

Section Ten

Commercial References and Other Matters

I General Summary of Responses

Responses to the Consultation

We have received substantive responses from the BBC, ITV, Channel 4 and Five, S4C, UKTV, ITN, Capital Radio, Chrysalis, the Commercial Radio Companies Association (CRCA), EMAP, Discovery Networks Europe, Trustar, Kanal 5, Enteraction TV, ZIP TV, the Radio Advertising Clearance Centre (RACC), National Lottery Commission, European Sponsorship Association, the Association of International Broadcasters (AIB), Satellite and Cable Broadcasters Group (SCBG), the Institute of Practitioners in Advertising (IPA), ISBA, the Association for Television On-Demand Limited (ATVOD), the Church of Ireland Broadcasting Committee, the Churches' Media Council, the Evangelical Alliance, the Christian Broadcasting Council, National Secular Society, Community Media Association, United Christian Broadcasting, MediaWise, mediawatch-uk, Ligali, Maranatha, Public Voice, Campaign for Press and Broadcasting Freedom, the RNIB, the Institute of Fundraising, the Advertising Association (AA), Sustain, Olswang, Freedom Media, CSV Media, and a number of individuals. There were 13 confidential responses.

A number of respondents, including Channel 4 and Five, believe that this section of the Code should apply to the BBC.

ITV suggests that product placement should be allowed provided it is transparent to the audience.

The National Lottery Commission believes that the National Lottery merits special consideration in the context of this section of the Code.

Regulatory organisation RACC says that no material or detrimental changes have been made and the wording of the proposed amended rules is clear and easily understood for practical interpretation purposes.

Kanal 5 believes that the approach of Ofcom is too conservative and will stifle innovation.

UCB responds at length on the question of fundraising. It is in favour of specialist religious services being able to raise funds, but no other services or individual programmes.

Ofcom response

As with sponsorship, this section of the Code is of interest to many commercial organisations, not just the broadcasting industry. We received comments, some of them very detailed, from a wide range of respondents. These have led to a number of amendments. We will also address specific concerns raised in guidance. The revised Code section fulfils the requirements of the TWF Directive and the Act, and is both proportionate and light touch.

Commercial References and Other Matters

(section 319(2)(i) and 319(4)(f) of the Act, Television Without Frontiers Directive ('TWF') Articles 1(c) and (d) 10(1) and (4), and 18, and section 21(1) of the Financial Services and Markets Act 2000)

II Preamble

This section of the Code does not apply to the BBC.

Responses to the Consultation

Channel 4 and Five believe that the BBC should be subject to the same regulatory regime as commercial broadcasters in relation to inappropriate commercial involvement.

The BBC suggests that the preamble be amended to read "This section of the Code does not apply to BBC services funded by the licence fee or grant in aid or to programmes supplied by the BBC to S4C as part of the statutory provision".

Ofcom response

As with the sponsorship section of the Broadcasting Code, we have amended the preamble to clarify that this section does not apply to BBC services funded by the licence fee or grant in aid. The BBC, S4C and Ofcom have been able to clarify the position regarding those programmes supplied by the BBC to S4C as part of the statutory provision. Such programmes must comply with the Broadcasting Code in its entirety as no separate provision has been made in legislation to exclude them.

It is not for Ofcom to decide whether this section of the Broadcasting Code should or should not apply to the BBC. If it were to apply to the BBC, then the Government would need to issue a notification to this effect.

III Principles

Principle 1

To ensure that the independence of editorial control over programme content is maintained.

Responses to the Consultation

There were no specific comments on the first principle.

Principle 2

To ensure that the advertising and programme elements of a service are clearly separated.

Responses to the Consultation

ITV believes the second principle should be amended to: "To ensure that the advertising and programme elements of a service are clearly identifiable and distinguishable from each other, and are separated by optical and/or acoustic means."

Ofcom response

The principle is a high-level statement of intent and Ofcom therefore believes it is unnecessary to include specific details such as how separation is to be achieved. This

section of the Broadcasting Code should be read in conjunction with the rules on the Amount and Scheduling of Advertising (RASA), in particular Rule 3.1 of RASA which states:

“Television advertising must be readily recognisable as such and kept quite separate from other parts of the programme services. Breaks containing advertising spots of any kind, including teleshopping spots, must be identified in vision and/or sound, eg station idents going in and out of breaks...”

IV Rules

Ofcom is currently reviewing its rules on the Promotion of Programmes, Channels and Related Services on Commercial Television, and will be consulting separately on this matter later in the year. We have therefore included a reference to cross-promotion in Section Ten: Commercial References and Other Matters of the Code to alert broadcasters to the possibility that this section may need to be amended in the near future.

Draft Rule 10.1 (now Rule 10.1)

Broadcasters must maintain the independence of editorial control over programme content.

Responses to the Consultation

Campaign Group CPBF supports the key rules set out in Rules 10.1 to 10.4. ITV accepts this rule.

Draft Rule 10.2 (now Rule 10.2)

Broadcasters must ensure that the advertising and programme elements of a service are clearly separated.

Responses to the Consultation

ITV suggests that the rule should instead say “broadcasters must ensure that the advertising and programme elements of a service are clearly identifiable and distinguishable from each other, and are separated by optical and/or acoustic means”.

Ofcom response

We note ITV’s response and its accord with the TWF Directive. As ITV implies the separation of programmes and advertising may be achieved by “optical and/or acoustic means”. However, this is the means by which draft Rule 10.2 can be achieved. At present, RASA (Rules on the Amount and Scheduling of Advertising), which remains in place, states that “Television advertising must be readily recognisable as such and kept quite separate from other parts of the programme service” and this is reflected in the rule. However, we will make it clear in the guidance that separation may be achieved by optical and/or acoustic means.

Ofcom is to consult on RASA.

Products or services in programmes

Draft Rule 10.3 (now Rule 10.3)

Products and services must not be promoted in programmes.

Responses to the Consultation

Capital Radio recommends that this rule is deleted completely. Channel 4 and Five suggest inserting '(except where programme-related)' after the word 'services'.

Emap believes this rule will prevent radio presenters mentioning places they have visited and make it difficult to describe prizes.

CRCA says that this should be a matter of balance and extent and that Rule 10.4 prevents abuses. Chrysalis Radio also suggests that 'promote' needs defining here, as radio presenters may describe products they have used without there being a commercial relationship.

ATVOD is currently consulting its members prior to establishing guidelines for the regulation of the incorporation of commercial references in on demand services.

ITV accepts this rule but would welcome clarification of 'promoted.'

Ofcom response

This rule reflects a requirement in the TWF Directive and is aimed at keeping advertising and programmes separate.

We note the radio industry's concern. However, the intention of this rule is simply to avoid a 'sell' (direct or indirect). We will clarify this rule in guidance.

We agree with Channel 4 and Five and propose to exempt programme-related material from this rule, since this was always the intention.

Draft Rule 10.4 (now Rule 10.4)

No undue prominence may be given in any programme to a product or service. Any reference to a product or service must be limited to what can be justified by the editorial requirements of the programme.

Meaning of 'undue prominence':

Undue prominence may result from (but is not limited to) the recurring reference to or presence of a product or service (including company names, brand names, logos etc) in a programme, or from the manner in which a product or service is presented or appears in a programme.

Responses to the Consultation

The charity Institute of Fundraising is concerned that programme makers will use the concept of 'undue prominence', as described in the draft Code, to exploit the marketing value of the words 'charity' and 'charitable'. In the past, producers have used 'undue prominence' as a reason not to mention or profile specific charities that may be the beneficiaries of a promotion running in a programme.

UKTV questions why the definition of 'undue prominence' is changing on the basis that adding the word 'recurring' makes the measure quantitative rather than qualitative.

SCBG suggests that ‘undue prominence’ should be defined as: “The presence of products or services within a programme where their presence cannot be editorially justified, and/or where there are specific references to the attributes, benefits or prices of those products or services”.

The BBC suggests a clearer definition of ‘undue prominence’ would be beneficial, for example “Any references to a product, service or company within programmes must be clearly editorially justifiable. Undue prominence may result from the unjustifiable presence of a product or service (including company names, brand names, logos etc) in a programme, or from editorially unjustified repeated references to a product or service within the programme”.

Olswang says it may be preferable to combine Rule 10.4 with the definition of undue prominence as follows: “Any reference to a product or service must be limited to what can be justified by the editorial requirements of the programme and will otherwise be considered to be undue prominence. Examples of undue prominence include (but are not limited to) the recurring reference to or presence of a product or service (including company names, brand names, logos etc) in a programme, or from the manner in which a product or service is presented or appears in a programme, unless in each case, such reference, presence or manner of presentation is editorially justified.”

ITV accepts this rule but believes there should be guidance stating that the National Lottery will not normally be regarded as a product or service for the purpose of the rule. The National Lottery Commission stresses the unique status of the National Lottery and refers to comments made by the Government that “it would be entirely appropriate for Ofcom to recognise, in the application of their codes, the National Lottery’s distinctive place in the life of this country...”

Ofcom response

We have noted the responses and have now reworded both the rule and the explanation of how ‘undue prominence’ may occur. The Broadcasting Code now simply states that “No undue prominence may be given in any programme to a product or service”. There is now no ‘meaning’ of undue prominence within the Broadcasting Code. We note that undue prominence may arise from the presence etc of a product or service where there is no editorial justification or the manner in which a product or service appears or is referred to. We have removed the words “recurring reference”; we believe it to be unhelpful as it gives undue prominence more of a quantitative rather than qualitative feel (as noted by UKTV).

Ofcom intends to include in guidance a reference to the National Lottery to make clear that some degree of flexibility in applying the rules in this section may be appropriate in view of the National Lottery’s statutory and national status.

Draft Rule 10.5 (now Rule 10.5)

Product placement is prohibited.

Meaning of ‘product placement’:

Product placement is the inclusion of, or a reference to, a product or service within a programme in return for payment or other valuable consideration to the programme-maker or broadcaster (or any representative or associate of either).

Responses to the Consultation

ITV believes there is scope under the TWF Directive for relaxing the prohibition on product placement, provided it is made clear to the audience that it has occurred, for example, by means of the programme credits.

CRCA says that paid promotions are affected by this and does not believe that this revenue door should be closed.

Channel 4 and Five note that the right to include “an end credit to the provider of editorially necessary goods or services at reduced or no cost” is not included.

A number of respondents, including the AA, are concerned the new rule is more restrictive than under the current codes. Editing foreign sourced material, eg US imports, may not be possible.

Discovery Networks Europe believes that this rule should be deleted.

Ofcom response

Product placement is currently defined as the inclusion of, or a reference to, a product or service within a programme in return for payment or other valuable consideration to the programme-maker or broadcaster (or any representative or associate of either). The draft Code did not recommend lifting the current prohibition. There are mixed views over whether the prohibition should remain.

The basis for this rule is the TWF Directive which prohibits the use of “surreptitious advertising”. This is defined as “the representation in words or pictures of goods, services, the name, the trademark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the broadcaster to serve advertising and might mislead the public as to its nature. Such representation is considered to be intentional in particular if it is done in return for payment or for similar consideration”.

Some broadcasters argue that if audiences are made aware of a product placement relationship in a programme, eg by explicit mention in the credits, then they will not be misled and surreptitious advertising has therefore not occurred.

Against the backdrop of an apparent threat to the traditional spot advertising funding model of commercial broadcasting, Ofcom is keen to examine and explore new potential funding sources. These include product placement possibilities in the light of what the TWF Directive may allow, both now and when it is reviewed. The EU has stated that it will reach a provisional position on product placement as part of the re-drafting of the TWF Directive by the end of year. However, relaxing the rule on product placement immediately could have implications for the overall ecology of television funding. Ofcom has therefore decided that the Broadcasting Code should retain the prohibition on product placement, but that the issue should be specifically consulted upon in the context of a separate consultation which will examine programme funding options later this year.

We note the radio industry’s concern and have included an exclusion to the meaning of product placement, which should enable commercial radio to continue to feature currently legitimate ‘sponsorship and promotions’.

We appreciate the concern of Channel 4, Five and ITV and have amended the meaning of product placement to exclude reference to products or services acquired at no, or less than full, cost, where their inclusion within the programme is justified editorially and, on television, arrangements covering the inclusion of products or services in programmes acquired from outside the UK and films made for cinema.

Programme related material

Draft Rule 10.6 (now Rule 10.6)

Programme related material may only be promoted in programmes where editorially justified.

Responses to the Consultation

A number of respondents, including ITV, Discovery Networks Europe, S4C, the European Sponsorship Association, ISBA and the Branded Content Marketing Association, believe that broadcasters should be allowed to promote programme related material wherever that is relevant and editorially justified in the programme.

Channel 4 and Five agree with the proposed rule but believe clarification is needed.

The Community Media Association welcomes the extension of the provision for the promotion of programme related material to radio. CRCA questions what this rule has to do with radio.

The BBC believes that this is a difficult area on which guidance is needed.

Campaign group CPBF believes the promotion of commercial products or services in which the broadcaster has an economic interest should be permitted only after programmes or in end credits where appropriate.

Ofcom response

Programme related material is not a new concept; it is dealt with in existing (ITC) rules for television. Ofcom has decided to move away from detailed rules in this area; however, we will provide guidance where appropriate. We have also reworded the proposed rule slightly in the interests of clarity.

Bearing in mind the need for editorial justification, we believe it is no longer necessary to specify at what point in a programme references to programme related material may be made.

Draft Rule 10.7 (now Rule 10.7)

The broadcaster must retain responsibility for all programme related material.

Responses to the Consultation

ITV accepts this rule. Discovery Networks Europe and S4C welcome this new rule.

The BBC says that, as the intention is to allow on-air inclusion of material which is directly related to the programme and which is designed to editorially extend the audience's understanding of the programme, then it is important for the broadcaster to ensure that such material has been commissioned, licensed or developed in conjunction with the related programme or series and is indeed editorially acceptable and editorially consistent with the content and values of the related programme.

Ofcom response

We believe that the new rule is proportionate and appropriate; it is not intended to increase the regulatory burden upon broadcasters but will help ensure that only material that is indeed programme related is promoted under this section. We agree that clarification may be helpful and will consider providing this in guidance.

Draft Rule 10.8 (now Rule 10.8)

Programme related material may be sponsored, and the sponsor may be credited when details of how to obtain the material is given. Any credit must be brief and secondary, and must be separate from any credit for the programme sponsor.

Meaning of 'programme related material':

Programme related material is products or services that are both directly derived from a specific programme and intended to allow listeners or viewers to benefit fully from, or to interact with, that programme.

Responses to the Consultation

ITV accepts this rule. Discovery Networks Europe and S4C welcome this new rule. SCBG says it cannot see the logic of the separation required by this rule, as sponsorship credits are required under Rule 9.16 to be separated from the programme.

Channel 4 and Five believe that this rule is acceptable, provided there is a better definition of "programme support material."

The Community Media Association would like to commend a suggestion made by the Media Trust/Community Channel that the definition be rewritten as follows:

"...products or services, including programmes broadcast in partnership on other services, that are both directly derived from a specific programme and intended to allow ... viewers to benefit fully from, or interact with, that programme."

Capital Radio would like clarification on the definition of 'programme related material'. They recommend the definition be extended to include products and services derived from programming. Campaign Group CPBF believes that the definition of 'programme related material' fails to distinguish between commercial products and services and services such as educational material or fact sheets provided on a non profit basis. CPBF believes such distinctions should be reintroduced to safeguard against increasing commercial promotions occurring within programmes.

Two respondents argue that broadcasters have already impinged upon programme integrity, for example by using split screen end credits or talking over end music to promote telephone services, books etc. Rules in this area therefore need to be tightened.

The BBC believes that the proposed rule is too broad and could mean that at the broadcaster's discretion any products or services derived from the intellectual property of the programme, including toys and games, could be promoted within the body of the programme. It is also concerned that the broadcaster's own magazines related to programmes covered could be promoted in the body of the programme. It suggests that Ofcom seeks to ensure a clear separation between programme support material which is not

designed to make a profit and commercial programme related products. The BBC believes that this involves making a further distinction between commercial related products which are of an editorial nature, such as books or magazines and those which are not, such as toys and novelty items.

Ofcom response

Ofcom has considered the points made by respondents but has concluded that this rule helps ensure that advertising and programme content are separated and that editorial content is not distorted for commercial purposes.

The meaning of programme related material is derived from the TWF Directive (article 18(3) and Recitals 34 and 35 of 97/36/EC, the amending directive). In deciding whether, in a particular case, material is indeed programme related, Ofcom will need to consider the individual facts. The word 'directly' in the meaning of programme related material is important in this context. We appreciate that this is an area in which further clarification may be helpful and will therefore consider providing guidance.

Premium rate numbers

Draft Rule 10.9 (now Rule 10.9)

Premium rate numbers will normally be regarded as products or services, and are only acceptable in programme time when they fall within the meaning of programme related material (see above).

Responses to the Consultation

ITV accepts this rule. S4C believes that this rule does not, in practice, change the situation.

The BBC believes that premium rate numbers should only be used in programmes where it is editorially justified and enables the audience to interact with programme content or to access directly relevant support services or supporting publications. The BBC does not think premium rate numbers should be used as a way of promoting or selling other products or services or just to make money; rather, that competitions should always have a clear editorial purpose. For example, many reality shows use voting as a means of selecting a winning contestant or item, like a favourite movie or book; a premium rate line is often the most cost effective way for the viewer to interact.

Ofcom response

The BBC's point is addressed by the earlier rule in this section of the Broadcasting Code, which requires that programme related material may only be promoted where editorially justified.

Draft Rule 10.10 (now Rule 10.10)

Any use of premium rate numbers must comply with the Code of Practice issued by the Independent Committee for the Supervision of Standards of Telephone Information Services (ICSTIS).

Responses to the Consultation

ITV accepts this rule. S4C believes that this rule does not, in practice, change the current situation.

Ofcom response

We note the responses.

Competitions

Draft Rule 10.11 (now in Section Two: Harm and Offence, Rule 2.11)

Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known.

Responses to the Consultation

This rule is welcomed by a number of respondents, including the Branded Content Marketing Association, SCBG, ITV, Discovery Networks Europe and S4C. The general view seems to be that this rule should apply equally to radio and television.

Ofcom response

We note the responses.

However, while we recognise that this rule fits naturally into this section dealing with commercial references we believe that this rule should in fact be implemented under the standards objective in Section Two of the Broadcasting Code (Harm and Offence).

Draft Rule 10.12 (now deleted)

Competitions containing brand mentions may only take place within a programme, and cannot stand alone as programmes in their own right. Trailers for programmes may not include competitions with brand mentions.

Responses to the Consultation

A number of respondents, including ISBA and the Digital TV Production Company, say that there is no need to limit competitions with brand mentions to within programmes. UKTV states that it cannot comply with the rule as 85% of its programming is acquired, and proposes that competitions be permitted within the packaging around a programme, providing they are still relevant and the brand mentions not unduly prominent. UKTV would also like to see sponsors allowed to donate branded products as prizes for competitions in continuity spots as well as programmes. Brand mentions should be allowed within a competition as naming the goods/prizes is helpful to viewers.

Discovery Networks Europe would like to see this amended to read, “competitions containing brand mentions may only take place within a programme, and cannot stand alone as programmes in their own right. Trailers for programmes may include competitions with a brand mention, as long as the reference remains brief, secondary and factual”.

Emap feels that the last sentence is overly restrictive and contradicts Rules 10.3, 10.4 and 10.5.

SCBG believes that a prohibition on a brief mention from the prize provider in a promotion containing a viewer competition is unnecessary, and transparency is actually increased by brief reference. It suggests the following: “Competitions containing brand mentions may only take place within a programme, and cannot stand alone as programmes in their own right.

Trailers for programmes may include competitions with a brand mention, as long as the reference remains brief, secondary and factual.”

Channel 4 and Five believe that this rule is too prescriptive and that it can be amended by replacing the words ‘within a programme’ to ‘within programmes or in presentation time.’ ITV believes that the words ‘or presentation time’ should be added immediately after ‘within a programme’.

Chrysalis Radio does not understand the purpose of this rule and suggests no harm is done by having a sponsored competition stand as a programme in its own right. Capital Radio believes this rule should apply to television only.

S4C agrees with this rule.

Ofcom response

As a result of the consultation, we have removed the rule restricting competitions containing brand mentions to within programmes, since there appears to be no regulatory or other reason for retaining such a rule. This will allow branded competitions in programme trailers as well as in presentation time. However, to prevent undue prominence for commercial products or services, the Broadcasting Code will require any brand mentions within competitions to be brief and secondary.

There is also a cross reference to the draft rule above concerning competitions (now new Rule 2.11)

Use of advertisements in programmes

Draft Rule 10.13 (now Rule 10.12)

Advertising must be clearly separated from programmes and advertisements are not normally allowed in programme time. There are limited exceptions where the inclusion of an advertisement, or extracts of an advertisement, is sufficiently justified by the editorial requirements of the programme.

Responses to the Consultation

One individual believes the provision of advertisements could be left to market forces.

CRCA recommends that this rule should end after the words ‘programme time’. Capital Radio recommends that this rule should only apply to television.

ITV, Channel 4 and Five welcome this simplification.

Ofcom response

Ofcom has reworded this rule to make it both clearer and more concise. We have decided that the specific rules for factual and entertainment programmes are no longer necessary.

Charity appeals

Draft Rule 10.14 (now Rule 10.13)

Charity appeals that are broadcast free of charge are allowed in programmes provided that the broadcaster is satisfied that:

- (i) the organisation concerned is either registered with the Charity Commissioners or can produce satisfactory evidence of charitable status, or, in the case of an emergency appeal, that a responsible public fund has been set up to deal with it; and
- (ii) the organisation concerned is not prohibited from advertising.

Responses to the Consultation

This rule is welcomed by a wide range of respondents, including the RNIB, the Evangelical Alliance, ITV, Channel 4, Five, Discovery Networks Europe, SCBG and ISBA. The general view, in response to a specific question raised by Ofcom in the consultation, seems to be that it is sensible for this rule to apply both to radio and television.

The charity Institute of Fundraising suggests that registration with OSCR (Office of the Scottish Charity Regulator) is also included as proof of eligibility.

The Community Media Association would like clarification of ‘appeal’ and suggests the following definition: “An appeal is any programme, or part of a programme, which contains an invitation to make a financial contribution which will, in whole or in part, be passed on to a registered charity or voluntary sector organisation”.

Ofcom response

For clarity and ease of reference, we have removed the reference to the Charity Commissioners and now simply require organisations to be able to demonstrate their charitable status. Whilst we do not believe it is necessary to define an ‘appeal’, we will clarify in guidance if the rule causes difficulty in practice.

Draft Rule 10.15 (now Rule 10.14)

Appeals should be allocated among as wide a range of charities as possible.

Responses to the Consultation

CRCA says this is too much of an obligation and the phrase should be amended to ‘a wide range of charities or organisations seeking donations’. Capital Radio recommends that this rule be redrafted to refer only to ‘a wide range of charities’. Chrysalis Radio believes this is impractical to implement and that the rule implies there is some harm in a radio station’s choosing to champion a single charitable cause.

ITV welcomes the simplification but asks, as do Channel 4 and Five, for the addition of the phrase ‘over time’.

The Community Media Association says that the proportion of money going to a charity must be revealed as well as letting the viewer know how they can find out more about how the charity works.

The BBC suggests that to ensure a level playing field across all UK broadcasters and to enable everyone to take part in activities like the BBC’s Children in Need and Comic Relief appeals that there should be additional wording to the proposed Rule 10.15; for example: “However, programmes designed to raise money for charity through big fundraising events may raise money for a single charity or charitable trust which distributes money to a wide

range of beneficiaries, providing the charity is accountable to the broadcaster as to how the funds are distributed “.

Ofcom response

Having considered the responses, we have amended the rule to refer to ‘a wide range of charities’. The revised wording makes it clearer that it is not necessary for each individual appeal to benefit a range of charities and that this requirement can be met over time. The reason for requiring the broadcast of charity appeals to benefit a range of charities is that many work in a competitive environment and the rule prevents undue prominence for one organisation.

In response to the CMA’s point, we believe that this matter is already addressed by the Charity Commission and ICSTIS.

Community Service Announcements

Draft Rule 10.16 (now Rule deleted)

Community service announcements, transmitted free of charge, may be broadcast in programme time.

Responses to the Consultation

CRCA says that this rule is not relevant to radio and should be amended to read: ‘Community service announcements may be broadcast free of charge’. Capital Radio believes this rule should only apply to television. Chrysalis Radio questions this rule as radio stations already broadcast public service announcements.

The AA notes that this wording implies radio is subject to advertising ‘minutage’ restrictions, but this is only the case for TV.

However, a number of respondents, including Maranatha, the Church of Ireland Broadcasting Committee, the Churches’ Media Council, ITV, the BBC and Discovery Networks Europe agree with the rule.

Ofcom response

After careful consideration, we have removed this rule as it is unnecessary. There is nothing in the Broadcasting Code that will prevent a licensee – whether radio or television – providing, at no cost, publicity for community voluntary and not-for-profit organisations. There is therefore no need for a specific rule explaining that such announcements are permitted.

Financial reporting and promotion of investment activity

Draft Rule 10.17 (now Rule 10.17)

Financial promotions and promotions of investment activity may not be broadcast unless they comply with the relevant provisions in Appendix 4 to this Code [Annex 9 of the consultation].

Meaning of ‘financial promotion’

A financial promotion is an invitation or inducement to engage in investment activity (in accordance with section 21(1) of the Financial Services and Markets Act 2000 (Restrictions on financial promotion)).

Responses to the Consultation

ITV accepts this rule.

Ofcom response

We note the response.

In Annex 9 of the consultation, we noted that the Market Abuse Directive, relating to the fair presentation of investment recommendations and disclosure of conflicts of interest, had not yet been implemented. Reflecting the requirements of the Directive, the Investment Recommendation (Media) Regulations come into force on 1 July 2005. We have therefore adjusted the relevant rule in the Broadcasting Code, and the appropriate appendix, accordingly.

A letter was sent to broadcasters in March 2005 explaining this and asking for comments. The new sections of the rule and appendix, which refer to investment recommendations, address direct recommendations of specific investment decisions as opposed to more generic advice. The broadcaster's exposure under the new Regulations is limited to the work of its staff or freelance staff. Third party interviewees have responsibility for making appropriate disclosure. There is a requirement to state that the broadcaster is regulated by the Ofcom Broadcasting Code. However, the appendix makes it clear that a visual or oral statement in end credits will be acceptable.

Television

Events

Draft Rule 10.18 (now deleted)

Visual or oral reference to advertising, signage or branding at an event must be limited to what can clearly be justified by the editorial needs of the programme itself.

Meaning of 'event':

For the purpose of this rule, events are recognised sporting occasions or other legitimate events. Broadcast coverage must not be the principal purpose of the event and the event must be open to members of the public.

Responses to the Consultation

ITV, Channel 4 and Five think this rule should be deleted. Discovery Networks Europe does not support this rule. The BBC suggests that it needs amending.

SCBG believes this rule is unnecessary and notes that a reflection of the success of many sports channels is their ability to get sponsorship for events.

Law firm Olswang believes the definition of 'open to members of the public' should be clarified. For example, certain activities such as shooting and squash require the audience to be physically separated from the event for a variety of practical and safety reasons.

Ofcom response

Having considered the responses carefully, we have removed this rule. We believe the undue prominence rules are sufficient to limit on-screen exposure of signage and branding present at events.

Draft Rule 10.19 (now Rule 10.18)

The use of electronic imaging systems during broadcast coverage of an event must comply with the following rules:

- (i) Broadcasters and viewers must be informed in advance of the presence of virtual images.
- (ii) Virtual advertising may only replace existing on-site advertising. Virtual advertising messages must not be more visible or conspicuous than the actual advertising at the venue.
- (iii) Rules relating to prohibited advertisers apply also to virtual advertising. (Please refer to the Advertising Code.)
- (iv) The broadcaster may not trade in virtual advertising.

Meaning of ‘virtual advertising’:

Virtual advertising normally takes place at sporting events, and involves altering the broadcast signal to replace existing venue advertising with other advertising in the television picture (potentially targeted at a particular geographical audience).

Responses to the Consultation

SCBG believes this is not practical in the case of virtual advertising as the sport or event rights holder generally controls the rights.

ITV seeks clarification from Ofcom as to why broadcasters will continue to be prohibited from trading in virtual advertising. S4C requires clarification of this rule.

Discovery Networks Europe is unclear as to whether this rule prevents virtual advertising and if so suggests it may be a restraint of trade. Again, they do not support this rule.

Ofcom response

Without the prohibition on broadcasters trading in virtual advertising, product placement would effectively be permitted in the coverage of sporting and other events. Broadcasters would have an incentive to ensure that the advertising placed at events received prominence in the broadcast coverage. The current rules, whilst allowing virtual advertising but only to benefit the event rights holder, ensure that the broadcaster’s responsibility to be guided only by the editorial needs of the event are not compromised.

Whilst there is a prohibition on trading, the proposed rule does not prevent a broadcaster recovering reasonable costs incurred in the transmission of virtual advertising. By agreeing to the inclusion of virtual advertising, the broadcaster is also likely to benefit through a reduced licence fee for the coverage of the event concerned.

V Questions

Question 13g: *Should the rule prohibiting television services appealing for funds to make programmes and fund services be removed, kept or altered?*

Responses to the Consultation

ITV and RNIB do not support appealing for money and Channel 4 and Five and the BBC all say that such an issue requires a full consultation, in itself, as this could significantly change the landscape for PSBs, bringing the funding mechanism closer to the American model. The Community Media Association believe that community or local TV should be permitted to appeal to the relevant community as did ISBA (Incorporated Society of British Advertisers).

The only substantive respondents who have said yes to this question are approaching the matter from the perspective of support for religious services. The Evangelical Alliance, Maranatha, and the Christian Broadcasting Council believe specialised religious services should be allowed to make such appeals.

Ofcom response

Under Rule 6.2(a) of the legacy RA Programme Code, programmes broadcast on radio are permitted to appeal for funds, goods and services on behalf of others. Appeals for funds to make programmes are also permitted. If the service is 'listener-funded', then it is also permissible to appeal for funds to fund the radio service itself. However there is no definition of a listener-funded station. All radio licences must be held either by individuals or by companies. Under the RA Code, radio licensees are prohibited from making profits from appeals and there is a requirement that money, goods and services received from appeals should be carefully controlled. In addition, a number of the pilot community services licensed by the RA have used on air appeals, and it is likely that a number of the prospective community operators will similarly wish to do so, given that they will be required to limit their commercial fund raising to not more than 50% of their annual income.

Television services are permitted to make charitable appeals on behalf of others but they are prohibited from appealing for funds to support programmes or services.

There is nothing in law historically or now that require television and radio to be treated differently. Equally, however, the Act provides for standards to be applied to particular descriptions of programmes or television and radio services as appears appropriate for securing the standards objectives. Ofcom therefore is permitted to set different standards for television and radio if it thinks it appropriate to do so.

As the broadcasters acknowledge in their response the entire issue of the future funding of television is of major importance. As part of the exploration of this subject we intend to undertake a production funding review. We also plan to undertake a consultation on community television planned for later this year which will raise the funding issue for community television services. This is an issue which we believe cannot be approached in a piecemeal fashion. Any change will affect the entire ecology of television funding. Therefore we have accepted the weight of consultation responses on this issue and will retain the present prohibition on appealing for funds to fund services or programmes on television. An appropriate rule has been added to Section Ten: Commercial References and Other Matters of the Code.

Radio will be allowed to appeal for funds to support services and programmes. Section Ten: Commercial References and Other Matters of the Code therefore includes a separate rule for radio; this is a simplified version of the protections currently in place in the RA Code.

Question 13j: *Should there be rules regarding merchandising arrangements?*

Responses to the Consultation

The majority of respondents who have commented on this question (including ITV, Channel 4, Five and the Branded Content Marketing Association) believe it is unnecessary to retain rules on merchandising arrangements.

MediaWise suggests there should be rules regarding merchandising agreements to protect the public, especially children, from exploitation.

SCBG notes that very few children's programmes are made without a marketing agreement being in place, and that the option of banning merchandising arrangements would be impossible to regulate; it suggests merchandising be encompassed by its suggestion of undue prominence (Rule 10.4).

Four individuals believe the current rules should remain. One of these individuals believes these rules are required to maintain editorial independence and stop commercial infringement on programmes. Another believes children's programmes should not be subjected to merchandising at all.

Ofcom response

In considering what rules are necessary in this area, Ofcom needs to balance the commercial interests of sponsors with safeguarding the editorial independence of the broadcaster and protecting the viewer/listener from surreptitious advertising. Taking into account all the circumstances, Ofcom has decided to remove the merchandising rules. This is likely to be particularly attractive to the toy industry. However, the Commercial References section of the Broadcasting Code requires broadcasters to maintain editorial control over programme content (Rule 10.1). In addition, products and services must not be promoted in programmes (Rule 10.3) and no undue prominence may be given in any programme to a product or service (Rule 10.4).

These rules will prevent programmes from being used merely as advertising platforms for merchandise and we therefore believe that separate, specific rules on merchandising arrangements are not required.