alleged undue discrimination was a broadcaster.

Stakeholder responses: other issues

- 3.40 Channel 4 considered that, in section 5.6 of the proposed guidance, it would be most appropriate for Ofcom to presume that broadcasters did not generally implement single tariff practices, adding that this could be clarified by removing the word “necessarily”.

- 3.41 Channel 4 also proposed the following, as an additional bullet point to section 5.8 of the proposed guidance set out in the consultation document:

“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.”

- 3.42 Channel 4 considered that this amendment would provide advertisers and broadcasters with greater confidence that they can continue to have the flexibility to agree bespoke arrangements to the benefit of both parties.
- 3.43 One confidential respondent proposed that section 5.8 of the proposed guidance be amended to reflect the fact that a broadcaster may choose to donate commercial airtime not only “for a period” but on an ongoing basis, e.g. in the example of own-brand charities.
- 3.44 Another confidential respondent observed that the Code did not make it clear how it inter-relates with the Cross-promotion Code. The respondent argued that without such clarification, it may be open to companies to use the Cross-promotion Code as a mechanism to unduly discriminate under the proposed Code by justifying discriminatory and exclusionary behaviour towards competitors under the proposed Code, whilst being able to promote freely under the Cross-promotion Code.

Ofcom’s position

- 3.45 Ofcom notes that in both TV and radio some advertising is more highly valued than other advertising. As a result, prices for advertising on different channels/stations, at different times of day, and other characteristics will vary and certain advertising products may be able to command a premium in the market based upon the particular mix of characteristics/attributes that they offer.

3.46 Therefore we would expect to see a range of prices for advertising, rather than a single price. Section 5.6 of the proposed guidance recognises that the price of advertising may differ by advertiser and that prices will reflect bespoke negotiations between the broadcaster and the relevant sales house/advertiser. These negotiations cover a wide range of terms and conditions and advertiser requirements. As Channel 4 notes, this will result in different prices. For example, it may be the case that prices are higher for those sub-segments or categories of advertising which are highly sought after by advertisers and/or are in limited supply. Equally, prices between advertisers may vary due to the relative size and volumes of advertising they spend (i.e. volume discounts). In order to clarify this position, Ofcom has included the following sentence in section 5.6:

“Prices charged to different advertisers may vary due to a range of factors, including (but not limited to) the level of demand for that particular product, the availability of particular impacts (e.g. peak), demographics or specific slots, and other terms and conditions also included in the contract.”

3.47 Ofcom has taken account of Channel 4’s concern about the inclusion of the word “necessarily” in section 5.6 and a confidential respondent’s concern about the phrase “for a period” in section 5.8 of the proposed guidance and has amended the text accordingly.

3.48 With regard to the confidential respondent’s observation on the inter-relationship between the Code and the Cross-promotion Code, Ofcom notes that the Cross-promotion Code allows television broadcasters to promote programmes, channels and other broadcasting-related services without such promotions being considered advertising and included in the calculation of advertising minutage. The Cross-promotion Code is of limited scope – it only requires that licensees ensure that cross-promotions are limited to broadcasting-related services and makes particular provision in relation to the analogue services of Channel 3, Channel 4 and Channel 5 licensees. Ofcom does not believe the Cross-promotion Code could itself be used as a mechanism to objectively justify undue discrimination under the Code.

3.49 Finally, two respondents raised specific competition concerns which are not directly related to the drafting of the Code and therefore Ofcom does not consider it appropriate to deal with them in this Statement. Ofcom will liaise with these respondents individually regarding their particular concerns.

3.50 The complete Code on the Prevention of Undue Discrimination between Broadcast Advertisers can be found at Annex 1.

Section 4

Code Implementation

- 4.1 To fulfil its duty under sections 319(1), 319(2)(k) and 319(3) of the Communications Act 2003, Ofcom has published the Code on the Prevention of Undue Discrimination between Broadcast Advertisers (as an addendum to the Ofcom Broadcasting Code), which comprises Annex 1 of this Statement. This approach replicates that taken by Ofcom when it implemented the Cross-promotion Code as an addendum to the Ofcom Broadcasting Code, in July 2006.
- 4.2 The Code applies with immediate effect (i.e. from 27 February 2012).

Annex 1

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 27 February 2012.

Purpose of this Code

- 2.1 Under section 319 of the Communications Act 2003 (“the Act”) 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(2) 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”¹⁴.

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 UK Code of Broadcast Advertising (BCAP Code)¹⁵.

¹⁴ See sections 319(1), 319(2)(k) and 319(3) of the Act.

¹⁵ Available at:

<http://bcap.org.uk/The-Codes/BCAP-Code.aspx>

Rules

- 4.1 A television broadcaster must not unduly discriminate between advertisers¹⁶ 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 profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment”¹⁷.

- 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 reference¹⁸.

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.

¹⁶ For the sake of clarity, an ‘advertiser’ includes, but is not restricted to, any commercial or non-commercial entity.

¹⁷ 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>

¹⁸ ‘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>

- 5.5 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 Rules. In order for a breach of the Rules to have occurred, any discrimination must be “undue”.
- 5.6 The Rules do not therefore 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. Prices charged to different advertisers may vary due to a range of factors, including (but not limited to) the level of demand for that particular product, the availability of particular impacts (e.g. peak), demographics or specific slots, and other terms and conditions also included in the contract.
- 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.
- 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. The examples below are a non-exhaustive list of examples of potential objective justifications. However, every complaint will be dealt with on a case-by-case basis, taking account of the individual circumstances of each case.
- 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 as part of a social responsibility policy.
 - Where a licensee refuses advertising it does not wish to carry for legal or moral reasons, this may not amount to undue discrimination with respect to other advertisers. As a result, a licensee may choose not to carry a particular category of advertising (e.g. gambling services) or there may be particular circumstances why it may choose not to carry advertising from a specific party on legal or moral grounds. Accordingly, a licensee 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 1998.

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 website¹⁹.
- 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 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 complaints²⁰.
- 5.14 This guidance will be reviewed from time to time to reflect Ofcom's experiences with individual cases.

¹⁹ Available at:
<http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/?a=0>

²⁰ Available at:
<http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/complaints-disputes/>. These Guidelines are currently being reviewed.