

Section 11

Privacy

This section is laid out as follows:

- Proposed Code section 8
- Background to proposed Code section 8
- Proposed inclusions
- Proposed deletions
- Questions

Proposed Code, section 8, Privacy

(sections 3(2)(f) and 327 of the Act and section 107(1) and 130(1) of the 1996 Act)

Foreword

This section of the Code and the preceding section on fairness are different from other sections of this Code. They apply to how broadcasters treat the individuals or organisations directly affected by programmes rather than to what the general public see and/or hear as viewers and/or listeners. In this section, programmes includes advertisements.

This section contains rules Ofcom expects broadcasters to observe to avoid the unwarranted infringement of the privacy of individuals or organisations in programmes, or in the making of programmes. However, failure to observe any rule in this section will only normally constitute a breach of this Code where it results in an unwarranted infringement of privacy. Importantly, the Code cannot foresee every eventuality and does not set out all the circumstances in which there may be an unwarranted infringement of privacy.

Principle

To ensure that broadcasters avoid any unwarranted infringement of privacy in programmes and in the making of programmes.

Rules

- 8.1 Any infringement of privacy in programmes, or in connection with the obtaining of material included in programmes, must be warranted.

Meaning of “warranted”:

In this section ‘warranted’ has a particular meaning. It means that where broadcasters wish to defend an infringement of privacy as warranted, they should be able to demonstrate why. If the reason is that it is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy. Examples of public interest would include revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations or disclosing significant incompetence in public office.

Private lives, public places and legitimate expectations of privacy

Meaning of “legitimate expectations of privacy”:

Legitimate expectations of privacy will vary according to the place and nature of the information, activity or condition in question and whether the individual concerned is already in the public eye. There may be circumstances where people can reasonably expect privacy even in a public place. Some activities and conditions may be of such a private nature that filming or recording, even in a public place, could involve an infringement of privacy.

- 8.2 People taking part in programmes, including people under investigation or in the public eye, and their immediate family and friends, retain the right to a private life. Any private information about them should therefore only be broadcast with their consent, unless the disclosure of that information is warranted.
- 8.3 The location of a person’s home or family should not be revealed without permission, unless it is strictly relevant to behaviour under investigation and/or the disclosure of the information is warranted.
- 8.4 When people are caught up in events which are covered by the news their situation should not be abused or exploited in the making or transmission of a programme, unless it is warranted. This applies both to the time when these events are taking place and to any later programmes that revisit those events.
- 8.5 Broadcasters should ensure that words, images or actions recorded in, or transmitted from, a public place, are sufficiently public to justify their broadcast without the prior consent of the individuals concerned, unless to do so without their consent is warranted.

Consent

- 8.6 If a programme would infringe the privacy of anybody featured in it, that person’s consent should be obtained before the programme is broadcast, unless the infringement of privacy is warranted. (Callers to phone-in shows are deemed to have given consent to the broadcast of their contribution.)
- 8.7 Where the individual is under eighteen, consent must be obtained from a parent, guardian or other person over eighteen in loco parentis, unless the subject matter is trivial and the participation minor, or it is warranted to proceed without consent.
- 8.8 If an individual or organisation’s privacy is being infringed, and they ask that recording or live transmission be stopped, the broadcaster should do so, unless it is warranted to continue the recording or live transmission.
- 8.9 When filming or recording in institutions, organisations or other agencies, permission should be obtained from the relevant authority or management unless it is warranted to film or record without permission. Individual consent of employees or others whose appearance is incidental or where they are essentially anonymous members of the general public is normally not required.

- 8.10 However, in potentially sensitive places such as ambulances, hospitals, schools, prisons or police stations, a separate consent should be obtained from those in sensitive situations unless the individual's identity has been concealed (unless not obtaining consent is warranted).

Gathering information or images

- 8.11 The means of obtaining material must be proportionate to the subject matter of the programme.
- 8.12 Surreptitious filming or recording should only be used where it is warranted, and:
- (i) there is prima facie evidence of a story in the public interest; and
 - (ii) there are reasonable grounds to suspect that necessary evidence could be obtained; and
 - (iii) it is necessary to the credibility and authenticity of the programme.
- 8.13 Material gained by surreptitious filming and recording should only be transmitted when it is warranted.

Meaning of "surreptitious filming or recording":

Surreptitious filming or recording includes the use of long lenses or recording devices, as well as leaving an unattended camera or recording device on private property without the full and informed consent of the occupiers or their agent. It may also include recording telephone conversations without the knowledge of the other party, or deliberately continuing a recording when the other party thinks that it has come to an end.

- 8.14 Broadcasters should identify themselves to telephone interviewees from the outset, and explain the purpose of their call, or seek agreement from the other party, if they wish to broadcast a recording of a telephone call between the broadcaster and the other party, unless it is warranted not to do so.
- 8.15 Doorstepping should not take place unless a request for an interview has been refused, or there is good reason to believe that an investigation will be frustrated if the subject is approached openly, and it is warranted to doorstep. Broadcasters may normally however, without prior warning interview, film or record people in the news when in public places.

Meaning of "doorstepping":

Doorstepping is the filming or recording of an interview or attempted interview with someone, or announcing that a call is being recorded for broadcast purposes, without any prior warning.

Suffering and distress

- 8.16 Broadcasters should not take or broadcast footage or audio of people caught up in emergencies, victims of accidents or those suffering a personal tragedy, even in a public place, where that results in an infringement of privacy unless it is warranted.

- 8.17 People in a state of distress should not be put under pressure to take part in a programme or provide interviews unless it is warranted.
- 8.18 Broadcasters should take care not to reveal the identity of a person who has died, or of victims of accidents or violent crimes, unless and until it is clear that the next of kin have been informed, unless it is warranted.
- 8.19 Broadcasters should try to minimise the potential distress to victims and/or relatives when making or broadcasting programmes intended to examine past events that involve trauma to individuals (including crime). This applies to dramatic reconstructions and dramas, as well as factual programmes.
- 8.20 So far as is reasonably practicable, surviving victims, and/or the immediate families of those whose experience is to feature in a programme, should be informed of the plans for the programme and its intended transmission. Failure to do this might be deemed unfair or an unwarranted infringement of privacy, even if the events or material to be broadcast have been in the public domain in the past.

People under the age of eighteen and vulnerable people

- 8.21 Broadcasters must recognise that people under the age of eighteen do not lose their rights to privacy because, e.g. of the fame or notoriety of their parents or because of events in their schools.
- 8.22 Persons under the age of sixteen and vulnerable people should not be questioned about private matters or asked for views on matters likely to be beyond their capacity to answer properly, unless that is warranted.

Meaning of “vulnerable people”:

This varies, but may include those with learning difficulties, those with mental health problems, the bereaved, people with brain damage or forms of dementia, people who have been traumatised or who are sick or terminally ill.

Background to proposed Code section 8 - Privacy

1. The regulation of broadcasters regarding privacy is intended to protect individuals or organisations from having their privacy infringed in programmes, or in the making of programmes, without proper justification.
2. Section 3(2)(f) of the Act requires Ofcom to apply standards that provide adequate protection to members of the public and all other persons from an unwarranted infringement in privacy resulting from the activities of radio and television services. Ofcom is required by section 327 of the Act to take over the functions of the BSC contained in part 5 of the 1996 Act (with some exceptions).
3. Particularly, however, under section 107(1) of the 1996 Act, Ofcom has a duty to draw up a Code giving guidance as to the principles to be observed and the practices to be followed in connection with avoiding the unwarranted infringement of privacy in programmes, or in the obtaining of material included in programmes. The legislation, on which the regulation in this area is based is otherwise unchanged from the 1996 Act. The aim of the principle and rules in the draft Code is therefore, as can be expected, similar to the Code of Guidance issued by the BSC which is currently in force.

Proposed inclusions

4. The foreword to this section of the Code is intended to explain to users of the Code what the section applies to. This is necessary because the sections on fairness and privacy are different from the other sections of the Code.
5. The rules in this section are largely similar to the predecessor Codes. The legislation, on which this section of the Code is based is unchanged. However the wording has changed in places to follow the structure adopted by this Code.
6. The principle and rule 8.1 directly mirror the wording in the legislation section 107(1)(b) of the 1996 Act.
7. Rules 8.2 to 8.5 deal with private lives, public places and legitimate expectations of privacy.
8. Rules 8.6 to 8.10 set out the practices Ofcom would expect broadcasters to follow when obtaining informed consent and the circumstances where that is particularly important.
9. Rules 8.11 to 8.15 set out the practices Ofcom would expect broadcasters to follow when gathering information or images, in particular with reference to surreptitious filming or recording.
10. Rules 8.16 to 8.20 set out the particular safeguards Ofcom would expect broadcasters to follow when dealing with people in situations of suffering or distress.
11. Rules 8.21 and 8.22 relate to people under the age of eighteen and vulnerable people, and the additional practices broadcasters are expected to observe.

Proposed deletions

12. This proposed section, together with the proposed section on fairness, in the Ofcom Code will replace the BSC Code on Fairness and Privacy, section 2 of the ITC Programme Code and section 3 of the RA Programme Code. Ofcom proposes to omit some of the advisory narrative in the previous Codes. Where it is useful to do so, some of this may be included in the guidance. Significant omissions, i.e. omissions that imply that there could be a change in what is required from broadcasters and/or what the public can expect, are set out below.
13. Paragraph 14 of the BSC Code on Fairness and Privacy states that “an infringement of privacy has to be justified by an overriding public interest”. The proposed Ofcom Code does not use this form of words. The legislation requires that “unwarranted” infringements of privacy must be avoided. Previous decisions by the BSC have shown that an infringement of privacy is warranted when there is a public interest in the disclosure of the private information that outweighs the individual’s right to privacy. However, the legislation does not specify that the public interest test is the only way of warranting an infringement of privacy, and Ofcom therefore proposes that the draft Code should follow the wording of the 1996 Act.
14. Paragraph 33 of the BSC Code on Fairness and Privacy and section 2.2(iii) of the ITC Programme Code contain specific rules and guidance relating to police (or similar) operations. This section reflects good industry practice rather than a regulatory requirement. Ofcom proposes not to include any specific reference to police operations.
15. Paragraph 32 of the BSC Code on Fairness and Privacy and section 2.11 of the ITC Programme Code contain rules and guidance relating to reporting of sexual and other offences involving children. Similar provisions remain, but appear in the section of the proposed Code relating to Protecting the Under Eighteens (section 1 of the draft Code and section 4 of this consultation).
16. Rule 3.6 of the RA Programme Code relates to information about listeners. It is important that broadcasters do not pass on personal information without consent. The general principle that privacy should not be infringed without justification ensures that personal details are not broadcast without consent. However, the RA rule also relates to information passed by the broadcaster to a third party, e.g. in a dating phone-in. It is clearly important that broadcasters do not pass personal information to a third party without the express consent of the individual concerned. Equally, however, broadcasters will be subject to the provisions of the Data Protection Act. Consequently Ofcom does not propose to include a specific rule in this Code.
17. Rule 3.7 of the RA Programme Code also prohibits misuse of a wireless receiver to obtain information. It is an offence under section 5 of the Wireless Telegraphy Act 1949 for anyone to use a wireless receiver with intent to obtain information about any message which that person is not authorised to receive. Broadcasters are expected to comply with the law, and that is set out in the proposed introduction to the Code (section 3 of this consultation). It is therefore proposed not to include this rule in the Code.

Questions

Question 11a: Are the principles, rules and meanings necessary, consistent, proportionate and achievable? If not, can the wording be improved and if so how?

Question 11b: Are there any principles, rules or meaning we have not put here which would achieve the intentions of the Communications Act and other applicable legislation and be necessary, consistent, proportionate and achievable?

Section 12

Sponsorship

This section is laid out as follows:

- Proposed Code section 9
- Background to proposed Code section 9
- Proposed inclusions
- Proposed deletions
- Questions

Proposed Code, section 9, Sponsorship

(section 319(i) and (j) and particularly 319(4)(f). Also TWF Directive Articles 1(e), 10(1) and 17).

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

Principle

To ensure that the unsuitable sponsorship of programmes on radio and television is prevented, with particular reference to:

- **Transparency – to ensure sponsorship arrangements are transparent.**
- **Separation – to ensure that sponsorship messages are separate from programmes and to maintain a distinction between advertising and sponsorship.**
- **Editorial independence – to ensure that the broadcaster maintains editorial control over sponsored programmes.**

Meaning of “unsuitable sponsorship”:

Unsuitable sponsorship is sponsorship that infringes any provision of this section of the Code.

Rules

There are specific rules for the content of sponsored programmes and the content of sponsor credits. Some of these are different for radio and television. In addition to these rules, sponsorship must comply with advertising rules, relating to both content and scheduling, relevant to, respectively, radio and television.

Meaning of “sponsored programme”:

A sponsored programme is a programme that has had some or all of its costs met by a sponsor with a view to promoting its own or another’s name, trademark, image, activities, services, products or any other direct or indirect interest.

Costs include any part of the costs connected to the production or transmission of the programme.

A sponsor is any organisation or person, other than the broadcaster or programme producer, who is sponsoring the programme or programming in question with a view to promoting their or another's name, trademark, image, activities, services, products or any other direct or indirect interest. This meaning extends to those who are otherwise supplying or funding the programme.

Sponsorable content

9.1 All programmes, including substantive programme strands and themed blocks of programmes, may be sponsored, with the following exceptions:

Radio

- (i) News bulletins and news desk presentation may not be sponsored.

Television

- (ii) News and current affairs programmes may not be sponsored.
- (iii) Consumer advice programmes (programmes or series offering or including reviews or advice on products or services, including what to buy or where to go) may not be sponsored by sponsors whose business involves the marketing or provision of products or services of the type featured.

9.2 A television channel or radio station may not be sponsored.

Prohibited and restricted sponsors

9.3 No programme on radio or television may be sponsored by a sponsor that is not allowed to advertise on that media, with the following exception:

- (i) Bookmakers and gaming companies may sponsor subject to certain conditions. [The specific conditions that apply to sponsorship by betting and gaming companies are being consulted upon]

9.4 Scheduling restrictions that apply to advertising on the relevant media apply also to sponsorship.

9.5 Bookmakers or gaming companies may not sponsor programmes aimed at persons under the age of eighteen.

The content of sponsored programmes

9.6 A sponsor may not influence the content and/or scheduling of a programme in such a way as to affect the responsibility and editorial independence of the broadcaster.

9.7 There may be no promotional reference to the sponsor, its name, trademark, image, activities, services, products or any other direct or indirect interest, in the programme. Any non-promotional reference must be editorially justified. This extends to generic references.

Sponsorship credits

- 9.8 Sponsorship must be clearly identified at the beginning and/or end of the programme.
- 9.9 The relationship between the sponsor and the programme must be transparent.
- 9.10 Sponsor credits on radio and television must comply with advertising rules that apply to that medium.

Radio

- 9.11 Credits must be broadcast during longer sponsored output, as appropriate for the degree of transparency required.
- 9.12 Credits must be short branding statements. They may, however, contain legitimate advertising messages, which must remain secondary.
- 9.13 A sponsor credit for a betting and gaming company may include only a concise description of its provision of service. No advertising content is permitted.
- 9.14 Credits must be cleared for broadcast in the same way as advertisements.
- 9.15 Programme trails are treated as programmes and the same rules apply.

Television

- 9.16 There may be no sponsor credits within programmes.
 - (i) Where a programme contains sponsored strands or sponsored specialist reports, credits must be presented outside, and clearly separated from, the programme.
 - (ii) Front credits must not be integrated within any part of the programme other than its title sequence, provided that the sequence does not include, nor is preceded by, any part of the programme itself.
 - (iii) Bumper or end credits may overlap the programme for not more than five seconds.
- 9.17 Sponsorship must be clearly separated from advertising. Sponsor credits must not contain advertising messages or calls to action. In particular, credits must not encourage the purchase or rental of the products or services of the sponsor or a third party.
- 9.18 Where a programme trailer contains a reference to the sponsor of the programme, the sponsor reference must remain brief and secondary.

Background to proposed Code section 9 - Sponsorship

1. The primary purpose of sponsorship is to create an association between the sponsor and the programme. Successful sponsorship can change how a brand is perceived and be used by the sponsor to build a relationship with a specific target audience.
2. Sponsorship credits describe the relationship between the sponsor and the programme. They appear outside advertising time, which is limited on television (but not on radio), and must not be confused with advertising.
3. Ofcom is required by section 321(1) of the Act to include general provisions governing standards and practice in the sponsorship of programmes and may include provision prohibiting forms and methods of sponsorship (whether generally or in particular circumstances). Section 321(4) of the Act also requires Ofcom, in relation to programme services, to have a general responsibility with respect to methods of sponsorship. Ofcom is required by standards objectives laid out in 319(2)(j) to prevent unsuitable sponsorship. 319(4)(f) also requires Ofcom to have regard to the desirability of maintaining editorial control in setting the standard objective contained in section 319(2)(j).
4. The regulation of sponsorship in the UK has evolved along different lines for radio and television. This is because the basis for sponsorship regulation on radio was derived from the Broadcasting Acts, while the regulation of television sponsorship has also had to comply with the more detailed provisions in the Article 17 of the TWF Directive.
5. This difference in the legal background is reflected in the proposed Code section. The proposed Code brings the regulation of sponsorship on radio and television together as far as possible. The aim of the regulation of sponsorship on both radio and television is to ensure that the sponsor does not influence the content of the programme in a way that compromises the editorial independence of the broadcaster, and that sponsorship credits are clearly distinguished from advertising.
6. The proposed Code section does not apply to the BBC as the BBC does not take sponsorship.
7. The current Codes relating to sponsorship on radio and television are part A of the ITC Code of Programme Sponsorship and sections 1 rule 3 of the RA Advertising and Sponsorship Code.
8. In drawing up the new Code section for sponsorship on radio and television, Ofcom has aimed to simplify the principles and rules to the minimum necessary to safeguard the objectives of the legislation underpinning regulation in this area. Some rules are different for radio and television.
9. The background and rationale for each principle and rule is set out below. Ofcom invites comments both on some specific questions and the proposed Code section as a whole.

Proposed inclusions

Principle

10. The first line of the principle mirrors the wording of the standards objective in section 319(2)(j) in the Act. The three subheadings set out the three broad pillars we derive from this objective. All the rules for both radio and television refer back to these subheadings and thus to the standards objective.
 - The use of the word “transparency” is key to ensuring that sponsorship is clearly identified to viewers (TWF Directive, Article 17.1(b)).
 - “Separation” relates to the separation of sponsorship from both programmes (Article 17.1(b)) and advertising (Article 10.1).
 - “Editorial independence” conveys the fundamental expectation that broadcasters maintain editorial control over sponsored programmes (section 319(4)(f) of the Act and TWF Directive Article 17.1(a)).
11. While the TWF Directive does not apply to radio, we consider that the three subheadings are appropriately derived from the requirement in the Act that unsuitable sponsorship is prevented, and so they apply equally to radio.

Rules

12. Rules 9.1 and 9.2 set out what may be sponsored (sponsorable content) and the relevant exceptions for radio and television respectively. There is no change proposed from what is currently allowed. Rule 9.2 prohibits sponsorship of a whole television channel or radio station. For television, the TWF Directive provides for sponsorship of ‘programmes’, and no other parts of the service. For radio and television, the broadcaster’s editorial responsibility for the service is paramount, and could be seen to be compromised if an entire channel was sponsored. Ofcom does, however, recognise that there are differing views on the matter of channel sponsorship, and invites views on the question.
13. Rules 9.3, 9.4, and 9.5 relate to prohibited and restricted sponsors. These rules derive from legislation and the desire for consistency across advertising and sponsorship. These rules are currently applied and we are not proposing to change them. However, 9.3(i) relates to sponsorship by betting and gaming companies and requires further discussion.
14. Most betting and gaming companies (such as bookmakers and casinos) are prohibited from advertising on television and radio. A prohibited advertiser may not normally sponsor. There is, however, an exception for betting and gaming companies, who are allowed to sponsor subject to specific rules.
15. The advertising prohibition for betting and gaming companies stems from a public policy concern not to encourage gambling. Sponsorship was recognised to be different from advertising as it is more about brand awareness than encouraging an activity. Ofcom’s regulation on both radio and television in this area remains subject to public policy and changes in the law. A Gambling Bill has been published which proposes the setting up of a Gambling Commission to regulate this area.

16. Ofcom does, however, wish to consider whether the rules for radio and television in this area can be consolidated. Currently, on both radio and television, betting companies may not sponsor programmes concerned with horse or greyhound racing or the results of such racing, and gaming companies may not sponsor programmes that resemble the gaming that takes place in casinos. On radio, bookmakers or betting companies may not sponsor programming involving betting or tips, while on television, this would in certain circumstances be possible. On radio, gaming companies may sponsor programming with bingo elements, but not on television. Both betting and gaming companies are, however, able to sponsor most other programmes, including other sports coverage.
17. To consolidate rules for radio and television, Ofcom therefore has to consider which categories of programmes betting and gaming companies should be allowed to sponsor. This could range from allowing sponsorship of all programmes (subject to the general rules in the Code) to maintaining the current position but modifying the points where radio and television differ. In each case, the outcome would be subject to the final shape of the Gambling Bill and any consultation with government and the proposed Gambling Commission.
18. Rules 9.6 and 9.7 relate to the content of sponsored programmes. This is an example of where Ofcom considers there is scope for aligning television with radio. On radio, references to the sponsor that can be editorially justified are allowed, as long as the programme does not give undue prominence to the sponsor. Ofcom proposes considering changing the current rules for television relating to references to the sponsor in the programme they are sponsoring.
19. Current rules for sponsored television programmes prohibit any reference to the sponsor, its product or service in the programme. This is intended to implement the TWF Directive requirements on the content of sponsored programmes. Broadcasters have argued that the current interpretation of the TWF Directive is too strict and is onerous in practice.
20. A complete prohibition on references to the sponsor does, of course, also remove any incentive a broadcaster may have to include a sponsor reference in a programme to please the sponsor, pre-empting the possibility that the sponsor may try to influence the content of the programme.
21. However, Ofcom recognises that the responsibility for preserving editorial integrity of the programme, should be left to the broadcaster, and would consider relaxing this rule, as long as broadcasters remain within the parameters of the TWF Directive. It is, however, important to ensure that Ofcom can intervene where it appears that the sponsor may have influenced the content of the programme.
22. The suggested rules 9.6 and 9.7 in the proposed Code would allow non-promotional, editorially justified references to the sponsor, and have been drafted to reflect closely the wording of the legislation.
23. Should this change be implemented, it will impact on other aspects of the current rules for television. Specifically, there will be no rationale for retaining special provisions for events where the event sponsor is the same as the

broadcast sponsor, “Single interest channels” or “Masthead programmes”. These currently enjoy exceptions to the rule prohibiting references to the sponsor in the programme (section 9.1.2 of the ITC Code of Programme Sponsorship). Masthead programmes on radio are discussed below.

24. Rules for sponsorship credits to the same effect as 9.8, 9.9 and 9.10 currently apply to both radio and television, so there is no proposed change. These rules go back to the main principle and are derived from legislation.
25. For radio, rules 9.11, 9.12, 9.13, 9.14, and 9.15 reflect current requirements and no substantive changes are proposed. These rules are fundamental to maintaining a distinction between advertising and sponsorship.
26. For television, rule 9.16 already applies and no change is proposed. This rule is essential to maintaining separation, and is directly derived from legislation.
27. Rule 9.17 relates to the content of credits on television and, again, is derived directly from the legislation. However, the rule proposed in the draft Code is different in some important respects from the rules that currently apply to the content of credits on television:
28. The current rules on the content of credits states that credits must not contain direct exhortations to the purchase or rental of the sponsor’s product or service, and that they must not include specific references to attributes, benefits or prices. Ofcom is considering rewording this rule to make it simpler to apply, while maintaining the thrust of the TWF Directive and the distinction between spot advertisements and sponsor credits.
29. The suggested rule in the draft Code (rule 9.17) ensures a clear distinction between advertising and sponsorship, and mirrors the wording of the TWF Directive. The proposed rule would still allow sponsors to include information such as basic contact details and a basic description of their business in the credit, as long as these do not form part of an advertising message (similar to what is currently allowed). It would not prevent mandatory price information from being included (e.g. if the sponsor was a premium rate service provider), as long as this did not form part of an advertising message or call to action.
30. The purpose of a trailer is to alert viewers to a forthcoming programme. Trailers appear in programme time and it is important to limit the sponsor’s presence to maintain separation. Rule 9.18 is essentially the same as the current rule for television, with one change. Ofcom is considering removing the reference to a 5 second limit, leaving it to broadcasters to ensure that references are sufficiently brief and that they remain secondary.

Proposed deletions

30. The current Codes relating to sponsorship on radio and television (part A of the ITC Code of Programme Sponsorship and section 1, rule 3 of the Radio Authority Advertising and Sponsorship Code) contain rules and guidance that do not appear in the draft Ofcom Code. Where it is useful to do so, some of this may be included in non-binding guidance which will be available separately to the Code. Significant omissions, i.e. omissions that imply that there could be a change in what is required from broadcasters and/or what the public can expect, are set out below.

Television

31. Section 5 of the current ITC Code of Programme Sponsorship contains a list of prohibited sponsors. They remain prohibited. However, Ofcom is proposing to remove the list as it is covered by rules 9.3, 9.4 and 9.5. If this change is implemented, broadcasters will have to ensure they refer to the restricted and prohibited advertisers set out in the Advertising Code and the Rules on the Amount and Scheduling of Advertising (RASA)².
32. For discussion of section 8.6 in the ITC Code of Programme Sponsorship relating to merchandising and licensing arrangements, please refer to the RIA, section 14 of this consultation. A relevant question has been added at the end of this section.
33. Ofcom is proposing to remove section 9.2 of the ITC Code of Programme Sponsorship relating to programme presenters. The rule is intended to protect the integrity of news and current affairs presenters, and maintain a clear line between programmes that may not be sponsored and sponsors. Ofcom is considering not including any such rule in the Code, thereby allowing news and current affairs presenters to appear in sponsored programmes that are scheduled adjacent to the un-sponsorable programme they have appeared in.
34. The ITC Code of Programme Sponsorship contains rules relating to the content of credits that go beyond the rule proposed to be included in the Ofcom Code (rule 9.14). Ofcom proposes not to include rules relating to the purpose of the credit (section 11.1.1 of the ITC Code of Programme Sponsorship), use of the sponsor's product in the credit (section 11.1.2 of the ITC Code of Programme Sponsorship), extracts from advertising campaigns (section 11.1.3 of the ITC Code of Programme Sponsorship), or the use of credits to resolve promotions in other media (section 11.1.5 of the ITC Code of Programme Sponsorship). These matters would therefore not be prohibited, as long as the credit as a whole complied with the rules in the proposed Code (specifically rule 9.14).
35. Section 11.2 of the ITC Code of Programme Sponsorship contains rules relating to the sponsorship message. Ofcom proposes to remove specific restrictions on the wording that can be used in describing the sponsor's relationship with the programme. The requirement in the proposed Code that the relationship must be transparent to the audience is expected to cover this issue. Use of the wording "brought to you by" would be allowed if the broadcaster was content that this accurately and transparently described the sponsor's relationship with the programme.
36. The Code of Programme Sponsorship also contains section 11.3 which deals with presenters and voiceovers in sponsor credits. The purpose of these rules is to ensure that there is no confusion between station continuity and sponsorship, or between sponsor credits and programmes. These rules are based on the principle of clear separation, and the intention behind them is carried forward in the proposed Code. RASA contains separation rules

² Subject to parliamentary approval, advertising content would become the primary responsibility of the Broadcast Committee for Advertising Practice (BCAP) and the application of it would become the responsibility of the Advertising Standards Authority Broadcast (ASAB). Ofcom would retain an overview of the Code and ASAB's application of it.

relating to persons appearing in advertisements and programmes ('artist separation'), and sponsorship must comply with the relevant advertising rules. Ofcom proposes to remove any specific rules from the Sponsorship section. This would allow continuity presenters to feature in credits, provided this was done in a way that did not undermine the principles of separation, editorial integrity or transparency.

37. Section 11.3.3 of the ITC Code of Programme Sponsorship replicates the ITC Advertising Code requirement that persons who regularly present news or current affairs may not feature in advertisements. Advertising rules apply to sponsorship credits, and no separate rule is therefore required in the sponsorship section of the draft Code.
38. Section 13 of the ITC Code of Programme Sponsorship sets out special rules for Masthead programmes and section 14.2 of the ITC Code of Programme Sponsorship deals with single interest channels. Provided that the changes relating to non-promotional references to the sponsor in the sponsored programme (rule 9.7 in the draft Code) are implemented, the exceptions that these categories of programmes currently enjoy will be superseded. Ofcom proposes not to include any specific rules for Masthead programmes or single interest channels in the Code.
39. Credit length on ITV, Channel 4 and Five is limited in section 14 of the Code of Programme Sponsorship. This rule was designed to ensure that these channels would not use sponsor credits as a way of extending their (restricted) advertising minutage and maintain a limit on the amount of overall commercial airtime on the public service channels. There is no restriction on credit length on cable or satellite channels. Ofcom is considering whether, in a multi-channel environment, there should still be a differentiation between the main terrestrials and other channels. No major problems have been encountered with cable and satellite channels regarding this issue and Ofcom proposes to remove restrictions on credit length for ITV, Channel 4 and Five.

Radio

40. Section 1 rule 3.5(b) of the RA Advertising and Sponsorship Code contains detailed requirements for the content of sponsor credits. Ofcom proposes to consider removing these specific requirements regarding the information credits must contain, as this can arguably be expected to be covered by the general rule in the proposed Code that requires sponsorship arrangements to be transparent. More detailed suggestions of what type of material could contribute to making the relationship transparent in the credit could be contained in guidance.
41. Sponsors may buy spot advertising in and around the programming they sponsor. This is set out in section 1 rule 3.6 in the RA Advertising and Sponsorship Code. Ofcom does not propose including rules stating what is allowed (as opposed to what is not allowed), unless it is setting out an exception to a rule, and is therefore proposing to omit this rule.
42. The RA Advertising and Sponsorship Code also contains specific safeguards in section 1 rule 3.8(c) for children's and religious programming. It requires sponsor credits for such programming to be copy cleared centrally and urges special care not to link such programming to inappropriate sponsor products or services. Ofcom proposes that determining the suitability of a sponsor

should be left to the broadcaster. However, the proposed Code retains a requirement that all credits on radio must be appropriately cleared in 9.14.

43. There are specific provisions for Masthead programming in section 3.10 of the RA Advertising and Sponsorship Code. These allow print or web publications to have the name of the publication included in the title of the programme they sponsor instead of in a sponsor credit. Ofcom proposes to omit specific rules for Masthead programmes in the Code, and allowing other sponsors the same benefits. However, this raises the issue of transparency.
44. Sponsorship arrangements must be transparent to listeners and viewers. On radio, this is done by describing the sponsor's relationship with the programme in a sponsor credit. As long as the sponsorship arrangement is transparent, Ofcom could allow the sponsor credit to be replaced by the sponsor's name in the programme title. This is already permitted on television, but because of the nature of the radio medium, it may well have more of an impact on radio.
45. Arguably, replacing a sponsor credit with the sponsor's name in the title of the programme could appear to compromise the station's editorial integrity. However, Ofcom wants to consider whether radio could be aligned with television in this respect.

Questions

Question 12a: Are the principles, rules and meanings necessary, consistent, proportionate and achievable? If not, can the wording be improved and if so how?

Question 12b: Are there any principles, rules or meaning we have not put here which would achieve the intentions of the Communications Act and other applicable legislation and be necessary, consistent, proportionate and achievable?

Question 12c: Should the current rules for television sponsorship be changed to allow non-promotional references to the sponsor in the programme they are sponsoring?

Question 12d: Should the rule restricting the content of sponsorship credits on television be changed and is the proposed rule (9.17) in the draft Code appropriate?

Question 12e: Should Ofcom remove the 5 second limit on sponsor references in programme trailers, and is it appropriate to replace it with a requirement that sponsor references in trailers remain brief and secondary?

Question 12f: Does the Code require a rule that contains more detailed description of what is an acceptable sponsorship message than that proposed in the Code (rules 9.8 and 9.9)?

Question 12g: Should the restriction on the length of sponsorship credits for ITV, Channel 4 and Five be removed?

Question 12h: Are the rules relating to credits (9.8 to 9.18) in the proposed Code sufficient to ensure transparency and maintain separation?

Question 12i: Is it appropriate to retain the prohibition on the sponsorship of a whole TV channel or radio station?

Question 12j: How can the rules on sponsorship by betting and gaming companies best be consolidated for radio and television?

Section 13

Commercial References and Other Matters

This section is laid out as follows:

- Proposed Code section 10
- Background to proposed Code section 10
- Proposed inclusions
- Proposed deletions
- Questions

Proposed Code, section 10, Commercial References and Other Matters

(section 319(2)(i) and 319(4)(f) of the Act, TWF Directive Articles 1(c) and (d) 10(1) and (4), and 18, and section 21(1) of the Financial Services and Markets Act 2000)

This section of the Code does not apply to the BBC

Principles

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

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

Rules

- 10.1 Broadcasters must maintain the independence of editorial control over programme content.
- 10.2 Broadcasters must ensure that the advertising and programme elements of a service are clearly separated.

Products or services in programmes

- 10.3 Products and services must not be promoted in programmes.
- 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.

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).

Programme related material

- 10.6 Programme related material may only be promoted in programmes where editorially justified.
- 10.7 The broadcaster must retain responsibility for all programme related material.
- 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.

Premium rate numbers

- 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).
- 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).

Competitions

- 10.11 Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known.
- 10.12 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.

Use of advertisements in programmes

- 10.13 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.

Charity appeals

10.14 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.
- 10.15 Appeals should be allocated among as wide a range of charities as possible.

The issue of raising funds to support programmes and services is discussed in the RIA (section 14 of the consultation).

Community Service Announcements

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

Financial reporting and promotion of investment activity

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)).

Television

Events

10.18 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.

10.19 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).

Background to proposed Code section 10 – Commercial References and Other Matters

1. Broadcasters operate in a commercial environment and are entitled to reflect this in their programmes. The regulation of commercial references in programmes seeks to ensure that there is no commercial influence on the editorial content of programmes and to maintain a clear separation between advertising and programmes.
2. The proposed Code section sets out rules that limit commercial references in programmes and maintain a clear separation between advertising and programmes. The proposed Code section also sets out rules that enable certain products or services, such as legitimate programme related material, to be promoted in programme time. It also sets out rules that enable other matters, including charity appeals and “financial promotions” to be included in programmes.
3. Legislation underpinning regulation of television in this area largely derives from the TWF Directive, and is underpinned, as is the regulation of radio in this area by the requirements relating to editorial control in section 319(4)(f) of the Act. In drawing up the new Code section we have aimed to simplify the number of principles and rules to the minimum necessary to safeguard the objectives of the legislation underpinning regulation in this area.
4. Rules 10.1-10.16 and 10.18-10.19 of the proposed Code section do not apply to the BBC because they are largely based on certain obligations in the TWF Directive which the UK government has decided not to apply to the BBC. The relevant sections of the TWF Directive would apply to the BBC only if the government was to issue a notification to that effect. Rule 10.17 does not apply to the BBC because those provisions are currently enforced through the BBC Producer’s Guidelines. The BBC would fall under Ofcom’s regulation in this area if the government amended the relevant Order to that effect.
5. The current regulation relating to commercial references on radio and television can be found in Part B of the ITC Code of Programme Sponsorship, section 8 of the ITC Programme Code and section 1 rule 2 of the RA Advertising and Sponsorship Code.

Proposed inclusions

Principles

6. The first principle mirrors the wording of section 319(4)(f) in the Act, and the second spells out the key distinction between advertising and programmes (TWF Directive, Article 10(1)). While the TWF Directive does not apply to radio, the distinction between programmes and advertising is fundamental to maintaining editorial control over programmes (section 319(4)(f)), and the second principle applies equally to radio.

Rules

7. Rules 10.1 and 10.2 translate the principles into rules.

8. Rules 10.3, 10.4, and 10.5 relating to references to products or services in programme time currently apply to radio and television, and no change is proposed. Rule 10.3 is fundamental to maintaining the distinction between programmes and advertising. Rules 10.4 and 10.5 support the principle of editorial independence. Product placement (10.5) is prohibited on television by the TWF Directive (Article 10(4)), and section 2.5 of the 2004 *Interpretative Communication on certain aspects of the provisions on televised advertising In the Television Without Frontiers Directive* from the European Commission underpins the use of the concept of 'undue prominence' (rule 10.4). These rules may equally be derived from the principle of editorial integrity, and apply also to radio.
9. Rules 10.6, 10.7 and 10.8 enable programme related material (products or services that are directly derived from a programme and intended to allow the audience to benefit fully from or interact with the programme) to be promoted in programme time. Similar rules already apply to television. For television, this is allowed as an exception to what is defined as advertising by the TWF Directive (Recital (34) and (35) to 97/36/EC and Article 18(3)), and we are not proposing to change the rules for television. However, Ofcom would consider allowing programme related material to be promoted whenever that is editorially relevant and justified, rather than only at the end of the programme.
10. On radio, there has not previously been any provision for the promotion of programme related material in programme time. While Ofcom recognises that radio programming is different in nature to television programmes, Ofcom proposes to include radio in this rule, which would allow the promotion of programme related material also on radio.
11. Rules 10.9 and 10.10 allow the use of premium rate numbers in programme time. Premium rate numbers are by their nature commercial, and can be used to raise revenue for broadcasters. Allowing their presence in programmes needs to be balanced by the need to ensure that programmes are not used to sell or promote products or services. There are currently rules that restrict the use of premium rate numbers both on radio and television. Rule 10.9 ensures that premium rate numbers are only used in programme time where that is intended to allow the viewer or listener to benefit from, or to interact with, a programme.
12. Rule 10.10 is currently applied on both radio and television, and Ofcom is not proposing to change it. Many broadcasters now use premium rate numbers for a host of services. While premium rate service providers are, in any case, directly subject to the ICSTIS Code of Practice, it is important that broadcasters are responsible for all aspects of the service they provide, including premium rate numbers.
13. Rule 10.11 relates to how broadcasters conduct competitions. This rule is currently applied to radio only. However, this is an area that concerns many viewers as well as listeners, and Ofcom proposes to consider extending the rule to television. The Act obliges Ofcom to have regard to the degree of harm that a programme could cause viewers or listeners (319(4)(a)). It would be possible for members of the public to be misled or lose money with no genuine hope of success (e.g. for premium rate calls) if this rule was not in place.

14. Rule 10.12 restricts the use of competitions with brand mentions. This rule supports the principle of separation between programmes and advertising, and ensures that competitions are not used primarily for promotional purposes for the prize donor. Ofcom is, however, proposing to omit the current rules for television which restrict the number of brand mentions within a competition.
15. Rule 10.13 allows the use of advertisements in programmes where that can be editorially justified. This rule currently applies to television, and the main rule is not proposed to be changed. In addition, there are specific rules for factual and entertainment programmes respectively. While it is important to retain a rule that ensures that advertisements are not used in programmes without sufficient editorial justification, Ofcom will consider whether the more detailed requirements are needed.
16. There is currently no rule allowing the use of advertisements in programme time on radio. Ofcom proposes including radio in rule 10.12 to enable radio programming to make use of advertisements where that can be editorially justified.
17. Rules 10.14, and 10.15 enable programmes to include charity appeals. On television, charity appeals are allowed in programme time by the TWF Directive (Article 18.3). There are no specific provisions in the Act for charity appeals on radio. Ofcom proposes to include radio in this rule to enable charity appeals in programme time on radio.
18. Rule 10.16 allows broadcasters to transmit community service announcements in programme time. This is enabled on television by the provision for “public service announcements” in the TWF Directive (Article 18.3). Ofcom proposes to include radio in this rule to enable community service announcements in programme time on radio. This provision would also allow for “public information programmes”, and where relevant more detailed guidance would be issued by Ofcom.
19. Rule 10.17 (together with Annex 9) relate to financial reporting and promotion of investment activities. These rules provide an exemption for broadcasters from the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001 for programmes that include elements that fall within “financial promotions” under this Act. In previous Codes, these rules were different for radio and television. The proposed Code would consolidate the rule to apply to both radio and television.
20. Rules 10.18 and 10.19 relate to broadcast coverage of events, and apply to television only. No significant change is proposed to the rules that currently apply. Rule 10.18 recognises that broadcasters have a difficult balance to maintain when covering high profile events, which will inevitably contain commercial branding, without appearing to give prominence to the branding rather than the event.
21. Specific rules apply to so-called 'virtual advertising'. Rule 10.19 corresponds to the rules on virtual advertising in the *Interpretative Communication on certain aspects of the provisions on televised advertising in the Television Without Frontiers Directive* from the European Commission.

Proposed deletions

22. The current Codes relating to commercial references on radio and television (Part B of the ITC Code of Programme Sponsorship, section 8 of the ITC Programme Code and section 1 and 2 of the RA Advertising and Sponsorship Code include a number of rules that do not appear in the draft Ofcom Broadcasting Code. Where it is useful to do so, some of this may be included in non-binding guidance which will be available separately to the Code. Significant omissions, i.e. omissions that imply that there could be a change in what is required from broadcasters and/or what the public can expect, are set out below.

Radio

23. Section 2 rule 24 of the RA Advertising and Sponsorship Code relates to the integrity of station presenters or news readers. This rule allows presenters or news readers to voice over advertisements, provided that does not appear to compromise their impartiality or programming role. Proposed rules 10.1, 10.4 and 10.5 of this section of the Code and the section of the Code which deals with due impartiality are arguably sufficient to ensure that separation between any presenters' advertising and programming activities is maintained. Ofcom therefore proposes not to include this rule in the proposed Code.
24. There are no other omissions from the RA Advertising and Sponsorship Code which imply a significant change.

Television

25. Ofcom proposes to retain the rules in section 8.1(i) of the ITC Programme Code prohibiting promotion of products or services in programme time and allowing programme related material to be promoted. However, this section of the ITC Programme Code also goes into some detail in setting out how programme related material may be promoted. While it may be useful to have detailed instructions, these matters are arguably covered by the main rule, and Ofcom will consider not including the remainder of this section in the Ofcom Code. To the extent that guidance is needed, that can be issued separately.
26. Section 8.1(ii) of the ITC Programme Code also currently contains special provisions for social action and education programmes that allow programme related material for such programmes to be promoted whenever appropriate in the programme. In other programmes, this is restricted to the end of the programme. If rule 10.6 of the draft Code section is implemented, it will allow the promotion of programme related material whenever editorially justified in all programmes, which would make the current exception for social action and education programmes superfluous.
27. Section 8.2 of the ITC Programme Code contains detailed rules for the use of premium rate numbers in programmes. The spirit of these rules remain and is intended to be covered by rules 10.9 and 10.10 in the draft Code section. Ofcom does not propose to include any more detailed rules on premium rate numbers.

28. Currently, there are specific rules for brand mentions and description of prizes in viewer competitions (section 8.6 of the ITC Programme Code and section 18 of the ITC Code of Programme Sponsorship). The rules in this area are detailed and specific, and set out the limits clearly. However, Ofcom proposes to consider whether these rules are necessary, as, arguably, the intention behind them will be covered by the other rules in the draft Code section (10.3, 10.4 and 10.5).
29. Section 8.7 of the ITC Programme Code contains rules relating to the use of video news releases in programmes. They are intended to ensure that programme time is not used to promote commercial (or other) interests. We think this is equally covered by the general rules on commercial references in the proposed Code section and propose to not include any specific rules on video news releases.
30. Products placement is, and will remain, prohibited. However, section 15 of the ITC Code of Programme Sponsorship also explains what is not considered to be product placement, such as where goods or services are provided to the broadcaster at no, or less than full cost, and how such arrangements can be credited. Ofcom proposes that these rules are better placed in guidance. Section 3 of the ITC Code of Programme Sponsorship also recognised that certain types of acquired programmes, in particular films made for the cinema and coverage of sporting events taking place outside the UK, may deviate from rules in the Code where that was unavoidable. Ofcom maintains this recognition, but considers that it is better placed in guidance.
31. Section 17.2 of the ITC Code of Programme Sponsorship states that close similarity between advertising and the content of a programme may constitute grounds for regarding the programme as having an unacceptable promotional purpose. This remains the case, however, the intention behind the rule is arguably covered by the rules on editorial integrity and separation (10.1 and 10.2). A separate rule would therefore not be necessary.
32. Section 20 of the ITC Code of Programme Sponsorship allows the crediting of timing and information service providers. While it may be helpful to provide guidance on these matters, Ofcom proposes not to include any specific rules in the proposed Code. Arguably, the crediting of information providers will be sufficiently covered by other rules in the proposed Code section (10.3, 10.4 and 10.5).
33. Section 18 of the ITC Code of Programme Sponsorship set out detailed rules relating to advertiser references in game shows and viewer competitions. These refer to how prizes may be described, the amount and placing of brand mentions in viewer competitions and the role of a programme sponsor in competitions. With the exception of the restriction on branded competitions appearing as programmes in their own right (rule 10.11 in the proposed Code) Ofcom proposes not to include these rules in the Ofcom Code. This would allow the broadcaster to judge how prizes should be described and the prize donor to be mentioned, provided this complied with the rule on products and services in programmes (rule 10.3) and the undue prominence rule (rule 10.4). It would also allow the programme sponsor to donate their branded products as prizes, subject to compliance with the undue prominence rule and the rules on the content of sponsored programmes (9.6 and 9.7 in the sponsorship section of this Code).

Questions

Question 13a: Are the principles, rules and meanings necessary, consistent, proportionate and achievable? If not, can the wording be improved and if so how?

Question 13b: Are there any principles, rules or meaning we have not put here which would achieve the intentions of the Communications Act and other applicable legislation and be necessary, consistent, proportionate and achievable?

Question 13c: Should there be a rule for both radio and television relating to how viewer and listener competitions are conducted, and should there be a rule that limits the use of competitions with brand mentions to within programmes?

Question 13d: Are the rules for charity appeals appropriate and should they be extended to include radio?

Question 13e: Is the provision for community service announcements appropriate and should it be extended to include radio?

Question 13f: Should broadcasters be allowed to promote programme related material wherever that is relevant and editorially justified in the programme?

Question 13g: Should the rule prohibiting television services appealing for funds to make programmes and fund services be removed, kept or altered? If altered - then how should it be altered? Please see the RIA, section 14 of this consultation for further information.

Question 13h: If the rule referred to in 13g is removed, will this provide a complimentary mechanism for raising funds or will it be a substitute mechanism?

Question 13i: Given the substantial market share held by some channels, would this have a distorting effect, in which case should Ofcom use its competition powers?

Question 13j: Should there be rules regarding merchandising or not? And if so what rules? Please see the RIA in section 14 of this consultation for relevant arguments.

Section 14

Regulatory Impact Assessment

1. The analysis presented in this section of this document, when read in conjunction with the rest of this document, represents a Regulatory Impact Assessment (RIA), as defined by section 7 of the Communications Act 2003. You should send any comments on this RIA to us by the closing date for this consultation. We will consider all comments before deciding whether to implement our proposals.
2. RIAs provide a valuable way of assessing different options for regulation and showing why the preferred option was chosen. They form part of best practice policy-making and are commonly used by other regulators. This is reflected in section 7 of the Act, which means that generally we have to carry out RIAs where our proposals would be likely to have a significant effect on businesses or the general public, or when there is a major change in Ofcom's activities. In accordance with section 7 of the Act, in producing the RIA in this document Ofcom has had regard to such general guidance as it considers appropriate, including related Cabinet Office guidance.
3. Ofcom's regulatory impact assessment of the proposed Code is set out below.

Issue

4. Does the proposed Code contain regulation which is necessary, targeted, proportionate and consistent with its statutory duties and have the significant issues - which should be contained within a RIA - been correctly identified and assessed?
5. We have identified a number of proposals which may be regarded as having a significant effect. They are listed below and for convenience have been divided into three sections. (There are other less significant proposed changes discussed in the body of this consultation.)

Approach to the Code

5. Whether to have one or more Codes
6. The proposed approach to regulation and the structure of the Code (specifically the relationship between principles, rules, meanings and guidance)

Scheduling matters on television services

8. Whether the transmission of R18s and R18 standard material is compatible with the requirements of the Act and TWF Directive relating to the protection of minors

Whether such material should be prohibited or allowed on certain services. If it is allowed, whether those under eighteen, and adults who do not wish to view this material, can be adequately protected (by technical or other

devices). Whether the restrictions regarding 'adult' television services should be changed and if so with what protections

9. Whether there should, or should not, be a watershed on premium subscription services and, if so, at what time
10. Whether programmes regarding the paranormal should be allowed on all television services at times when significant numbers of children are not available to view

Appeals for funds and merchandising

11. Whether there should be rules prohibiting appeals on television services for funds to make programmes and fund services
12. Whether religious programmes and/or services should be allowed to appeal for funds or not
13. Whether there should be rules regarding merchandising arrangements

Approach to the Code

1. Whether to have one or more Codes

Background

14. Ofcom is required by the Act, and also by the 1996 Act, to draw up a Code or Codes relating to standards in programmes, sponsorship and fairness and privacy. You can see the relevant sections of the Acts in annex 4.
15. Previously legislation regarding radio and television standards was contained in the Broadcasting Acts of 1990 and 1996. Those Acts resulted in the establishment of the RA, ITC and BSC. Those organisations no longer exist and their functions have been taken over by Ofcom. At the same time the necessary legislation regarding radio and television standards has been brought together in one Act with reference to certain parts of the 1996 Act.

Option one – one Code

16. An option is to have one Code that will apply to both radio and television and will cover standards for programmes, sponsorship and fairness and privacy.

Option two – multiple Codes

17. Another option is publish a selection of Codes, e.g. – one for radio programmes, one for television programmes, one for radio sponsorship and one for television sponsorship.

Benefits

18. The merit of publishing one Code is that all necessary regulation is contained in one place. It will be simple to use for members of the public, those working in the broadcast industry and linked industries (eg those concerned with sponsorship), and those concerned with training those who work in or want to work in broadcasting and associated industries.
19. There is also merit in bringing together radio and television standards as different mediums of communication converge.
20. Radio and television has most recently been regulated separately, sometimes on the basis of a different interpretation of the same legislation. Where those differences are not supported by legal requirements, or research, or regulatory experience, it is possible to standardise radio and television and remove unnecessary regulatory burdens upon broadcasters in line with the requirements of section 6 of the Act.
21. There is also an economic benefit in terms of administrative costs to Ofcom in having one Code and thus to the broadcasters who pay for the broadcasting related costs of Ofcom.
22. The benefit of option two is consistency with past practice.

Disadvantages

23. A disadvantage of option one is that the sections of the proposed Code regarding due impartiality, and election and referendum broadcasting, and the sections regarding sponsorship and commercial references and other matters do not apply to the BBC. There could be a risk of confusion with just one Code applying to many broadcasters. In order to meet that risk those sections will include a statement at the start explaining they do not apply to the BBC, as will the introduction to the Code as a whole.
24. There is also a fundamental difference in the impact radio and television have on listeners and viewers. For example, a scene of violence on radio may have less impact than one on television. There is risk that, in standardising rules so that they apply equally to television and radio, Ofcom will remove regulation necessary to protect the viewer and listener, or impose a higher regulatory burden than has hitherto been the case on either radio or television thereby potentially increasing the exposure to regulatory risk and economic sanctions. In order to minimise that perceived risk Ofcom proposes, where necessary, retaining separate rules for radio and television.
25. The disadvantage of option two is that multiple Codes would be more expensive and would create an extra burden in time and money for the public, programme makers, broadcasters and related industries in acquiring, cross referencing (where necessary), and training in the Codes (particularly in the light of converged broadcasters).

Recommendation

26. Ofcom proposes that there should be one Code.
27. Please see related question in section 3.

Approach to the Code

2. The proposed approach to regulation and structure of the Code (specifically the relationship between principles, rules, meanings and guidance)

Background

28. The legacy regulators operated six Codes in these areas as described in the summary. These were generally written with a narrative, giving guidance, intermixed with rules based on legislation and rules based on regulatory practice, research evidence and past cases.

Option one – an approach to the Code which continued the legacy regulators approach

29. It is possible to draft a Code which takes a similar approach.

Option two – an approach which separates principles, rules and guidance

30. It is possible to create a proposed draft Code composed of principles, rules and meanings, with an introductory section, which explains how the Code should be used. There would also be guidance on the Ofcom web site. This approach is described in the introduction to the Code (section 3) and the philosophy behind the approach is described in the introduction to the consultation (section 2). This has therefore not been described again in full here.

Benefits

31. The benefit of option one would be consistency with past practice and potentially greater regulatory certainty. Some stakeholders may also prefer more specific rules for specific types of services.
32. The merit in laying out the Code as proposed in option two is that broadcasters are encouraged to use the principles in interpreting the rules. The rules can be applied flexibly taking into account e.g. different audiences for different programmes and services, their expectations and what information those audiences may have received as well as the impact on somebody who views or hears a programme in passing.
33. This approach also acknowledges the possibility of increased media literacy in the future and appropriate and transparent labelling by broadcasters.
34. If broadcasters apply these principles and rules appropriately they would take ownership of the Code in a way which will benefit broadcasters, programme makers and the public. The 'chilling' effect that broadcasters suggest exists (see below) would be properly reduced. The proposed Code would be used in a targeted way to protect the public but the flexibility in setting the Code (allowed by 319(4)) would enable audiences to receive creative, innovative and, where appropriate, provocative and challenging programming. This should lead to better protection of the audience and greater scheduling and

commissioning freedom (within the standards set by legislation) for broadcasters.

Disadvantages

35. The disadvantage of option one is that broadcasters, and other interested parties, have put the case that they are concerned that the Codes are unclear because it is not obvious what is a rule and what is guidance. It is also unclear in the legacy Codes what has been drafted because of specific legislation and what has been drafted using the discretion granted the regulators by the 1990 Act. They also feel that the approach used in the legacy Codes is confusing. Broadcasters argue that this has a 'chilling' effect on innovation, creativity and freedom of expression. Importantly, as presently drafted, if a specific rule is not in a Code, it can be difficult to apply the regulation.
36. With option two the loss of the explanatory narrative (used in the legacy Codes which gives guidance in interpretation) may be viewed as a genuine loss in the quality of advice attached to the Code. As more is left to interpretation it could reduce certainty. However the creation of guidance on line which can be updated quickly to meet specific situations – and indeed more quickly than a printed Code can be updated – would be designed to assist here. Further it could also be argued that increased flexibility could also have the effect of reducing regulatory uncertainty.

Recommendation

37. Ofcom proposes that the Code should consist of an introduction, and sections with principles, rules and meanings supported by web based guidance as explained above.
38. Please see related questions in section 3.

Scheduling matters on television services

3. Whether the transmission of R18s and R18 standard material is compatible with the requirements of the Act and TWF Directive relating to the protection of minors

Whether such material should be prohibited or allowed on certain services

If it is allowed, whether those under eighteen, and adults who do not wish to view this material, can be adequately protected (by technical or other devices)

Whether the restrictions regarding 'adult' television services should be changed and if so with what protections

Background

39. This consultation seeks responses regarding the present prohibition on transmitting R18s and, consequently, R18 standard material. Should the prohibition be lifted or maintained? If it is not to be maintained then Ofcom seeks information on what technical protections or other protections are available which could ensure the protection of people under eighteen (and others who do not wish to access the material). Further, if the prohibition is lifted, on which services should it be lifted?
40. The R18 category is a special and legally restricted BBFC classification for explicit videos of consenting sex between adults. (The BBFC guidelines regarding R18s can be found on the BBFC website at www.bbfc.co.uk) The BBFC are currently classifying some 1400 videos in the R18 category a year. Such material may presently be supplied to adults only, over the counter, in licensed sex shops.
41. The content guidelines for R18s were significantly revised by the BBFC in 2000. Only material distributed in a form that attracts classification under the VRA - essentially videos and DVDs - is required to observe the VRA's restrictions. (The VRA does not prohibit the transmission of R18s on television.)
42. R18 standard material refers to material which has not been offered to the BBFC for classification, e.g. live sex shows or amateur videos, but if it were to be classified would be of R18 standard. This also covers foreign material which does not go through the BBFC system.
43. Section 1.4 of the ITC Programme Code stated that "*No R18 film should be transmitted at any time.*" R18 standard material is also effectively prohibited.
44. The UK government can, and has, on the regulator's recommendation, proscribed services which are licensed abroad but which transmit R18 standard material into the UK. It has previously proscribed five services.
45. In order to recommend such a proscription to the Secretary of State the ITC had to be satisfied that the trade for the service existed in the UK. These

proscriptions could in themselves be seen as evidence that some broadcasters wish to provide such services and that there are viewers who wish to receive them.

46. Ofcom is required to set standards which maintain generally accepted standards as required under section 319(2)(f) of the Act. The public must be adequately protected from the inclusion of offensive and harmful material in programmes as judged against generally accepted standards. Ofcom is also required to set standards to protect people under eighteen. The TWF Directive also requires that nothing is included in television broadcasts which might seriously impair the physical, mental or moral development of minors.
47. In a survey of public opinion of 1200 adults commissioned by the BSC and ITC (*The Public's View 2002*) it was found that 76% agreed that people should be allowed to pay extra to view particularly sexually explicit programmes on subscription services. The survey did not distinguish between R18s and R18 standard material and more commonly available 'adult' material.
48. The government has found no compelling evidence of harm to adults as R18s were made legally available in 2000. However the regulatory impact analysis of a government consultation paper on the regulation of R18 videos, published in 2000, explains the precautionary approach regarding children and R18s: *"There is always a risk of age-restricted material, such as tobacco or alcohol, falling into the hands of, and being misused by, children. Unlike tobacco and alcohol, which are widely available, there is no known and substantiated health or other risk associated with watching a video which has been given an R18 classification. However, there is widespread public concern about the possibility of children viewing sexually explicit material which is clearly unsuitable for them and the Government takes the common sense view that exposure to such material at an early age may be harmful to children. There is, therefore, a need to ensure that controls on the distribution and viewing of these videos is as stringent as possible."*
49. Ofcom also seeks responses as to whether the restrictions currently in place regarding transmitting 'adult' sex material on certain premium subscription services and on Pay Per View (PPV) and Pay Per Night (PPN) services should be changed and if so on what services and with what protections.
50. The ITC Programme Code does allow latitude for certain premium subscription services available to adults who have specifically chosen them in section 1.4(i). They must comply with measures that ensure the subscriber is an adult and may transmit such material only between 2200 and 0530.
51. Separately in the ITC Programme Code watershed rules may be waived for pay-per-view services *"where security mechanisms, such as a PIN system or equivalent, satisfactorily restrict access to films or programmes solely to those authorised to view. The mandatory security mechanism and the safeguards that it provides for children must be clearly explained to all subscribers. It should normally be supported by a detailed billing system that enables subscribers to check all viewing and, in particular, out-of-watershed viewing. In addition operators are expected to implement a suitable film classification system, or equivalent, and to provide any additional information about programme content and reasons for any restrictions that might assist parents and other adults to judge the suitability of material for children.* However such

services must still “exercise caution” in daytime and “adult’ sex material” must still comply with the 2200 to 0530 transmission rule.

52. Some argue that the restrictions in place regarding R18s, R18 standard material and ‘adult’ material are unnecessary regulation and a restriction on freedom of expression and choice. But other stakeholder groups regard such material as so innately offensive and potentially harmful to adults as well as under eighteens that they consider a prohibition on R18 and R18 standard material an absolute necessity. Some want ‘adult’ sex material prohibited as well.
53. To remove or change the rules which prohibit R18s and R18 standard material and to waive the 2200 rule and/or associated rules regarding ‘adult’ sex material would be an important change affecting broadcasters and consumers with significant commercial impact.
54. Option one - continue the prohibition on R18s, and R18 standard material and maintain ‘adult’ material restrictions
Ofcom could continue the stance taken by previous regulators with a prohibition on the transmission of R18s and maintain the restrictions regarding the transmission of ‘adult’ sex material as described above.
55. Option two – if appropriate safeguards are in place - remove or change the rules regarding R18s and R18 standard material and ‘adult’ material
Under section 6 of the Act, Ofcom has a duty to ensure that it does not impose or maintain unnecessary regulatory burdens. It may now be the case that the technology exists to protect the under eighteens from R18s, R18 standard material and ‘adult’ sex material (before 2200) and also protect those adults who do not want to see such material by mistake while allowing adults who have made a deliberate decision to view it.

Benefits

56. Option one would continue to protect the under eighteens and also be based on the assumption that such material is so potentially offensive to society that its transmission would be a breach of generally accepted standards.
57. The basis for retaining the restrictions on ‘adult’ sex material on certain premium subscription services would be that the restrictions are necessary to prevent those under the age of eighteen accessing this material and so the restrictions protect under eighteens. Also it prevents offence to adults who do not wish to see such material.
58. The benefit of option two would be that it would give viewers greater choice. Many of the member states of Europe allow the broadcast transmission of R18s. This would bring the UK into line with Europe. There would be new channels offering such material and other channels would be able to schedule more freely, potentially bringing in new subscribers thereby increasing the revenues that such channels receive.

Disadvantages

59. The disadvantages of option one would be that it may be out of line with public opinion, limit choice for adults and inhibit the commercial development of existing and potential services.

60. The disadvantages of option two are that under eighteens may not be sufficiently protected and adults may be exposed to potential offence. Furthermore Ofcom would have to employ a person or persons to view and regulate such material. That might lead to an increase in regulatory costs to broadcasters.
61. There may also be an adverse economic impact on television services presently supplying 'adult' sex material via premium subscription services or via PPV or PPN. These services have built up a stock of material permitted by the ITC and may find themselves at a disadvantage. They risk losing viewers and may have to acquire fresh stock making old stock redundant.

Recommendation

62. The status quo will prevail regarding a prohibition on R18s, and R18 standard material and also on a 2200 start for 'adult' sex material plus the other protections currently in place regarding 'adult' sex material. It will only change if it can be established that there are sufficient safeguards (technical and otherwise) to protect persons under eighteen, and ensure that adults who do not wish to see such material are adequately protected from harm and offence.
63. Please see related question in section 5.

Scheduling matters on television services

4. Whether there should or should not be a watershed on premium subscription services and if so at what time

Background

64. Ofcom may maintain, remove or alter the watershed on premium subscription services.
65. The watershed, and the proposed associated principles and scheduling rules contained in section 4 of this consultation, is the principle tool used by viewers and television broadcasters to protect children (which Ofcom suggests are defined as under 15). It is also, of course, used by some adults to regulate their own viewing in matters of harm and offence but this is not its primary purpose.
66. Content unsuitable for children should not be transmitted before 2100 or after 0530, except on premium rate subscription services where the watershed is at 2000.
67. The watershed is a well understood concept and is highly supported by viewers. Research contained in *The Watershed: providing a safe viewing Zone* published by the ITC and the BSC in 2003 showed that 95% in a survey of a survey of 4,000 adults who had heard of the watershed thought that there should be a watershed to protect young people and 77% agreed that it was a must. 78% thought it should apply to all channels. Of the 4,000 questioned 82% had heard of the watershed and significantly 92% of parents. However only 41% thought it applied to multi channel television. This research, which explores these attitudes further, is a useful tool in approaching the issue explored in this part of the RIA.
68. The rules suggested in section 4 are drawn from the standard objective laid out in section 319(2)(a) of the Act, that “*persons under the age of eighteen are protected.*” Some of the suggested rules in this section employ a more precautionary principle. and are necessarily restrictive. Many of the rules concern programme transmitted pre watershed and what they may contain.
69. Some argue that, since adults have made a specific decision to purchase premium subscription services there should be much greater flexibility with regard to scheduling as any parent purchasing such a service will be fully aware of the nature of that service and that there is less scope for children accidentally accessing the service. Others are concerned that any change will lead to less protection for children.
70. The 2003 BARB Establishment Survey shows that children were present in 26.5% of all households. This rose to 36.8% of multi channel households.
71. Option one - maintain the 2000 watershed on premium subscription services. One option is to maintain the watershed at 2000 hours on premium subscription services.
72. Option two – move the 2000 watershed on premium subscription services

Another option is to move the watershed on premium subscription services to another time. Respondents to this consultation are invited to suggest where the watershed might be and whether additional safeguards are required.

73. Option three – if suitable protections are in place – remove the watershed and associated rules on premium subscription services altogether.

A third option is to remove the watershed and the application of rules relating to the watershed from certain premium subscription services where broadcasters and platform operators can suggest, and put in place, suitable technical and other measures to ensure subscribers are adult, access is controlled by an adult and adults have appropriate information to make judgements on what children may watch.

Benefits

74. The benefits of option one are that the present rule is understood and applied so that children are protected but those who have paid for extra services are given the responsibility to make decisions after 2000 on behalf of their children. This would give full regulatory certainty to both viewers and broadcasters.
75. The benefits of option two are that some more scheduling leeway could be given to premium subscription services for the benefit of broadcasters and viewers but children would still be protected with a different watershed.
76. The benefits of option three is that those households without children are free to watch what they want when they want and for those with children they are free to watch what they want when they want having chosen to purchase such packages and being aware of the responsibility that goes with it.
77. Options two and three will benefit broadcasters who will be given more freedom to schedule adult material and so attract appropriate advertisers and sponsors. The potential economic benefit is that more relaxed scheduling may make services more attractive and bring in extra subscribers and/or could also lead to an increase in subscription fees.

Disadvantages

78. The disadvantage of option one and to a lesser extent option two is that the majority of households without children are given less choice in what they view and also that those households with children are not given their right to exercise full choice given they are paying extra for such services and have deliberately chosen them. This is also preventing broadcasters offering distinctive services and potentially limiting their revenues unnecessarily.
79. The disadvantage of option two and, to a greater extent, option three, is that children may be exposed to inappropriate content if adults fail or are unable to protect children in their households from unsuitable material.

An unintended but possible consequence of options two and three

There may be an upsurge in extremely cheap premium subscription service channels (e.g. 1p) wishing to take advantage of no watershed or a different watershed and associated rules. This may benefit viewers by offering greater choice and broadcasters by offering greater commercial opportunity. It may

also help distinguish those services which do offer a 'safe viewing zone'. However it may also lead to a drop in the public's understanding of the watershed and confidence in it on all television services and a possible loss of protection for children.

Recommendation

80. Ofcom makes no recommendation.
81. Please see related questions in section 4.

5. Whether programmes regarding the paranormal should be allowed on all television services at times when significant numbers of children are not available to view

Background

82. Programmes on these subjects range from religious programmes (astrology is a recognised part of some major religions and spiritualism is also a religion) to factual programmes and to entertainment programmes where there is no necessary expectation that the powers claimed are in fact real.
83. Section 7 of the RA Programme Code contained rules regarding the paranormal and supernatural issues. There are also rules regarding the occult and psychic practices in section 1.10 of the ITC Programme Code. This Code was updated recently in autumn 2003 following a consultation.
84. Television programmes regarding the paranormal are explicitly not allowed before the watershed on PSBs, that is ITV, Channel 4 and Five. The basis for this restriction is that children are more likely to see such material on PSBs before the watershed than on a cable and satellite channels and be exposed to matters on which they are not yet capable of making up their own minds.
85. Ofcom must protect those under eighteen according to section 319(2)(a) of the Act.
86. Option one - maintain the present restrictions
It would be possible to maintain the present restrictions on PSB services. This would, of course, extend the present restriction to the BBC.
87. Option two – bring all televisions services under one rule
The distinction regarding PSBs could be removed. The proposed rule could read “*Demonstrations of the paranormal must not be transmitted when significant numbers of children may be expected to be watching in the case of television or are particularly likely to be listening in the case of radio. (Religious programmes are exempted from this rule but must comply with the provisions in the section regarding religious programmes in this Code).*”
88. This would be contained in section 1 of the Code - Protecting the Under Eighteens. Other related rules concerning due objectivity, preventing the giving of life-changing advice and appropriate information would be contained in section 2 of the proposed Code on Harm and Offence.

Benefits

89. The benefit of option one is that children would be ‘protected’ from exposure to programmes about the paranormal until 2100, on PSB services. The present prohibition on PSBs is particularly relevant in the light of 319(4)(d) and may particularly protect children during term time day time .
90. The benefits of option two is that all broadcasters including PSBs could make decisions based on the likely number of children in the audience as allowed for by section 319(4)(b) and can also provide information as also allowed for by section 319(4)(c). This would allow adult audiences without multi-channel

services (or who have not bought, or have no access to, a relevant premium subscription service) access to such programmes. This is potentially significant for viewers.

91. Any change that allowed PSBs to transmit such material pre watershed would be a potentially significant change in that it would give the PSBs access to a new potentially highly commercial genre of programming. They have not previously been allowed to schedule paranormal programming such as medium entertainment shows in the afternoon during term time. That may open new sponsorship and advertising opportunities.

Disadvantages

92. During the ITC consultation some PSB broadcasters objected to the principle of applying specific regulation which differentiated between PSB and niche channels.
93. Option one would maintain that distinction.
94. However with option two certain television services who have built up a niche audience for such programmes may suffer commercially if there is competition, particularly from PSBs who have a significant share of the audience. This is potentially significant for these services.
95. Children may be more likely to come across such material if it is potentially available on all television services given the large audiences of the PSBs. However, they may be unable to assess it as objectively as an adult and may be offended, distressed, confused or potentially harmed. Adults who have not chosen to see such material may also come across it in error and may be offended.

Recommendation

96. Ofcom recommends that the proposed rule contained in option two should be included in the Code so that regulation is targeted where it is necessary and proportionate, and so that regulation is applied consistently across all services.
97. Please see related question in section 4.

Appeals for funds and merchandising

6. Whether rules prohibiting appeals on television services for funds to make programmes and fund services should be waived or not

Background

98. The 1990 Act explicitly required the legacy regulators to draw up a Code giving guidance regarding the rules to be observed regarding appeals for donations. As a result rules were included in section 6 of the ITC Programme Code and section 6 of the RA Programme Code. There is no such express requirement in the Act for rules to be drawn up by Ofcom.
99. Separately, charity appeals are allowed on television in programme time by TWF Directive and proposed rules for charity appeals are therefore included in section 14 of the consultation.
100. However there is a particular issue regarding appealing for funds (falling outside charity appeals) on which the ITC and RA regulated in a different manner. This is whether broadcasters should be permitted to appeals for funds to make programmes or to fund services.
101. 6.2 of the RA Programme Code specifically allows radio services to appeal for funds, goods or services on behalf of others and also for funds to make programmes, or to fund the radio station. Section 6.1 of the ITC Code however states that "*Licensees are not permitted to broadcast appeals for funds to make programmes.*"
102. If such appeals were to be allowed on television (option two below) a further issue would arise: namely whether such appeals, insofar as they are broadcast on television, fall within the definition of television advertising in the TWF Directive.
103. In the TWF Directive, television advertising is defined as "*any form of announcement broadcast whether in return for payment or other valuable consideration or broadcast for self-promotional purposes by a public or private undertaking 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 payments.*"
104. However, Ofcom is not proposing in this consultation to treat such appeals as advertising but as matters which properly fall within the scope of the proposed Ofcom Broadcasting Code.
105. Option one - maintain the present rules for television and radio
Ofcom could maintain the present difference between television and radio.
106. Option two - bring television into line with radio
Ofcom could remove the ITC prohibition on appealing for funds to make programmes and fund services so that television services were brought into line with radio.
107. The removal of this rule may affect all television services and is significant.

108. Option three - allow programmes and services to appeal of funds with new rules to give protections to audiences

It would be possible to create a rule whereby television services and programmes would be allowed to appeal for funds with some protections in place for audiences in the form of a new rule or rules eg that any monies raised must be for the use of the broadcaster in funding programmes or the service and not for any third party.

Benefits

109. Option one continues a well understood system.
110. Option two could reduce the dependence upon other methods of raising funds e.g. advertising, sponsorship, premium rate phone calls, subscription etc. (Subscription channels may wish to use this method but it is possible that subscribers may be less likely to have a positive willingness to contribute.) However, it is not clear if this would become a substitute for other methods of raising funds or if it would be a complimentary mechanism.
111. It is possible that new television services may be created that take advantage of such a proposed change, thus giving more choice to viewers. It is also possible that extra funds would flow into specific types of programming that viewers want again giving more choice, range and quality to viewers.
112. Option three would have many of the benefits of option two but regulation would be aimed at preventing harm to viewers.

Disadvantages

113. The disadvantage of option one is that television services may be denied an opportunity to fund programmes and services that viewers would be prepared to support.
114. With option two there is a risk that, given the substantial market share held by some channels this could have a distorting effect on the market and could raise competition issues as ITV or other PSBs may disproportionately benefit from a relaxation of this rule.
115. Section 319(4)(f) of the Act refers to the desirability of maintaining the independence of editorial control over programme content. It may be difficult to maintain editorial control if programmes are funded by donation, either by special interest groups or by large organisations. Such groups may want to pay for programmes in order to bring their unmediated message to the audience, (although of course such programming would be subject to the new Code). Any funding that fell within the definition of sponsorship would of course be subject to the sponsorship section of this Code (see section 12 of this consultation).
116. There is also a risk that without the boundaries provided by new rules, viewers will be sending money to fund programmes and services without proper protections in place regarding how their money is spent. This then would be a matter of potential harm to viewers.

117. Option three would provide viewers with protection from harm but is an increase in regulation and might deny programmes and services the right to appeal for funds without going through potentially unnecessary hurdles and limiting channels from extracting additional revenues from viewers where viewers may potentially be willing to pay more to have their specific preferences met.
118. If appealing for funds is not essentially advertising there is no legislative reason to treat radio and television differently. Appealing for funds has not created problems for the listeners and thus the RA previously.

Recommendation

119. Ofcom makes no recommendation.
120. Please see related questions in section 13

7. Whether religious programmes and/or services should be allowed to appeal for funds or not

Background

121. The Act, in section 319(6)(a), requires Ofcom to set standards containing provision designed to secure that religious programmes do not involve “*any improper exploitation of the susceptibilities of the audience for such a programme*”.
122. This is the same wording as that of the 1990 Act. However the ITC and RA interpreted the provision differently. The ITC did not allow fundraising by religious services, whereas the RA allowed it, with conditions.
123. The previous section of the RIA (section 6) has an essential bearing on this matter. Responses to that will have an impact upon the outcome of this section of the RIA as well.
124. Option one – maintain the present situation whereby radio services and programmes may appeal but television services and programmes may not.
An option would be to maintain the present situation whereby religious radio services and programmes may appeal for funds but religious television services and programmes may not.
125. Option two – retain the prohibition on religious programmes on television appealing for funds
Another option would be to lift the prohibition for specific religious services but keep it for religious programmes on television.
126. Option three – remove the prohibition on appealing for funds on religious programmes and services.
An option would be to lift the prohibition altogether.

Benefits

127. Option one would continue the well understood current situation.
128. Option two would mean that new services could be started. This is a significant effect. There would be economic benefit to the new broadcasters and to those who work in the industry.
129. There would be more choice for viewers. This again is significant.
130. Option three has the same benefits as option two but additionally this would bring religious programmes into line with other programmes and give access to those appealing for funds to many more viewers.

Disadvantages

131. If it is agreed, in response to this consultation, that it is acceptable for television programmes and services to appeal for funds, it may not be proportionate or consistent to treat these services differently, as proposed in option one,.

132. Television services licensed in Spain (some of which were originally UK based) transmit into the UK and can be found on Sky's EPG alongside UK regulated services. They fundraise. There have been no significant numbers of complaints from viewers as to the appropriateness of such direct appeals. It is difficult to postulate potential harm to the susceptible if such services have been broadcasting such material for a number of years with no evidence of a detrimental effect or groundswell of negative opinion although only broadcast to a limited number of viewers.
133. Disallowing fundraising in the new multi-channel environment may put some UK based specialist religious television services at risk of closure. They are competing with services established abroad but received in the UK, which are allowed to fundraise under other European Union states' regulations.
134. Option two however might open the door for individuals and/or groups who might use any relaxation of the rules to exploit peoples' susceptibilities purely for commercial gain.
135. To remove the prohibition simply for religious services but not for religious programmes on a whole, would mean that appeals for funds would go to a limited number of viewers and may inhibit the economic growth of this area.
136. Television advertising regulation in section 10.6 and 10.7 of the ITC Advertising Standards Code forbids appeals for funds by religious charities unless it is for disadvantaged third parties and is not connected with other objectives, e.g. proselytising. Programming would be out of step with television advertising regulation. (However an additional benefit would be that there would be no adverse impact on the television advertising industry). Rule 3.9 of the RA Advertising and Sponsorship Code does allow appeals for funds or donations for religious organisations/charities provided they comply with the relevant Code rules on charity advertising.
137. The disadvantage of option three would be that those who come across a religious programme on a general channel which is appealing for funds either to support its religion or to make programmes may be offended if they are members of a different religion or have no religious beliefs. They may also be offended if under eighteens in their families are exposed to such appeals.

Recommendation

138. Ofcom makes no recommendation.
139. Please see related question in section 7.

8. Whether there should be rules regarding merchandising arrangements

Background

140. The ITC Code of Programme Sponsorship currently contains a rule which restricts the extent to which income from merchandising can be used to fund a programme. This rule allows broadcasters to enter into merchandising arrangements with third parties to produce products based on programme characters or other elements of the programme. However, neither the programme nor its transmission can be funded in any way by the product manufacturer or broadcaster (or their agent). The merchandising rule exists in addition to the sponsorship rules (see section 12 of this consultation document). By implication, this rule, together with the rule relating to similarity between an advertiser's marketing activities and a programme's content (section 17 of the ITC Code of Programme Sponsorship), has meant that a programme cannot normally be based on an existing product.
141. Option one – retain or create new merchandising rules
Ofcom could retain or create rules which require the arms-length relationship between the broadcaster/programme maker and the merchandising manufacturer to be maintained, so that money from merchandise could not be fed back into the programme.
142. Option two – remove merchandising rules
Ofcom could remove specific restrictions on merchandising arrangements.

Benefits

143. The basis for option one would be that the independence of editorial control of the programme (the Act, section 319(4)(f)) could be compromised if there is a direct link between sales of merchandising and the programme.
144. Retaining specific rules for merchandising would maintain an arms-length relationship between the merchandise and the content of the relevant programme. This would prevent the market in programmes, particularly children's programmes, being influenced by companies who might wish to make or fund programmes (based on existing commercial products) that could then be offered to broadcasters at a discount, reflecting their promotional value for the company concerned.
145. Option two would remove specific restrictions on merchandising arrangements and could open up the option to make programmes based on existing commercial products. This could stimulate the programme making market, allowing broadcasters to draw on sources of programme funding which, to the extent this attracts new or larger audiences, could in turn increase advertising revenues.
146. Removing restrictions would create a level playing field for programmes based on existing products and other programmes.

Disadvantages

147. The disadvantage of option one is that including specific rules for merchandising in the Ofcom Code could maintain an inconsistency in approach to pre-existing commercial products and those that are launched after, or simultaneously to, a related programme. This could be viewed as distortionary in that it applies different rules to different potential investors and as a result could have an impact on downstream competition.
148. Removing merchandising rules, as suggested in option two, could make it more difficult to get programmes on air that did not have associated merchandising, thereby narrowing the range of programmes available to viewers and impacting upon companies and programme makers who specialise in programming that is not associated with merchandising. (Where PSBs are concerned the five yearly PSB review and related decisions allow Ofcom to encourage PSB investment in other forms of programmes for children.)

Recommendation

149. Ofcom proposes to remove specific restrictions on merchandising arrangements. We consider that to the extent that funding arrangements for programmes need to be regulated, that is appropriately covered by the rules for programme sponsorship.
150. Please see related question in section 13

Conclusion

151. It is intended that the changes proposed in this document would take effect two months after publication of the new Ofcom Broadcasting Code.

Questions

- 14.1** *Has this RIA correctly identified the significant changes (as described in the opening paragraph of the RIA) made in this consultation paper. If not, what other changes are significant, and why?*
- 14.2** *Do you disagree with the assessment of benefits and disadvantages drawn up in this RIA and, if so, how would you suggest it should be altered?*
- 14.3** *Can you assist with information which will help us quantify the increased costs or savings of the various options in this RIA?*

Section 15

Responding to this Consultation

How to respond

Ofcom invites written views and comments on the issues raised in this document, to be made by **5pm on Tuesday 5th October 2004**.

Ofcom strongly prefers to receive responses as e-mail attachments, in Microsoft Word format, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see annex 2), among other things to indicate whether or not there are confidentiality issues. The cover sheet can be downloaded from the 'Consultations' section of our website.

Please send your response to: **BroadcastingCode@ofcom.org.uk**

Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.

Sara Winter
Content and Standards
5th Floor
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA

Fax: 020 7981 3806

Note that we do not need a hard copy in addition to an electronic version. Also note that Ofcom will not routinely acknowledge receipt of responses.

It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at annex 3. It would also help if you can explain why you hold your views, (with evidence where possible) and how Ofcom's proposals would impact on you.

Further information

If you have any questions about the issues raised in this consultation, or need advice on the appropriate form of response, please contact Fran O'Brien on 020 7981 3845.

Confidentiality

Ofcom thinks it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt (when respondents confirm on their response cover sheet that this is acceptable).

All comments will be treated as non-confidential unless respondents specify that part or all of the response is confidential and should not be disclosed. Please place any

confidential parts of a response in a separate annex, so that non-confidential parts may be published along with the respondent's identity.

Ofcom reserves its power to disclose certain confidential information where this is necessary to fulfil its functions, although in practice it would do so only in limited circumstances.

Please also note that copyright and all other intellectual property in responses will be assumed to be assigned to Ofcom unless specifically retained.

Next steps

Following the end of the consultation period, Ofcom intends to publish a response on the Ofcom website and publish the new Ofcom Broadcasting Code around the end of January 2005.

Please note that you can register to get automatic notifications of when Ofcom documents are published, at http://www.ofcom.org.uk/static/subscribe/select_list.htm.

Ofcom's consultation processes

Ofcom is keen to make responding to consultations easy, and has published some consultation principles (see annex 1) which it seeks to follow, including on the length of consultations.

If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk. We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, whose views are less likely to be obtained in a formal consultation.

If you would like to discuss these issues, you can alternatively contact Philip Rutnam, Partner, Competition and Strategic Resources, who is Ofcom's consultation champion:

Philip Rutnam
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA
Tel: 020 7981 3585
Fax: 020 7981 3333
E-mail: philip.rutnam@ofcom.org.uk