

Response to Ofcom Broadcasting Code Review

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1. EXECUTIVE SUMMARY

1.1. Introduction

- 1.1.1. RadioCentre wrote to Ofcom in October 2008 stating that the Commercial Radio industry believed a full review of Sections 9 and 10 of the Broadcasting Code (the 'Code') was becoming critical. We noted the extreme financial strain the industry was under, the desire of advertisers to find new ways of connecting with listeners, the increasing media literacy of those listeners and the need to reduce ambiguity and confusion.
- 1.1.2. We are grateful that, in publishing its Review of the Broadcasting Code, Ofcom responded so promptly to our request. However, we believe Ofcom has adopted an unsatisfactory approach to the review. It appears that Ofcom made a choice only to amend in a minor way the existing regulatory structure, rather than undertaking a more fundamental revision of the principles that currently govern Sections 9 and 10.
- 1.1.3. The result is a Section 10 which, as a point of policy, continues to prohibit commercial references in radio programming but which allows for certain exceptions to that policy.
- 1.1.4. Ofcom suggests that one of the key requirements when considering revision of the Code is that it must remain "*fit for purpose*"; defining this as a regulatory framework which provides "*adequate protection for citizens and consumers and a consistent and a robust regulatory framework for broadcasters*"¹.
- 1.1.5. We believe the definition of 'fit for purpose' should be expanded to ensure that it includes the benefits that can flow from de-regulation (for industry, advertiser and listener), in addition to the benefits of continued regulation.
- 1.1.6. As a result of Ofcom's approach, it is our view that its proposed Section 10 is not 'fit for purpose' according to either its own, or our, definition. Commercial Radio has therefore drafted its own proposed Section 10, which is included within this response.

1.2. The importance of a regulatory framework that is 'fit for purpose'

Industry benefits

- 1.2.1. Commercial Radio is facing severe long term structural challenges, in addition to medium term cyclical pressures from the current recession. Economic modelling, commissioned by RadioCentre and conducted by Value Partners, has shown that the last five years have seen very significant declines in Commercial Radio's profitability. Value Partners also predict that, over the next two financial years, Commercial Radio revenues will fall by 13%, having already fallen by 13% in 2008/09.
- 1.2.2. The industry needs to find new revenue streams to engage with advertisers who are increasingly able to find creative and interactive means of reaching consumers via other media. A rapidly growing portion of Commercial Radio's revenue is derived from sponsorship and promotions (S&P); representing 19.8% of industry revenue today (equating to an annual figure of £104.8m) compared to 10% in 2000².
- 1.2.3. Whereas the current Code impedes stations' ability to develop new S&P formats, discussions within the industry allow us to estimate that

¹ Ofcom, Broadcasting Code Review, June 2009, p. 6

² RAB

relaxation of Sections 9 and 10 as proposed by Commercial Radio could allow for a further 20-50% uplift in S&P revenue, above that which would occur organically, dependent on market conditions³. Such estimates are, by their nature, very difficult to substantiate.

Advertiser benefits

- 1.2.4. Ofcom Chief Executive, Ed Richards, recently said, "*We know the advertising model is changing, and spot advertising is at the limits of what it can credibly do*"⁴. We agree.
- 1.2.5. There is clear demand amongst advertisers (and their agencies) to expand communication with listeners beyond traditional display advertising. Ofcom-commissioned commercial research, conducted by Change Agency, found that radio advertisers are increasingly favouring S&P activity, and would value the opportunity to become more involved in programming.
- 1.2.6. Greater relaxation of regulation around commercial references in radio programming will provide advertisers with a real opportunity to engage creatively with their target audiences, and reinvigorate advertiser confidence in Commercial Radio.

Listener benefits

- 1.2.7. There are two potential sources of benefits to listeners which result from allowing commercial references within radio programming :
 - A stronger Commercial Radio sector with more revenues will be better able to invest in quality programming.
 - Advertiser involvement in programming has the potential to increase the appeal and quality of content.
- 1.2.8. With revenues under increasing strain, content budgets are likely to continue to suffer. A reinvigorated revenue model would, however, have the potential to transform this, thereby contributing to better choice and quality for listeners.
- 1.2.9. Ofcom-commissioned consumer research also identified a "*clear appetite for some relaxation of Ofcom's rules*"⁵ surrounding commercial references in radio programming, recognising that creative S&P activity could enhance the listening experience.

Increased media literacy

- 1.2.10. Research commissioned by Ofcom has established that Commercial Radio is a medium through which most listeners expect to be 'sold to', or receive commercial messages, whether by spot ads or within programming⁶.
- 1.2.11. The research also found that few participants in Ofcom's consumer research "*imagined that commercial messages on radio were regulated in the way described*"⁷, and many were surprised at the levels of regulation.
- 1.2.12. Ofcom's 2008 Media Literacy Report also identified consumer recognition that regulation of radio content should not be overly restrictive. Of all media, radio secured the highest level of agreement that it should be "*free to be expressive and creative*"⁸.
- 1.2.13. We believe that the regulatory balancing act between protecting

³ Calculated following consultation with RadioCentre members

⁴ Ed Richards was speaking at the 2009 Radio 3.0 Conference, in May 2009.

⁵ Essential Research, "*Commercial References within Radio Programming*", June 2009. p. 2

⁶ *Ibid.*

⁷ Essential Research, p. 19

⁸ Ofcom, Media Literacy Report, 2008, p. 56

consumers and allowing for commercial freedom is now too skewed towards consideration of consumer protection, with insufficient consideration of the benefits to industry, advertisers and listeners that would accrue from a different approach.

Ensuring compliance

1.2.14. Commercial Radio invests significantly in compliance training and RadioCentre members recently approved a set of editorial principles that require stations to act with honesty and integrity⁹.

1.2.15. However, effective compliance also relies upon regulatory principles and rules that are clear and concise. In their current form, Sections 9 and 10 are ambiguous and do not provide stations with sufficiently clear direction.

Defining 'fit for purpose'

1.2.16. We therefore conclude that, in order to be 'fit for purpose' a revised Section 10 must:

- Capture all of the benefits that could flow from greater regulatory flexibility: for industry, advertisers and listeners;
- Provide citizen and consumer protection consistent with contemporary levels of media literacy; and
- Contain clear, concise and consistent regulatory principles and rules.

1.3. The right regulatory principles

1.3.1. Ofcom sets out five regulatory principles to be enshrined within its proposed Section 10:

- *To ensure that broadcasters maintain editorial independence and control over programming (editorial integrity).*
- *To ensure that programming and advertising remain distinct (separation)*
- *To protect audiences from surreptitious advertising (transparency).*
- *To ensure that audiences are protected from the risk of financial harm (consumer protection).*
- *To ensure that unsuitable sponsorship is prevented (unsuitable sponsorship).*

1.3.2. It uses these to create a Section 10 which, as a point of policy, continues to prohibit commercial references in programming but which allows for certain exceptions to this policy.

1.3.3. Based on the above definition of 'fit for purpose', RadioCentre recommends that a framework based on two clear principles would be more appropriate. These are:

- All programming must be executed with **editorial integrity**
- Any commercial influence over editorial must be **transparent**

1.3.4. The industry's proposed two principles of editorial integrity and transparency would allow for the removal of the principles of editorial independence, separation of advertising and programming, and the undue prominence rule.

⁹ See RadioCentre 'Principles of Editorial Trust' code, last updated February 2009 (attached as Annex 3).

Editorial Integrity – a crucial principle

- 1.3.5. In considering what principles should underpin a revised Section 10, we start from the position that commercial references should, as a point of policy, be allowed in radio programming output. However, we recognise that an appropriate regulatory framework is required if listeners are to be protected and commercial references are to be appropriately constrained.
- 1.3.6. We have therefore considered how best to balance the benefits that can arise from advertisers having some involvement in editorial with the need to ensure that, in making editorial decisions about advertisers' involvement, the balance of judgment falls on the side of producing appealing and compelling content rather than purely maximising income. We classify this as the need for **editorial integrity**.
- 1.3.7. The principle of **editorial integrity** would be underpinned by two rules (*with guidance*):
- Radio broadcasters must retain editorial control over all programming content (*despite any input or influence from an advertiser*)
 - Promotional or non-promotional references to a brand, product or service in editorial output must be editorially justified (*that is, in deciding the level and nature of the advertiser's involvement in the programming content, the broadcaster can demonstrate that the involvement was determined on editorial grounds, despite the existence of a commercial arrangement*)

Editorial Independence – a redundant and undesirable principle

- 1.3.8. We note a tendency, within the Broadcasting Code Review consultation document, to conflate the terms "*editorial independence*" and "*editorial integrity*". However, the two terms have quite different meanings and should therefore not be conflated. Editorial independence may result in editorial integrity, but editorial integrity need not result from editorial independence.
- 1.3.9. Whilst Ofcom states that listeners believe editorial independence to be vital, we believe that the consumer research suggests otherwise.
- 1.3.10. We also believe that the principle of editorial independence is both outdated (we note that even the old Radio Authority code did not require absolute editorial independence) and unnecessarily restrictive, and should therefore be removed from the framework for regulating commercial references in radio output.

Separation – a redundant and undesirable principle

- 1.3.11. Ofcom's proposals retain the principle of separation of programming and advertising. However, we believe that separation would be a redundant principle, on the basis that the consumer concerns which it seeks to meet are addressed by Commercial Radio's proposed principles of editorial integrity and transparency.
- 1.3.12. The Essential Research found that "*of all the principles, separation was regarded as the least important overall*"¹⁰. This was especially true if programming was felt to be editorially justified and commercial arrangements are made transparent to listeners.
- 1.3.13. Separation is also an undesirable principle, because it unnecessarily restricts Commercial Radio's ability to include commercial references (including advertising messages and claims) in radio programming. It is

¹⁰ Essential Research, p. 21

also clear from the consumer research that the practical implications of separation were considered highly undesirable to listeners, who “value a seamless flow of editorial content as far as possible”¹¹.

Transparency – a crucial principle

- 1.3.14. We agree with Ofcom that it is paramount that a revised Section 10 has at its heart the principle of **transparency**.
- 1.3.15. We note this key finding from Essential Research: “*The risk of being misled or deceived was the prime concern among respondents with regard to commercial radio promotions*”¹² The research also revealed that, if transparency is in place, the participants were quite willing to accept promotional references within radio programming, as long as the quality of the overall listening experience was not felt to be compromised (and that, where there is transparency, the principle of absolute editorial independence became less important).
- 1.3.16. Thus Commercial Radio is committed to ensuring that, when the inclusion of references to a brand, product or service is influenced by a commercial arrangement, this is made transparent to listeners.

Undue Prominence – a redundant rule

- 1.3.17. Ofcom continues to apply the general rule of undue prominence within its revised Section 10. It is specified that undue prominence may result from:
*“the presence of, or reference to, a product or service in a programme where there is no editorial justification; or
the manner in which a programme or service appears or is referred to in programming.”*¹³
- 1.3.18. RadioCentre’s proposed principle of **editorial integrity**, which will apply to all (promotional and non-promotional) commercial references in editorial, would safeguard effectively against these two potential scenarios, and therefore render redundant the need to regulate against undue prominence.

1.4. Ofcom’s proposed Section 10

- 1.4.1. We have already identified that we believe Ofcom’s proposed Section 10 secures inappropriate and unnecessary regulatory principles. We also examine whether the proposals deliver the objectives that we believe define whether or not a revised Section 10 is ‘fit for purpose’.
- 1.4.2. We assert that Ofcom’s restrictive approach to the revision of Section 10 does not deliver the full benefits that could flow from relaxation of regulation of commercial references in radio programming – for industry, advertisers and listeners.

The benefits for industry

- 1.4.3. Ofcom’s proposed regulatory revision will not provide the industry with the urgently required financial boost.
- 1.4.4. A modest increase in the rate at which spend on S&P activity is replacing spend on spot advertising will not have the required transformative effect. Instead, a revised Section 10 needs to enhance Commercial Radio’s reputation as an advertising medium and thus contribute to an overall

¹¹ Ofcom, Broadcasting Code Review, p. 90

¹² Essential Research, p. 20

¹³ Ofcom, Broadcasting Code Review, p. 79

increase in spend on radio advertising.

The benefits for advertisers

- 1.4.5. In order to engage with audiences in a more personalised, targeted manner, the industry and advertisers require freedom to try out innovative executions – many of which currently don't fit into the four narrow categories of relaxation proposed. Ofcom's proposals do not go far enough to address advertisers' and agencies' current or future expectations.

The benefits for listeners

- 1.4.6. Ofcom's proposed Section 10 will do little to increase the industry's ability to invest in quality programming, will limit variation between individual stations and inhibit creativity in the execution of promotions, and will restrict the industry's ability to harness the resources and input of third parties in order to create compelling output.

Protection consistent with contemporary levels of media literacy

- 1.4.7. Ofcom's proposed Section 10 applies the same regulatory principles as the current Section 10. We therefore do not believe that it takes into account current media literacy levels, and therefore misses an opportunity to revise consumer protection. It does so to the detriment of all the parties (industry, advertisers and listeners) who would benefit from de-regulation.

Clear and consistent principles and rules

- 1.4.8. It is critical that a revised Section 10 contains clear, concise and consistent regulatory principles and rules. There are three key reasons why we believe Ofcom's proposed Section 10 does not deliver clear, concise and consistent regulatory principles and rules:

- Ofcom's proposed Section 10 does not address the indisputable need to simplify and clarify; these are crucial if effective and compliant implementation is to be achieved;
- Ofcom's proposed Section 10 is insufficiently flexible and contains regulatory inconsistencies and breaches of its own principles (which will only lead to further complication and confusion);
- Sections of Ofcom's consultation document suggest that, despite the proposed new Sections 9 and 10 containing discrete rules for radio and TV, Ofcom may not apply a regulatory distinction between the two media.

Lack of clarity

- 1.4.9. Ofcom's proposed Section 10 is unnecessarily complicated because of the varying 'tiers' of principles and rules. Firstly, Ofcom proposes that the revised Section 10 should enshrine five principles, then it proposes six general rules, followed by a set of specific rules.
- 1.4.10. Ofcom believes that this structure should "*provide stakeholders with a more user-friendly means of assessing the acceptability of commercial references in programming and enable a better understanding of the purpose and spirit of the rules*"¹⁴. However, we believe that it has the opposite effect; having tested the proposed Section 10 with our members, we conclude that the use of three tiers of regulatory guidance is unnecessarily complicated and lacking in clarity.

¹⁴ Ofcom, Broadcasting Code Review, p. 76

An inflexible and inconsistent approach

- 1.4.11. Ofcom's proposals equate to a list of 'approved mechanisms', which essentially dictate the type of commercial opportunities that stations can offer to advertisers and agencies. This denies the industry the flexibility to innovate new commercial arrangements, to the benefit of listeners and advertisers. We therefore disagree with Ofcom that the proposed rules "are likely to enable substantial scope for creative development"¹⁵.
- 1.4.12. Our analysis of Ofcom's proposed Section 10 reveals several inconsistencies. These inconsistencies are compounded by the fact that, in pursuing an 'approved mechanisms' approach, whilst not addressing the need to revise the regulatory principles that underpin a revised Section 10, Ofcom's proposals entail allowing stations to breach the principles that are supposed to be at the heart of the revised Section 10 (the principles of editorial independence, the separation of programming and advertising, and the undue prominence rule).
- 1.4.13. We believe that, if principles are to have any weight and respect, there can be no exceptions under which they can be breached and therefore consider that these principles must be inappropriate.

Separate rules for radio and TV

- 1.4.14. We welcome Ofcom's decision to replace the current Section 9 (sponsorship) and Section 10 (commercial references in editorial) with discrete regulatory rules for radio and television.
- 1.4.15. However, some of Ofcom's proposals suggest that the regulatory regimes to be applied to radio and television may not be as distinct as first appears to be the case.
- 1.4.16. It is therefore important that, alongside separate Code sections for commercial references in radio and television programming, Ofcom adopts distinct regulatory approaches to the two media.

1.5. Commercial Radio's proposed Section 10

Starting with the principles that we believe will create a regulatory framework that is 'fit for purpose', the industry has drafted an alternative Section 10 (Commercial References in Radio Programming). This includes rules which establish how the principles should be implemented, and guidance which assists in the interpretation of these rules.

Principles

- All programming must be executed with **editorial integrity**
- Any commercial influence over editorial must be **transparent**

Rule 1: Radio broadcasters must retain editorial control over all programming content (*despite any input or influence from an advertiser*).

Rule 2: Promotional or non-promotional references to a brand, product or service in editorial output must be editorially justified (*that is, in deciding the level and nature of the advertiser's involvement in the programming content, the broadcaster can demonstrate that the involvement was determined on editorial grounds, despite the existence of a commercial arrangement*).

Categories of activity which may be compatible with this rule, depending on transparent execution and editorial justification, include (but are not limited to):

- Public service campaigns
- Interviews with entertainment figures as part of a promotional campaign, for example, for a film or book.

¹⁵ Ofcom, Broadcasting Code Review, p. 95

- Premium-rate numbers which allow interaction
- Inducements for listeners to access further content (including commercial content) via the radio station's or third parties' websites
- Promoting the availability of the music heard on a radio station for download
- Promoting odds or ticket sales information relating to events
- Scene setting at outside broadcasts
- Promotion of material which is directly linked to or derived from programming
- References to sponsors within sponsored programming
- References to sponsors within sponsored competitions

Rule 3: If the inclusion of references to a brand, product or service in programming is influenced by a commercial arrangement between a station and a third party, this must be made transparent to listeners throughout the relevant programming and in all programme trails.

Transparency may be achieved through

- Sponsor credits (pre-recorded or live)
- Presenter explanations

Rule 4: Sponsor credits may include short sales messages without the need for editorial justification.

Rule 5: Any commercial references included in programming must comply with all the relevant requirements of the BCAP Broadcast Advertising Standards Code.

Guidance:

- all advertising claims within programming (including within credits and trails) must be pre-cleared, either internally or (for special categories) by the RACC.
- no third party that is prohibited from advertising may sponsor programming, nor influence programming content.

1.6. Proposed Next Steps

- 1.6.1. We urge Ofcom to consider Commercial Radio's arguments for further consideration of the appropriate regulatory framework for a revised Section 10.
- 1.6.2. We note that Ofcom is required to revise the Broadcasting Code, in order to implement the requirements of the AVMS Directive into UK legislation before 19 December 2009. We also note that Ofcom suggests that "making all changes to the Code by the AVMS Directive implementation deadline of 19 December 2009, reduces any risk of confusion over the revisions and optimises both citizen understanding, and industry's implementation, of the changes"¹⁶.
- 1.6.3. However, we urge Ofcom to prioritise the critical need to secure the most appropriate regulatory framework for Commercial Radio, above practical considerations.
- 1.6.4. Commercial Radio therefore requests a short follow-up consultation, once Ofcom has had time to amend its proposals for Section 10.

¹⁶ Ofcom, Broadcasting Code Review, p. 4

2. **INTRODUCTION**

- 2.1. RadioCentre wrote to Ofcom in October 2008 stating that Commercial Radio believed that a full review of Sections 9 and 10 of the Code was critical. We noted the extreme financial strain the industry was under, the desire of advertisers to find new ways of connecting with listeners, the increasing media literacy of those listeners and the need to reduce ambiguity and confusion.
- 2.2. We advocated a 'back to basics' assessment of which regulatory principles are required to protect consumers, whilst also delivering the benefits that could flow from deregulation, for the industry, advertisers and listeners. We also gave some examples of the types of commercially-funded editorial initiatives which the industry believed should be permitted on Commercial Radio but which are prohibited by the current Code.
- 2.3. We are grateful that, in publishing its Review of the Broadcasting Code, Ofcom responded so promptly to our request. However, we believe Ofcom has adopted an unsatisfactory approach to the review. It appears that Ofcom made a choice only to amend in a minor way the existing regulatory structure, rather than undertaking a more fundamental revision of the principles that currently govern Sections 9 and 10.
- 2.4. The result is a Section 10 which, as a point of policy, continues to prohibit commercial references in radio programming but which allows for certain exceptions to that policy. And whilst we welcome that four out of five of the examples that we provided would be allowed under Ofcom's proposed Section 10¹⁷, we believe that Ofcom's decision not to review the regulatory principles that currently govern Sections 9 and 10 is a significant missed opportunity.
- 2.5. In conducting its review, Ofcom placed proper emphasis on evidence of listeners' attitudes to commercial references on radio. These attitudes were assessed for Ofcom by Essential Research, who exposed listeners to examples of material which could be allowed under a relaxed Code and explored what protections listeners felt were appropriate. The manner in which this research was conducted, however, simply underlines our view that Ofcom's mind was already made up as to which regulatory principles should underpin a revised Section 10 of the Code.
- 2.6. We note that "*respondents were asked to note in particular the significance of the three Ofcom principles of transparency, separation and editorial independence*"¹⁸. Essential Research asserts that respondents were not asked to evaluate material on the basis of these three principles; instead participants were informed merely to make them aware of the considerations currently taken into account by Ofcom when forming decisions or policy.
- 2.7. However, the explicit presentation of these regulatory principles inevitably influenced participants' evaluation of the audio material and therefore the outcome of the consumer research.
- 2.8. We believe that the limited deregulations proposed by Ofcom also stem from an unwillingness properly to test consumers' attitudes to greater relaxation. Ofcom states in its consultation document that "*we do not consider that there is sufficient evidence that listeners would be as*

¹⁷ The industry's proposal that the promotion of online activity, which is not directly linked to on-air activity, is excluded from Ofcom's proposals; we presume that this is primarily a result of an audio example of this type of activity not being included in the consumer research.

¹⁸ Essential Research, p. 19

*tolerant to sponsor references in other types of programming*¹⁹, aside from within sponsored broadcast competitions and outside broadcasts. However, the Essential Research findings reveal that, *"for the sponsored feature stimulus, no future scenario options were presented to respondents, as Ofcom was not considering changes to all types of sponsorship on radio"*²⁰. Ofcom appears therefore consciously to have decided not to test its proposition that listeners would be largely intolerant of sponsor references in other types of programming.

- 2.9. In fact, the consumer research found that participants did not absolutely reject the prospect of sponsored features containing sponsor references. Instead, *"there was some appetite for hearing about the sponsor's offers in detail, and a feature of this kind was felt to be a potentially effective and acceptable commercial vehicle for local shops and services"*²¹. Research participants' concern simply stemmed from the fact that the (example) sponsored feature was not executed with editorial integrity or transparency.
- 2.10. Ofcom suggests that one of the key requirements when considering revision of the Code is that it must remain *"fit for purpose"*; defining this as a regulatory framework which provides *"adequate protection for citizens and consumers and a consistent and a robust regulatory framework for broadcasters"*²².
- 2.11. We believe the definition of 'fit for purpose' should be expanded to ensure that it includes the benefits that can flow from de-regulation, in addition to the benefits of continued regulation. In Chapter 3 we set out why this is so important.
- 2.12. However, it is clear to us that, as a result of Ofcom's approach, the proposed Section 10 is not 'fit for purpose' according to either its own, or our, definition. Commercial Radio has therefore drafted its own proposed Section 10.
- 2.13. It is important to note that Commercial Radio has committed to acting with *"integrity"* and *"honesty"* in the RadioCentre 'Principles of Editorial Trust' document²³; adherence to this code is a requirement of RadioCentre membership. The industry recognises that trust is an important part of radio's appeal, and therefore considers preserving this trust to be critically important.

¹⁹ Ofcom, Broadcasting Code Review, p. 95

²⁰ Essential Research, p. 8

²¹ *Ibid.*, p.30

²² Ofcom, Broadcasting Code Review, p. 6

²³ Attached to this response (Annex 3)

3. THE IMPORTANCE OF A REGULATORY FRAMEWORK THAT IS 'FIT FOR PURPOSE'

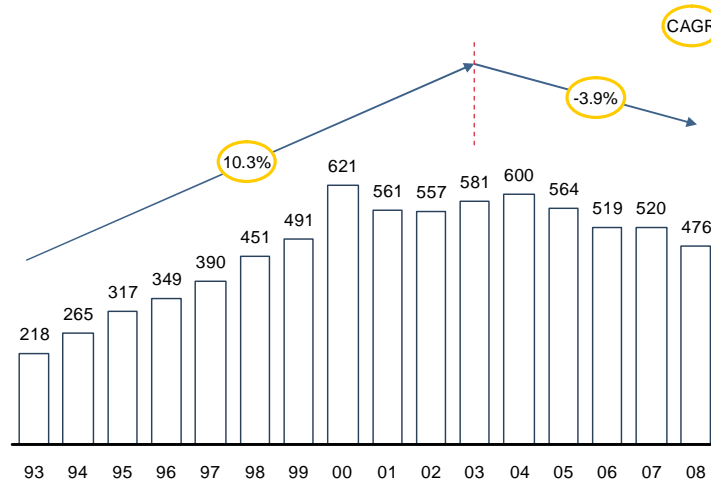
3.1. The benefits that will flow from a Section 10 that is "fit for purpose"

- 3.1.1. Ofcom suggests that one of the key requirements when considering revision of the Code is that it must remain "fit for purpose".
- 3.1.2. We have indicated that we believe the definition of 'fit for purpose' should be expanded to ensure that it includes the benefits that can flow from de-regulation, in addition to the benefits of continued regulation.
- 3.1.3. In this chapter we set out why we believe that a "fit for purpose" regulatory system is one that:
- Captures all of the benefits that could flow from greater regulatory flexibility: for industry, advertisers and listeners;
 - Provides citizen and consumer protection consistent with contemporary levels of media literacy; and
 - Contains clear, concise and consistent regulatory principles and rules.
- 3.1.4. We note that a deregulated framework has the potential to contribute to a successful commercial future for the radio industry; that advertisers will benefit from being able to use radio in more creative and integrated ways, and that, not only will this enable Commercial Radio to invest more in content, but also the increased involvement of advertisers can be harnessed to create better and more compelling radio programming to the benefit of listeners.
- 3.1.5. We emphasise the need to have regard to increasing media literacy amongst consumers, and to amend accordingly the existing regulatory principles that seek to protect consumers.
- 3.1.6. Finally, we underline how clear, concise and consistent regulatory principles and rules will facilitate effective industry compliance with a revised Section 10.

3.2. The benefits for industry – securing a viable future for Commercial Radio

- 3.2.1. Both the industry and Ofcom have acknowledged that Commercial Radio's current revenue model is under considerable strain. The industry is facing severe long term structural challenges, in addition to medium term cyclical pressures from the current recession.
- 3.2.2. Economic modeling, commissioned by RadioCentre and conducted by Value Partners, has shown that the last five years have seen very significant declines in Commercial Radio's profitability. Since 2004, advertising revenues have fallen by 21% in real terms; stripping out the 8% decline in total advertising revenues (primarily due to cyclical reasons), radio's loss of share of advertising spend is equivalent to a fall in revenues of 14%. The industry's decline in profitability over the same period, from £110m to £48m, is largely due to radio's loss of share of total UK advertising spend (from 3.9% to 3.3%).

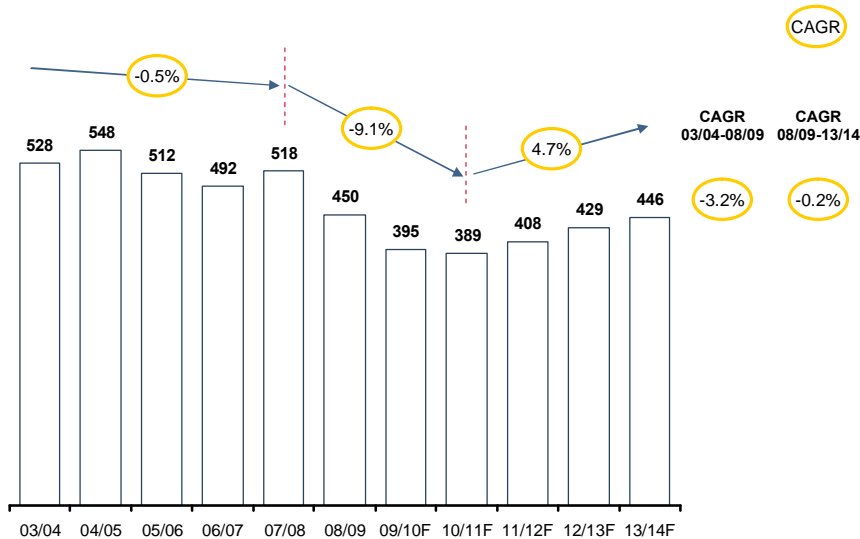
Figure 1: UK Commercial Radio advertising revenues, 2008 prices, £m



Source: RAB, Value Partners analysis

3.2.3. Value Partners predict that, over the next two financial years, Commercial Radio revenues will fall by 13%, having already fallen by 13% in 2008/09. Revenues in 2013/14 are forecast to be 9.3% lower in real terms than the industry's revenue between 2003/04 and 2007/08. Profits are expected to follow a similar pattern, with losses being registered for two successive years in 2009/10 and 2010/11, before rising to £36m in 2013/14. This 36m is less than half of the £95m average profits being recorded in the years 2003/04 to 2007/08.

Figure 2: Commercial Radio advertising revenues, 2003/04 to 2013/14, £m



Note: Year end 31st March, Revenues are net of agency commissions (15%)
 Source: Value Partners analysis, RAB, WARC, ZenithOptimedia, Group M

3.2.4. The industry currently faces a particularly difficult revenue situation. Total revenue for Commercial Radio in Q1 2009 was £128.6m; the lowest

quarter for more than a decade. Estimates of year on year decline for 2009 range from 10% to 15%.

3.2.5. This downturn in revenues has translated into an extremely serious position at station-level. Research conducted by RadioCentre for the Myers Review, an independent report commissioned by Government to inform its Digital Britain report, found that:

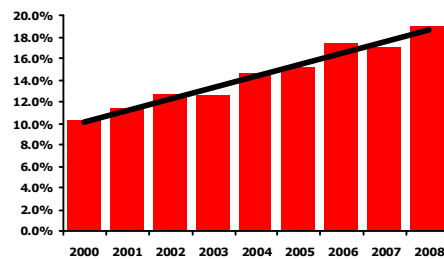
- Currently, half of all Commercial Radio stations are loss making, with two thirds of all stations (66%) loss making or only generating profits of less than £100k per annum. Stations generating profits of less than £100,000 per annum are extremely vulnerable to relatively small downturns in revenue (less than £2k per week, equivalent to one major client);
- 80% of stations serving populations of <700,000 are loss making or generate profits of <£100,000 per annum;
- 12% of stations are predicting to lose more than £250,000 in the current financial year (of whom more than 80% also lost >£250,000 last year and of those almost 70% also lost >£250,000k in the previous financial year)²⁴.

3.2.6. Consequently, the Myers Review predicted that up to 50 local commercial radio stations are at risk of closure during the next 18 months. Seven stations have already closed since the start of 2009 and more have gone into administration.

3.2.7. We welcome Ofcom's efforts to de-regulate Commercial Radio's localness and ownership regulation, in line with the Government's recommendations in the final *Digital Britain* report. However, savings derived from these de-regulations alone will not be sufficient to secure a long term viable framework for Commercial Radio. The industry needs to find new revenue streams to engage with advertisers, who are increasingly able to find creative and interactive means of reaching consumers via other media.

3.2.8. In parallel with the shift in the wider advertising market towards personalisation, interactivity and targeting, the radio advertising model is shifting from an emphasis on spot advertising to sponsorship and promotions (S&P) activity. S&P currently represents 19.8% of industry revenue (equating to an annual figure of £104.8m) compared to 10% in 2000²⁵ [Figure 2]. Indeed, some stations, including Q Radio, Heat and the forthcoming Absolute CTRL (working title)²⁶, are funded solely by S&P.

Figure 2: Share of Commercial Radio accounted for by S&P



²⁴ John Myers, *An Independent Review of the Rules Governing Local Content on Commercial Radio*, April 2009, p. 34

²⁵ RAB

²⁶ See here for further detail:

<http://www.mediaweek.co.uk/news/bulletin/mediaam/article/927496/?DCMP=EMC-MediaAMBulletin>

- 3.2.9. Yet, for some time, the industry has found the current Sections 9 and 10 highly restrictive and an impediment to meeting advertisers' ambitions in terms of engaging with listeners. On numerous occasions, stations have had to turn-down commercial opportunities as a result of the restrictive nature of Sections 9 and 10. (Note - it is extremely difficult to calculate the real value of revenue lost as result of these regulatory restrictions, as these proposals will not have been progressed or costed.) As expanded upon in 3.3.8 below, advertisers and agencies perceive Commercial Radio to be hampered by regulation, thus increasing reluctance to invest in the medium; it is even more difficult to quantify losses that have resulted from this reputation damage.
- 3.2.10. Revision of the Code would enable Commercial Radio better to harness advertiser and agency preference for S&P activity and to develop new and exciting means of delivering commercial messages in radio programming. It would also allow Commercial Radio to develop a competitive advantage over other traditional advertising mediums; retaining radio's unique characteristics of ubiquity and intimacy whilst competing more equally with forms of new media, particularly the internet, which are much less onerously regulated.
- 3.2.11. Reform would also help the sector achieve greater parity with BBC Radio. RadioCentre is concerned that the BBC's distinct regulatory structure allows it to provide third parties with a greater degree of commercial promotion than Commercial Radio is able to. This compounds the BBC's existing advantages, which arise from its status as a publicly-funded broadcaster, including: a secure and stable income, privileged access to spectrum, the ability to cross-promote and an ad-free environment. This concern is expanded upon in RadioCentre's editorial complaint against Radio 1's 'Harry Potter Day' (attached in Annex 2).
- 3.2.12. BBC Radio's on-air endorsement of commercial brands, products and services has a negative competitive impact on Commercial Radio, raising expectations amongst commercial partners that cannot then be met by the industry and disadvantaging the commercial sector in the procurement of programming inputs. Revision of Sections 9 and 10 of the Code will help to rectify this situation; the BBC's Editorial Guidelines will also need to be strengthened²⁷.
- 3.2.13. It is naturally difficult to assess and substantiate the substantial revenue opportunities that will flow from a revised Section 10. However, we believe that permitting commercial references within radio programming will help to both lock-in revenue to the industry and create incremental revenue growth. Discussions within the industry allow us to estimate that relaxation of Sections 9 and 10, as proposed by Commercial Radio, could allow for a 20-50% uplift in S&P revenue, above that which would occur organically, dependent on market conditions²⁸.

3.3. The benefits for advertisers – the enhancement of S&P activity

- 3.3.1. Ofcom Chief Executive, Ed Richards, recently said, "*We know the advertising model is changing, and spot advertising is at the limits of what it can credibly do*"²⁹. We agree.
- 3.3.2. There is clear demand amongst advertisers (and their agencies) to expand communication with listeners beyond traditional display advertising. Ofcom-commissioned commercial research, conducted by Change Agency,

²⁷ We note that a consultation on the BBC Editorial Guidelines is due to be launched in September 2009.

²⁸ Calculated following consultation with RadioCentre members

²⁹ Ed Richards was speaking at the 2009 Radio 3.0 Conference, in May 2009.

found that radio advertisers are increasingly favouring S&P activity, for a number of reasons including:

- Its greater scope for creative content;
- The ability for advertisers/agencies to have greater creative input;
- Its greater proximity to the station's brand;
- Its (potential) greater effectiveness and return on investment.

3.3.3. Thus S&P activity is perceived to address some of radio's perceived weaknesses as an advertising medium, particularly lack of creativity and inability to measure return on investment.

3.3.4. The following comments, from the Change Agency research, are indicative of advertiser and agency support for S&P:

- ❖ *"It's because it [S&P] offers a deeper level of engagement. Promotions do something a little different. They explain things a little bit more."*³⁰ Agency
- ❖ *"The growth's going to come from sponsorship and promotions within the total mix. People are coming to understand that it does need to be in the style of the station – the style that the audience wants to hear"* Agency³¹
- ❖ *"I would say there's almost more hunger for radio S&P than advertising ... its because it offers a deeper level of engagement"* Agency³²
- ❖ *"I'm more of a fan of S&P. That's when you really tap into station brands"* Agency³³
- ❖ *"I don't think clients want to tag anymore. I think they want to be more embedded in editorial."* Agency³⁴

3.3.5. This shift has likely been precipitated by changing consumer behaviour and attitudes. Ofcom-commissioned consumer research, conducted by Essential Research, reveals that radio listeners are increasingly less tolerant of spot adverts, as they are felt to be:

- intrusive;
- loosely targeted and consequently often irrelevant;
- repetitive

... and they display:

- an overt sales agenda;
- low production or tonal values.

3.3.6. However, the same consumer research found that listeners were more favorably disposed to sponsorship and promotions activity:

- ❖ *"spot advertisements were also considered overtly promotional in their approach, in comparison to more subtle commercial messages such as sponsor credits"*³⁵

³⁰ Change Agency, 'Future of UK Commercial Radio – Advertiser and Agency Research', March 2009, p. 27

³¹ *Ibid.*, p. 27

³² *Ibid.*, p. 27

³³ *Ibid.*, p. 13

³⁴ Change Agency, p. 14

³⁵ Essential Research, p. 16

- ❖ [Sponsor credits were] *"more conducive to a fluid, enjoyable listening experience. For this reason sponsor credits were considered a preferred form of commercial message"*³⁶
- 3.3.7. So, despite listeners and advertisers clearly favouring S&P activity over traditional spot advertising, the restrictions within Sections 9 and 10 of the current Code have stunted revenue growth in this area, at a time when it is critical that Commercial Radio is able to invigorate its revenue model and exploit its advantages over other advertising mediums.
- 3.3.8. The Change Agency research reveals that advertisers and agencies agree that Commercial Radio is currently hampered by regulation, thus increasing advertiser reluctance to invest in the medium:
- ❖ *"A lot of our clients who are heavily associated with music, for example, can't necessarily broadcast that on air because there are concerns over regulation."*³⁷ Agency
 - ❖ *"I think there are opportunities to increase revenues by lightening the restrictions around sponsorship and promotions, around creative, terms and conditions."*³⁸ Agency
 - ❖ *"There will have to be a lessening of some of the requirements. It would be good to have stations less constrained."*³⁹ Advertiser
 - ❖ *"The scale of regulation on radio is disproportionate to any other medium you want to compare it with and it's constipating, holding up, commercial radio development and has a knock-on effect to their ability to deliver content ... I just think they need to be given more opportunity to grow."*⁴⁰ Agency
- 3.3.9. Greater relaxation of regulation around commercial references in radio programming will provide advertisers with a real opportunity to creatively engage with their target audiences, and reinvigorate advertiser confidence in Commercial Radio.
- 3.4. The benefits for listeners – the potential for enhanced and compelling broadcast output**
- 3.4.1. There are two potential sources of benefits to listeners which result from allowing commercial references within radio programming :
- A stronger commercial radio sector with greater revenues will be better able to invest in quality programming.
 - Advertiser involvement in content has the potential to increase the appeal and quality of that content.
- 3.4.2. Commercial Radio has a long tradition of investing in quality content of appeal to its listeners. Throughout its history it has innovated new formats and genres, including stations for ethnic minority audiences, children, or lovers of jazz, country or rock music; it pioneered the kind of listener interaction that is now commonplace across the medium; and has, for decades, galvanised communities of geography and interest behind common causes, such as charity appeals and community projects.
- 3.4.3. The very fact that Commercial Radio commands over 42.7% of radio listening, including over 78% of local listening, demonstrates that millions

³⁶ Essential Research, p. 16

³⁷ Change Agency, p. 15

³⁸ *Ibid.*, p. 24

³⁹ *Ibid.*, p. 23

⁴⁰ *Ibid.*, p. 23

continue to value the industry's broadcast output.

- 3.4.4. However, it is inevitable that the decline in revenues has diminished stations' ability to invest in content. Ofcom recently calculated that Commercial Radio as a whole has only £75m to spend on programming (for its 350 analogue and digital stations), compared with BBC Radio's programming budget of c. £400m (for its 56 local, regional and national stations)⁴¹.
- 3.4.5. With revenues under increasing strain, content budgets are likely to continue to suffer. A reinvigorated revenue model would, however, have the potential to transform this, thereby contributing to better choice and quality for listeners.
- 3.4.6. An important additional benefit for listeners of permitting commercial references within programming is the potential for the advertiser's involvement to enhance that particular element of the output. Sponsor involvement allows stations to harness the resources and input of third parties; without such support, it is often simply unfeasible for stations to produce compelling, but expensive, programming.
- 3.4.7. The consumer research, conducted by Essential Research, reveals a "*clear appetite for some relaxation of Ofcom's rules*"⁴² surrounding commercial references in radio programming. This appetite does not simply stem from a preference for S&P over traditional spot advertising; amongst the research participants, there was also clear recognition that creative S&P activity could enhance the listening experience.
- 3.4.8. For example, the research revealed a clear listener appetite for outside broadcasts, which would allow a station to further embed itself within their community, whilst enhancing their localness output. Paid-for public information campaigns also cannot currently feature on Commercial Radio, despite there being a clear public benefit in them doing so (especially given Commercial Radio's high reach amongst sectors of the population that are traditionally hard to reach through traditional mass-media).
- 3.4.9. **It is clear that a revised Section 10 has the potential to deliver benefits for all Commercial Radio stakeholders. We therefore conclude that, in order to be 'fit for purpose' a new Code Section 10 must capture all of the benefits that could flow from greater regulatory flexibility: for industry, advertisers and listeners.**

3.5. An increasingly media literate audience

- 3.5.1. As we emphasise throughout Chapter 4 of this submission, we recognise the imperative to ensure that a revised Section 10 provides listeners with requisite consumer protection to protect them from harmful and potentially misleading broadcast content.
- 3.5.2. At the same time, we recognise that consumers are increasingly media literate; even more so than when Sections 9 and 10 were drafted following the 2003 Communications Act. Ofcom's Media Literacy reports have repeatedly uncovered evidence of increased access to and understanding of media devices. Indeed, we agree that "*the days are gone when people are spoon-fed media*"⁴³ (Agency).
- 3.5.3. The consumer research conducted by Essential Research establishes that Commercial Radio is a medium through which most listeners expect to be

⁴¹ Ofcom, Building on the Myers Review, May 2009, p. 7

⁴² Essential Research, p. 2

⁴³ Change Agency, p. 24

'sold to', or receive commercial messages, whether by spot ads or within programming⁴⁴. We are told that "commercial radio was very much regarded as a legitimate sales environment; whether overtly through spot ads or in more integrated formats of sponsor credits"⁴⁵.

3.5.4. The consumer research also found that not only had few participants in Ofcom's consumer research "imagined that commercial messages on radio were regulated in the way described"⁴⁶, many expressed surprise at the level of regulation:

- ❖ "If that's not allowed – that's just splitting hairs" Cardiff 45-60yrs⁴⁷ [referring to current restrictions on sponsored competitions]
- ❖ "widespread surprise across the sample at the revelation that the St Patrick's Day example was not permitted under current regulations"⁴⁸
- ❖ "It seems daft if you're at a venue not to mention the venue and its products." Cardiff 35-44yrs⁴⁹

3.5.5. The research also found that most participants "felt that their own common sense was sufficient to protect them from commercial deception or misinformation"⁵⁰ and "on the whole, respondents were confident in their own ability to detect and – if desired – deflect advertising messages"⁵¹. The following comments were made:

- ❖ "Commercial messages inform you – you can do what you want, you can make up your own mind." London 35-44yrs⁵²
- ❖ "You need to leave people some space to make up their own minds about things ... I can make my own mind up about what I'm listening to" Cardiff 35-44ys

3.5.6. Ofcom's 2008 Media Literacy Report also identified consumer recognition that regulation of radio content should not be overly restrictive. Of all media, radio secured the highest level of agreement that it should be "free to be expressive and creative" (77%)⁵³.

3.5.7. Given these considerations, we believe that the regulatory balancing act (contained within the current Section 10) between protecting consumers and allowing for commercial freedom is now too skewed towards consideration of consumer protection, with insufficient consideration of the benefits to industry, advertisers and listeners that would accrue from a different approach.

3.5.8. **We conclude therefore that a revised Section 10 must provide citizen and consumer protection consistent with contemporary levels of media literacy.**

3.6. The need for regulatory consistency and clarity

3.6.1. Commercial Radio invests significant resources in guaranteeing compliance with the industry's various regulatory structures. Compliance training is provided by stations and groups as well as at industry level. In addition the industry has committed to a set of editorial principles that

⁴⁴ Essential Research, p. 2

⁴⁵ *Ibid.*, p.15

⁴⁶ *Ibid.*, p. 19

⁴⁷ *Ibid.*, p.27

⁴⁸ *Ibid.*, p. 7

⁴⁹ *Ibid.*, p. 33

⁵⁰ *Ibid.*, p. 18

⁵¹ *Ibid.*, p. 22

⁵² *Ibid.*, p. 18

⁵³ Ofcom, Media Literacy Report, 2008

ensure that all stations act with honesty and integrity⁵⁴.

- 3.6.2. However, effective compliance also relies upon regulatory principles and rules that are clear and concise, and regulatory documents that can be easily and quickly understood by sales and programming staff operating at the station level.
- 3.6.3. RadioCentre members find that, in their current form, Sections 9 and 10 are ambiguous and do not provide sufficiently clear direction. We are therefore keen to ensure that a revised regulatory regime for commercial references in radio programming rectifies the ambiguity that has led to some of the recent breaches of Section 9 and 10.
- 3.6.4. **We conclude therefore that a revised Section 10 must contain clear, concise and consistent regulatory principles and rules.**

⁵⁴ See RadioCentre 'Principles of Editorial Trust' code, (attached as Annex 3).

4. THE RIGHT REGULATORY PRINCIPLES

4.1. Defining the principles required for the regulation of commercial references in radio programming

4.1.1. Ofcom sets out five regulatory principles to be enshrined within its proposed Section 10:

- *To ensure that broadcasters maintain editorial independence and control over programming (editorial integrity).*
- *To ensure that programming and advertising remain distinct (separation)*
- *To protect audiences from surreptitious advertising (transparency).*
- *To ensure that audiences are protected from the risk of financial harm (consumer protection).*
- *To ensure that unsuitable sponsorship is prevented (unsuitable sponsorship).*

4.1.2. It uses these to create a Code Section 10 which, as a point of policy, continues to prohibit commercial references in programming but which allows for certain exceptions to this policy.

4.1.3. In Chapter 3 we outlined how permitting commercial references in programming would benefit listeners, advertisers and the Commercial Radio industry. Here we consider what regulatory framework might be needed if such commercial references were to be allowed, in order to deliver these benefits in full. We conclude that a framework based on two clear principles would be appropriate. These are:

- All programming must be executed with **editorial integrity**
- Any commercial influence over editorial must be **transparent**

4.1.4. Below, we set out why we believe that these two principles are appropriate and why, consequently, additional or corresponding principles proposed by Ofcom are rendered redundant. Our assertions are supported by reference to Ofcom's consumer and advertiser/agency research, and the legislative framework within which Ofcom must operate.

4.1.5. Firstly, we briefly touch on the legislative framework within which Ofcom must operate, to emphasise that the regulatory framework that we propose fits within this.

4.2. The legislative framework

4.2.1. The existing Code Sections 9 and 10 have adopted a tightly restrictive approach to the regulation of commercial references in radio programming, having built upon a comparatively light-touch legislative foundation.

4.2.2. Legislation defines the following objectives for Ofcom's regulation of commercial references on radio:

- The Communications Act requires the exclusion of political advertising, harmful, misleading or harmful advertising, or unsuitable sponsorship⁵⁵;
- The Communications Act also requires Ofcom to develop standards codes, which must be informed by Ofcom's assessment of the desirability of maintaining the independence of editorial control over

⁵⁵ Communications Act 2003, 319 (2) (g); (h); (j); 321 (1) – (3)

programme content⁵⁶, whilst being flexible enough to take account of the different contexts in which material may be broadcast⁵⁷;

- Separate legislation derived from Europe prohibits the inclusion of paid-for promotions which do not make it clear “*by images or sounds clearly identifiable by the consumer*” that they are paid-for⁵⁸.

4.2.3. Taken collectively, legislation therefore requires that commercial references in radio programming comply with certain legal restrictions (such as prohibiting certain types of advertiser), are transparently presented if paid for, and do not undermine a level of editorial independence which Ofcom has deemed necessary in a given radio broadcasting context. There is no prohibition in legislation on either promotional or non-promotional references appearing in radio programming, whether paid-for or not.

4.2.4. We believe therefore that the principles set out below – **editorial integrity** and **transparency** – comply with Ofcom’s legislative requirements.

4.2.5. Separate legislative requirements and stated Ofcom regulatory principles demand that Ofcom demonstrate a compelling rationale for regulating beyond the basic requirements of legislation:

- Broadcasters enjoy a legal right to “*freedom of expression*” under human rights law⁵⁹.
- Ofcom has a stated “*bias against intervention*”⁶⁰.
- Ofcom must ensure “*a wide range of TV and radio services of high quality and wide appeal*”, which we interpret as requiring Ofcom to assist in enabling an environment for service viability and growth⁶¹.

4.2.6. We do not believe that, in the case of regulating commercial references in radio programming, such a compelling rationale is present, and therefore suggest that a simpler and less interventionist regulatory approach is needed.

4.3. Editorial Integrity – a crucial principle

4.3.1. In considering what principles should underpin a new Section 10, we start from the position that commercial references should, as a point of policy, be allowed in programming output. However, we recognise that an appropriate regulatory framework is required if these references are to be appropriately constrained and a complete commercial free-for-all is to be avoided.

4.3.2. As discussed above, there is a clear need for Commercial Radio to develop new revenue models as competition between advertising media increases. It is imperative that Commercial Radio is able to assert and capitalise upon its advantages as an advertising medium if it is to invest in its digital future and continue to produce content that serves its audiences.

4.3.3. The flexible and creative nature of radio programming is highly attractive to advertisers and agencies, as was apparent from the commercial research commissioned by Ofcom:

- ❖ “*Radio’s completely unique in terms of how you can be with it ... on*

⁵⁶ Communications Act 2003, 319 (4) (f)

⁵⁷ Communications Act 2003, 319 (3); 319 (4) (a)-(e)

⁵⁸ The Consumer Protection from Unfair Trading Regulations 2008, Schedule 1 (11)

⁵⁹ European Human Rights Convention, Article 10

⁶⁰ <http://www.ofcom.org.uk/about/sdrp/>

⁶¹ Communications Act 2003, (3) (2) (c)

*radio there's an opportunity to be more creative and do things a little bit differently."*⁶² Agency

- 4.3.4. Similarly, Ofcom's research amongst advertisers and agencies found a clear appetite for increased involvement in programming content.
- ❖ *"You can get better creative because the stations understand their audiences better ... people here want to work on it."* Agency⁶³
 - ❖ *"It's about getting a deeper understanding of who their listeners are."* Agency⁶⁴
 - ❖ *"People are coming to understand that it does need to be in the style of the station – the style that the audience wants to hear"* Agency⁶⁵
- 4.3.5. Ofcom's research into consumer attitudes revealed that listeners are not, in principle, resistant to the concept of greater commercial references in radio programming, and indeed welcome certain types of relaxation:
- ❖ *"participants showed a clear appetite for some relaxation of Ofcom's rules concerning commercial references in programming and sponsorship"*⁶⁶
 - ❖ *"irritation with spot advertising tended to make respondents more open to hearing less intrusive commercial content on radio"*⁶⁷
- 4.3.6. But caution is needed. We accept that an unregulated environment where advertisers were allowed unfettered influence or control over editorial content would be undesirable. And whilst we are aware that our members would naturally resist such practices, as they would likely undermine the appeal of their output, there is recognition that a self-regulatory framework for commercial references would provide insufficient consumer protection.
- 4.3.7. We have therefore considered how best to balance the benefits that can arise from advertisers having some involvement in editorial with the need to ensure that, in making editorial decisions about advertisers' involvement, the balance of judgment falls on the side of producing compelling content rather than maximising income. We classify this as the need for **editorial integrity**.
- 4.3.8. The principle of **editorial integrity** would be underpinned by two rules:
- Radio broadcasters must retain editorial control over all programming content (*despite any input or influence from an advertiser*)
 - Promotional or non-promotional references to a brand, product or service in editorial output must be editorially justified (*that is, in deciding the level and nature of the advertiser's involvement in the programming content, the broadcaster can demonstrate that the involvement was determined on editorial grounds, despite the existence of a commercial arrangement*)
- 4.3.9. Thus the fear of one research participant - *"without editorial independence it wouldn't be a radio station – it would be Coca-Cola FM"*⁶⁸ – would not be realised.

⁶² Change Agency, p. 15

⁶³ *Ibid.*, p. 13

⁶⁴ *Ibid.*, p. 12

⁶⁵ *Ibid.*, p. 28

⁶⁶ Essential Research, p. 2

⁶⁷ *Ibid.*, p. 37

⁶⁸ *Ibid.*, p. 20

- 4.3.10. The need to ensure that programming output is editorially justified is reflected in findings from Essential Research which emphasised that respondents felt that promotions that did not relate directly to programming would unacceptably disrupt the listening experience:
- *"the frequency of commercial references throughout the clip ... were felt to be too intrusive, to the point where the quality of the listening experience was compromised"*⁶⁹
 - *"the promotional segment was considered too long, lacking in personal relevance and a 'turn-off' for respondents"*⁷⁰
- 4.3.11. Preserving editorial integrity is also crucial if value is to be delivered to advertisers; stations need to deliver prominence and value to each client. Advertisers also value the station's branding, personality and relationship with its listeners – especially when it comes to S&P activity.
- ❖ *"for spot advertising, it's just how well a station does against your target audience ... For sponsorship and promotion, it's much more about brand fit."* Agency⁷¹
 - ❖ *"People are coming to understand that it does need to be in the style of the station – the style that the audience wants to hear."* Agency⁷²
- 4.3.12. We note also that the principle of editorial integrity focuses upon the output that listeners hear, rather than the process behind the making of that output.
- 4.3.13. We recognise that the concept of editorial justification is subjective, and will therefore principally rely upon the judgement of station personnel, both commercial and programming, for its correct implementation. However, we believe that the concept is no more subjective than that of, say, the existing concept of 'undue prominence', which also relies upon judgement.
- 4.3.14. The manner in which Ofcom regulates the principle of editorial integrity, and the concept of 'editorially justified' need not differ from the manner in which it regulates current regulatory principles and rules. Ofcom can go through the necessary process to evaluate thoroughly whether a breach has in fact taken place and its severity, and then apply the appropriate sanction. This is a familiar and easy to implement process, similar to that associated with 'undue prominence'.
- 4.3.15. **We strongly believe that, so long as the principle of editorial integrity is abided by, advertiser input in programming can, on balance, enhance the listening experience whilst providing consumers with sufficient protection.**
- 4.4. Editorial Independence – a redundant principle**
- 4.4.1. We note a tendency, within the Broadcasting Code Review consultation document, to conflate the terms "*editorial independence*" and "*editorial integrity*". Namely, it is proposed that "*broadcasters maintain editorial independence and control over programming (editorial integrity)*"⁷³ (emphasis added). However, the two terms have quite different meanings and should not therefore be conflated. Editorial independence may result in editorial integrity, but editorial integrity need not result from editorial

⁶⁹ Essential Research, p. 7

⁷⁰ *Ibid.*, p.31

⁷¹ Change Agency, p. 12

⁷² *Ibid.*, p. 28

⁷³ Ofcom, Broadcasting Code Review, p. 79

independence.

4.4.2. Nowhere does the consultation document specifically address the question of why Section 10 should continue to preserve the principle of editorial independence. We note that 'editorial independence' is specifically required by the AVMS directive, but equally note that the directive does not apply to radio.

4.4.3. We also note that Ofcom states that "*in considering our approach in relation to commercial references in radio programming, we have conducted deliberative and qualitative research into listeners' attitudes towards commercial references in radio*"⁷⁴. This implies that Ofcom believes that listeners continue to think that the principle of editorial independence is vital.

4.4.4. However we disagree that the consumer evidence presented points to this conclusion. The 'key findings' section of Essential Research's report states that:

"Of prime importance to listeners is the quality of the listening experience itself. Commercial activity which is deemed to impair the listening experience tends to fall into one of two main camps:

- *it is not relevant to the listening context; and/or*
- *it intrudes on the listening experience;*

Alongside the listener experience, listeners hold dear two broad 'listener principles' which demand that any piece of commercial activity:

- *is clearly understood as being commercial in nature; and*
- *does not threaten listener trust.*

*These listener principles could be summarised as 'clarity and integrity'; and, as acceptance criteria, are broadly in line with Ofcom's three principles of separation, transparency and editorial independence ..."*⁷⁵

4.4.5. We disagree with the assertion that these 'listener principles' are broadly in line with Ofcom's principles of separation, transparency and editorial independence. Instead, we would suggest that the listener principles of 'clarity' and 'integrity' are more in line with Commercial Radio's proposed principles:

Integrity (*"The trust I have in the presenter/broadcaster/promoter is not under threat"*⁷⁶) accords with our proposal of **editorial integrity**.

Clarity (*It's clear that what I'm listening to has/will have a commercial slant"*⁷⁷) accords with our proposed principle of **transparency**.

4.4.6. The consumer research further elaborates upon the reasons that editorial independence was felt by the research participants to be so important:

- *"Occasions where editorial control was felt to be compromised for commercial interests were also felt to present a potentially high risk of consumer deception;*
- *As radio listeners, they had strong reservations about permitting advertisers to control or alter editorial content, largely on the grounds that it was not considered their area of expertise and would result in poor quality output;*

⁷⁴ Ofcom, Broadcasting Code Review, p. 75

⁷⁵ Essential Research, p. 2-3

⁷⁶ *Ibid.*, p. 23

⁷⁷ *Ibid.*, p. 23

- *Closely linked to the issue of editorial independence was the question of presenter endorsement of commercial products or services. This was a recurring concern among respondents. Many had long-standing, trusted relationships with radio presenters, and the idea that presenter opinion or playlist selection might be directly influenced by a commercial organisation was unpalatable.*⁷⁸
- 4.4.7. These concerns can thus be summarised as: firstly, concerns about commercial arrangements between radio stations and advertisers not being made apparent to listeners; and secondly, concerns about the quality of the listening experience suffering as a result of advertisers having control or too great an influence on the editorial content. The first of these concerns is addressed by our proposed principle of **transparency** (discussed in greater detail below) and actually has nothing to do with the need for an absolute principle of editorial independence. The second would be dealt with by our proposed principle of **editorial integrity**. Ultimate control over content would remain with the broadcaster and the involvement of the advertiser would have to be editorially justified. This would address the concern amongst participants *“about permitting advertisers to control or alter editorial content, largely on the grounds that it was not considered their area of expertise and would result in poor quality output”*⁷⁹.
- 4.4.8. We note also that the ‘Advertising and Sponsorship Code’ of the Radio Authority, the radio industry’s regulator prior to Ofcom (and therefore prior to the 2003 Communications Act), did not require radio broadcasters to ensure absolute editorial independence. Ofcom’s definition of Editorial Independence is: *“To ensure that programming is not distorted for commercial or other purposes. To this end, the broadcaster must maintain editorial control over all programming (i.e. including sponsored programming).”*⁸⁰ Whereas the Radio Authority’s ‘Advertising and Sponsorship Code’ stated that: *“editorial control of, and responsibility for, sponsored programming or promotions must remain with the Licensee. However, sponsors may contribute to the content of most sponsored programming or promotions ... provide contributions adhere to all the Rules in this Code.”*⁸¹ (emphasis added)
- 4.4.9. The Radio Authority expanded on this rule in greater detail: *“Sponsors may contribute to, or suggest information, advice or ideas for, programming content or presentation. For example, a supermarket chain which sponsors an item on healthy eating may produce the feature, contribute to production costs and include specialist advice from its nutritionist. However, the content must be balanced and impartial, and an appropriate range of views and information must be represented where they exist.”* (emphasis added)
- 4.4.10. The Radio Authority’s approach to sponsorship and commercial references in editorial (last updated in 2001) was – ironically – more in touch with today’s commercial and consumer realities than Ofcom’s current and proposed approach.
- 4.4.11. We suggest that the decision to introduce the principle of ‘editorial independence’ into the Ofcom Broadcasting Code was the wrong one and was out of step with Ofcom’s regulatory principle to ensure that regulation

⁷⁸ Essential Research, p. 20

⁷⁹ Essential Research, p. 20

⁸⁰ Ofcom, Broadcasting Code Review, p. 181

⁸¹ Radio Authority, ‘Advertising and Sponsorship Code’ (last revised March 2001), p. 3

does not impose “burdens that are unnecessary”⁸².

- 4.4.12. Whilst we note that the 2003 Communications Act requires Ofcom to secure “the availability throughout the United Kingdom of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests”⁸³, we also note the important caveats within Section 319 (4)(f) of the same legislation which states “In setting or revising any standards under this section, OFCOM must have regard, in particular and to such extent as appears to them to be relevant to the securing of the standards objectives, to each of the following matters - ... the desirability of maintaining the independence of editorial control over programme content.”⁸⁴ (emphasis added). We believe these caveats give Ofcom sufficient flexibility to recognise that, within a revised Section 10, absolute editorial independence no longer reflects commercial or consumer reality, and is out of sync with contemporary levels of media literacy.
- 4.4.13. **The principle of editorial independence is both out-dated and unnecessarily restrictive and should be removed from the framework for regulating commercial references in radio programming.**

4.5. Separation – a redundant and undesirable principle

- 4.5.1. The current Sections 9 and 10 of the Broadcasting Code require that advertising and programming are kept separate; Ofcom’s proposals retain this principle of separation.
- 4.5.2. However, we believe that separation would be a redundant principle on the basis that the consumer concerns which it seeks to address are addressed by Commercial Radio’s proposed principles of **editorial integrity** and **transparency**.
- 4.5.3. In addition, we acknowledge that any commercial references included in radio programming must comply with the relevant requirements of the Broadcast Advertising Code; and that all ‘special category’ advertising messages must be cleared by the Radio Advertising Clearance Centre.
- 4.5.4. The Essential Research found that “of all the principles, separation was regarded as the least important overall”⁸⁵. This was especially true if programming is felt to be editorially justified and commercial arrangements are made transparent to listeners:
- ❖ “If you’re transparent and conducting editorial content correctly, then separation will naturally occur” London 25-34yrs⁸⁶
 - ❖ “Separation is important – you do need to know what is fact and what is not. Isn’t that the same as transparency though?” Cardiff 35-44yrs⁸⁷
 - ❖ “it was felt that if a communication was clearly promotional in nature (i.e. transparent) then, for many, it effectively rendered the material separate from editorial content”⁸⁸
 - ❖ “a common view was that, if promotional material was transparent and editorially independent, then separation was a less important

⁸² Section 6 (1), 2003 Communications Act

⁸³ Section 3 (2) (c), 2003 Communications Act

⁸⁴ Section 319 (4) (f), 2003 Communications Act

⁸⁵ Essential Research, p. 21

⁸⁶ *Ibid.*, p. 21

⁸⁷ *Ibid.*, p. 20

⁸⁸ *Ibid.*, p. 20

*consideration*⁸⁹.

- 4.5.5. We also believe that separation is an undesirable principle because it interrupts the flow of programming valued by listeners. It is clear from the consumer research that participants *"wanted editorial content to flow as seamlessly as possible"*⁹⁰. Thus the continued requirement to separate advertising and programming would act as a barrier to the more integrated type of commercial activity that respondents appeared to welcome on radio:

- ❖ *"I like the lack of separation; it's less annoying and obtrusive this way"* Cardiff 18-24yrs⁹¹
- ❖ *"Ads stop the flow of the programme, the pace changes"* Cardiff 45-60yrs⁹²
- ❖ *"I'd prefer ads to be merged without pauses, because it feels like it stops and starts with no continuous flow, which isn't professional."* Liverpool 18-24yrs⁹³

- 4.5.6. Removing the principle of separation will not undermine the regulatory framework which currently exists and which, in its consultation document, Ofcom proposes should remain. The Advertising Standards Authority's role in regulating advertising, and Ofcom's regulation of programming (including sponsorship and advertising messages within programming), will continue.

- 4.5.7. **We believe that, under a revised Section 10, consumers will be adequately protected by the principles of editorial integrity and transparency, and the requirements of the BCAP Code, without the need for the separation principle (which impedes the listening experience).**

4.6. Transparency – a crucial principle

- 4.6.1. We agree with Ofcom that it is paramount that a revised Section 10 has at its heart the principle of **transparency**.

- 4.6.2. We note this key finding from Essential Research: *"The risk of being misled or deceived was the prime concern among respondents with regard to commercial radio promotions"*⁹⁴

- 4.6.3. The importance of transparency was repeatedly highlighted by research participants:

- ❖ *"It's very important to know where the information is coming from. Honesty and trust are essential."* Liverpool 45-60yrs⁹⁵
- ❖ *"[Transparency is] important because it stops things being an advert when you don't realise it."* Cardiff 35-44yrs⁹⁶

- 4.6.4. If transparency is in place, the research revealed that participants were quite willing to accept promotional references within radio programming, as long as the quality of the overall listening experience was not felt to be compromised (secured by RadioCentre's proposed principle of **editorial integrity**).

⁸⁹ Essential Research, p. 21

⁹⁰ *Ibid.*, p. 21

⁹¹ Essential Research, p. 24

⁹² *Ibid.*, p. 16

⁹³ *Ibid.*, p. 21

⁹⁴ *Ibid.*, p. 20

⁹⁵ *Ibid.*, p. 21

⁹⁶ *Ibid.*, p. 19

- 4.6.5. We note that the principle of transparency also accords with the Consumer Protection from Unfair Trading Regulations 2008, which prohibits *"using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial)."*⁹⁷
- 4.6.6. **Thus Commercial Radio is committed to ensuring that, when the inclusion of references to a brand, product or service is influenced by a sponsorship deal, or any other form of commercial relationship, this is made transparent to listeners throughout the relevant programming.**
- 4.7. Undue Prominence – a redundant rule**
- 4.7.1. Ofcom continues to apply the general rule of undue prominence within its revised Section 10. It is specified that undue prominence may result from:
- ❖ *"the presence of, or reference to, a product or service in a programme where there is no editorial justification; or*
 - ❖ *the manner in which a programme or service appears or is referred to in programming."*⁹⁸
- 4.7.2. RadioCentre's proposed principle of **editorial integrity**, which will apply to all commercial references in editorial, would safeguard effectively against these two potential scenarios, and therefore renders redundant the need to regulate against undue prominence.
- 4.7.3. We note too that the inclusion of an undue prominence rule, in addition to the principle of editorial integrity, has the potential to confuse, and thereby threaten compliance with the revised Section 10.
- 4.7.4. There is also a danger that, by including an undue prominence rule in relation to paid-for commercial references, radio's ability to reflect on and relate to commercial products and services within a non-paid-for piece of editorial would be threatened. This ability forms an important part of radio's place as the most intimate and conversational medium, and it is important that this characteristic is not endangered by unnecessary regulation.
- 4.7.5. **We believe that the principle of editorial integrity renders the undue prominence rule redundant.**
- 4.8. The listening experience**
- 4.8.1. As discussed above, we note from the consumer research that participants were found to be comfortable with promotional messages within radio programming, and in some circumstances even desired this relaxation, as long as the promotional material did not impede programming, was editorially justified and transparently presented.
- 4.8.2. Preserving the quality of the listening experience was of primary importance to participants in the consumer research, above all other considerations:
- ❖ *"although not within Ofcom's remit, respondents could not put aside the quality of their listening experience ... ultimately, their listening experience was what appeared to matter to them"*⁹⁹

⁹⁷ The Consumer Protection from Unfair Trading Regulations 2008, Schedule 1 (11)

⁹⁸ Ofcom, Broadcasting Code Review, p. 79

⁹⁹ Essential Research, p. 37

❖ *"throughout this research, respondents' most common concerns tended to centre as much around issues of poor execution as regulatory infringement"*¹⁰⁰

4.8.3. As discussed above, stations recognise the need to preserve the editorial integrity of radio programming, for the benefit of both listeners and advertisers. It is undeniable that *"a radio station that failed to monitor the quality and interruptive potential of broadcast promotional material would be likely to lose listeners"*¹⁰¹.

4.8.4. However, research participants recognised that the quality of the listening experience was predominantly a concern for radio stations, rather than for Ofcom¹⁰². We believe there is a danger that Ofcom perceives the need to protect (what it believes to be) 'high quality output' as rationale for a regulatory approach to commercial references in radio programming that is more restrictive than is either desirable or necessary.

4.8.5. **We believe that the twin principles of editorial integrity and transparency would preserve, and enhance, the listening experience of Commercial Radio's audience**

4.9. The 'consumer protection' principle

4.9.1. There are no existing rules in the current Sections 9 and 10 regarding broadcast competitions and voting. However, Ofcom proposes introducing the following principle:

"To ensure that audiences are protected from the risk of financial harm (consumer protection)."

4.9.2. And the following rules:

10.11 Broadcast competitions and voting must be fairly promoted and conducted and broadcasters must not materially mislead listeners so as to cause financial harm.

10.12 Terms and conditions of entry and participation must be drawn up by the broadcaster and be appropriately brought to the attention of listeners. In particular, significant conditions that may affect a listener's decision to participate must be made clear at the time an invitation to participate is broadcast.

4.9.3. We agree that it is crucial that listeners are protected from potential financial harm, and note that the proposed rules reflect existing good practice in the promotion of competitions and publication of terms and conditions. However, in the interests of clarity and consistency, we do not believe that these rules should be included in Section 10 alongside rules on commercial references in radio programming.

4.9.4. **We believe that all principles and rules related to listener participation should be handled in a single place within the Code, and do not fit in a revised Section 10.**

4.10. The 'unsuitable sponsorship' principle

4.10.1. Ofcom suggests that a revised Section 10 should also contain the following principle:

"To ensure that unsuitable sponsorship is prevented (unsuitable sponsorship)."

¹⁰⁰ Essential Research, p. 23

¹⁰¹ *Ibid.*, p. 23

¹⁰² Essential Research, p. 23

- 4.10.2. We believe that a revised Section 10 would benefit from a rule that stated that any commercial references included in programming must comply with all the relevant requirements of the BCAP Broadcast Advertising Standards Code. In essence:
- All advertising claims within programming (including within credits and trails) must be pre-cleared, either internally or (for special categories) by the RACC.
 - No third party that is prohibited from advertising may sponsor programming, nor influence programming content.
- 4.10.3. We note that "Ofcom considers that radio broadcast advertising regulations offer the most appropriate consumer protection available"¹⁰³.
- 4.10.4. **If all commercial references within radio programming must comply with the relevant requirements of the BCAP Broadcast Advertising Standards Code, the 'unsuitable sponsorship' principle is rendered redundant.**

¹⁰³ Ofcom, Broadcasting Code Review, June 2009, p. 90

5. OFCOM'S PROPOSED SECTION 10

5.1. Not "fit for purpose"¹⁰⁴

- 5.1.1. We have already identified that we believe Ofcom's proposed Section 10 secures inappropriate and unnecessary regulatory principles. Here we examine whether it delivers the objectives that we believe define whether or not a revised Section 10 is 'fit for purpose'.
- 5.1.2. Ofcom states that one of the key requirements when considering revision of the Code is that it must remain "fit for purpose". We have indicated that we believe the definition of 'fit for purpose' should be expanded to ensure that it includes the benefits that can flow from de-regulation, in addition to the benefits of continued regulation
- 5.1.3. In Chapter 3, we set out why we believe that a 'fit for purpose' regulatory framework is one that:
- Captures all of the benefits that could flow from greater regulatory flexibility: for industry, advertisers and listeners;
 - Provides citizen and consumer protection consistent with contemporary levels of media literacy; and
 - Contains clear, concise and consistent regulatory principles and rules
- 5.1.4. Our analysis of Ofcom's proposals concludes that they do not sufficiently deliver these objectives.

5.2. Delivering benefits for industry, advertisers and listeners

- 5.2.1. **We assert that Ofcom's restrictive approach to the revision of Code Section 10 does not deliver the full benefits that could flow from relaxation of regulation of commercial references in radio programming – for industry, advertisers and listeners.**

The benefits for industry

- 5.2.2. Ofcom's regulatory approach to revision of Section 10 essentially dictates a small number of tightly defined commercial arrangements that will be allowed between stations and third parties. This limits variations between individual stations, inhibits creativity in the execution of promotions and restricts Commercial Radio's opportunity to harness the resources and input of third parties, in order to create compelling output.
- 5.2.3. These restrictions - and resulting financial benefits - are acknowledged by Ofcom:
- ❖ On outside broadcasts: *"we consider that, in practice, the increased promotional benefit to venues sponsoring outside broadcasts would be limited and the scale of outside broadcast adoption would be unlikely to increase dramatically as a result of the proposed rules"*¹⁰⁵.
 - ❖ On content-related promotions: *"it is ... possible that these proposals could result in some substitution between the two media. However, it is our expectation that this substitution effect is likely to be limited ... The rules ... allow for some additional flexibility but at the same time impose constraints on the type of promotion permitted."*¹⁰⁶
 - ❖ On sponsored listener competitions: *"The proposed rules could have an adverse effect on other forms of media if the newly allowed sponsor*

¹⁰⁴ Ofcom, Broadcasting Code Review, p. 1

¹⁰⁵ *Ibid.*, p. 95

¹⁰⁶ *Ibid.*, p. 92

*references were to draw existing revenues to radio. However, the scale of this substitution effect is likely to be limited to the extent that different sponsors target different media.*¹⁰⁷

- 5.2.4. Ofcom's regulatory revision will not provide the industry with the financial boost that it urgently requires. Exaggerating the existing trend for industry revenue to be increasingly derived from S&P, at the expense of spot advertising, is not adequate.
- 5.2.5. In addition, Ofcom's proposed Section 10 preserves the current imbalance in regulation of commercial references: within local media markets (between local Commercial Radio and local press) and between traditional and new media (particularly the internet). It also does nothing to help the sector achieve greater parity with BBC Radio, by continuing to prohibit Commercial Radio from benefiting from its reputation as a medium through which most listeners expect to be 'sold to', or receive commercial messages¹⁰⁸.

The benefits for advertisers

- 5.2.6. As discussed above, advertisers are increasingly keen to move beyond the spot ad, and engage with audiences in a more personalised, targeted manner. In addition, the industry is keen to reinvigorate advertiser confidence in Commercial Radio.
- 5.2.7. However, in order to achieve these ends, the industry and advertisers require freedom to try out innovative executions – many of which currently don't fit into the four narrow categories of relaxation proposed, (and likely increasingly will not do so). Ofcom's proposals, in particular its insistence on the principle of editorial independence, do not go far enough to address advertiser and agencies' current or future expectations.

The benefits for listeners

- 5.2.8. Above we identified two potential sources of benefits to listeners which result from allowing commercial references within radio programming:
- A stronger commercial radio sector with greater revenues will be better able to invest in quality programming.
 - Advertiser involvement in content has the potential to increase the appeal and quality of that content.
- 5.2.9. We note that Ofcom states that it is proposing the introduction of some promotional material within programming, *"with a view to allowing the promotion of goods or services that offer added benefit to the listening experience"*¹⁰⁹. We believe that, for the reasons set out above, all forms of commercial references within radio programming could enhance the listening experience, if executed in accordance with the principles of editorial integrity and transparency.
- 5.2.10. Ofcom's proposed Section 10 will restrict the industry's ability to deliver these benefits in full, by continuing to prohibit commercial references in radio programming aside from a few highly restrictive exceptions, and by continuing to impose the principles of editorial independence and separation, and the undue prominence rule.
- 5.2.11. In addition, we believe that the principles themselves act as a hindrance to enhancing the listening experience. The consumer research revealed

¹⁰⁷ Ofcom, Broadcasting Code Review, June 2009, p. 99

¹⁰⁸ Essential Research, p. 2

¹⁰⁹ Ofcom, Broadcasting Code Review, June 2009, p. 90

that preserving the quality of the listening experience was of primary importance to participants, above all other considerations; the requirement to separate advertising and programming would act as a barrier to the more integrated type of commercial activity that respondents appeared to welcome on radio.

- 5.2.12. If Ofcom's proposed Sections 9 and 10 were to be implemented, Commercial Radio would continue to be prohibited from broadcasting the following, all of which would comply with the industry's proposed principles of **editorial integrity** and **transparency**, and would enhance the listening experience:
- Refer to online content which appeals to listeners but is subject to commercial arrangements and not directly linked to on-air activity. This includes content provided on stations' own websites (including competitions, features and special offers) and third party websites. Ofcom's consumer research did not test listener tolerance for this form of activity.
 - Allow sponsors to influence or be featured in sponsored cost-intensive programming. Ofcom is proposing a limited relaxation in this area with its ideas for public information programming, but the scope is restricted to public interest matters and non-commercial funding. The consumer research found that participants did not absolutely reject the prospect of sponsored features containing sponsor references. Instead, *"there was some appetite for hearing about the sponsor's offers in detail, and a feature of this kind was felt to be a potentially effective and acceptable commercial vehicle for local shops and services"*¹¹⁰.
 - Make reference to the products, services, brands or other interests of a commercial or non-commercial organisation in an interview with a representative of that organisation. The declining exclusivity of media platforms means that programming inputs such as special guests are often only available in the context of sponsorship or other commercial arrangements. The prohibition on including transparent commercial references in editorial output therefore restricts commercial radio's ability to access content which would be of interest to our listeners. Again, no such activity was tested during Ofcom's consumer research.

5.3. Protection consistent with contemporary levels of media literacy

- 5.3.1. As set out in 3.5, given the increasing levels of media literacy, we believe that the regulatory balancing act between protecting consumers and allowing for commercial freedom, contained within the current Code Section 10, is now inappropriately skewed towards consideration of consumer protection. We believe that evidence from the consumer research backs up this assertion.
- 5.3.2. Ofcom's proposed Section 10 applies the same regulatory principles as the current Section 10. We therefore do not believe that it takes into account current media literacy levels, and therefore misses an opportunity to revise consumer protection. It does so to the detriment of all the parties (industry, advertisers and listeners) who would benefit from de-regulation.
- 5.3.3. **Ofcom's proposed principles, and corresponding rules, do not reflect contemporary media literacy levels.**

¹¹⁰ Essential Research, p.30

5.4. **Clear and consistent principles and rules**

5.4.1. It is critical that a revised Section 10 contains clear, concise and consistent regulatory principles and rules, to enable programming and sales staff to make informed decisions about the suitability of particular executions. We note that Ofcom believes that "*the proposed rules would reduce regulatory burdens that may be unnecessary or unnecessarily restrictive*"¹¹¹. We dispute this, and believe that they may indeed have the opposite effect.

5.4.2. There are three key reasons why we believe Ofcom's proposed Section 10 does not deliver clear, concise and consistent regulatory principles and rules:

- Ofcom's proposed Section 10 does not address the indisputable need to simplify and clarify the Code; these are crucial if effective and compliant implementation is to be achieved;
- Ofcom's proposed Section 10 is insufficiently flexible and contains regulatory inconsistencies and breaches of its own Principles (which will only lead to further complication and confusion);
- Sections of Ofcom's consultation document suggest that, despite the proposed new Code containing discrete rules for radio and TV, Ofcom may not apply a regulatory distinction between the two media.

A failure to clarify and simplify

5.4.3. Ofcom's proposed Section 10 is unnecessarily complicated because of the varying 'tiers' of principles and rules.

5.4.4. Firstly, Ofcom proposes that the revised Section 10 should enshrine the following **Principles**:

- *To ensure that broadcasters maintain editorial independence and control over programming (editorial integrity).*
- *To ensure that programming and advertising remain distinct (separation)*
- *To protect audiences from surreptitious advertising (transparency).*
- *To ensure that audiences are protected from the risk of financial harm (consumer protection).*
- *To ensure that unsuitable sponsorship is prevented (unsuitable sponsorship).*

5.4.5. Ofcom then proposes that the following **General Rules** should apply:

- *Broadcasters must maintain independent editorial control over programming.*
- *Products and services must not be promoted in programming, unless permitted by specific rules in this section of the Code (e.g. programming-related material).*
- *No undue prominence may be given in programming to a product or service.*
- *Broadcasters must ensure that advertising and programming are kept separate.*
- *Advertisements must not appear as part of programming, unless editorially justified. Where advertisements are featured as part of*

¹¹¹ Ofcom, Broadcasting Code Review, June 2009, p. 75

programming, their presence must not be unduly prominent.

- *All listeners' communications that are solicited by or on behalf of the broadcaster in programming must be treated fairly and consistently.*
- 5.4.6. Ofcom then proposes a set of **Specific Rules** on matters including product placement, premium rate services, broadcast competitions and voting, programme-related material and charity appeals. Also included is detail of the specific relaxations that Ofcom proposes, including content-related promotions, venue-sponsored outside broadcasts, sponsored listener competitions and public information programming.
- 5.4.7. Ofcom believes that this structure should “*provide stakeholders with a more user-friendly means of assessing the acceptability of commercial references in programming and enable a better understanding of the purpose and spirit of the rules*”¹¹².
- 5.4.8. However, we believe that it has the opposite effect; having tested the proposed Section 10 with our members, we conclude that the use of three tiers of guidelines – **Principles, General Rules** and **Specific Rules** – is unnecessarily complicated and lacking in clarity. Instead, we believe that Section 10's principles can and should be expressed in such a way as to negate the need for General Rules.
- 5.4.9. Ofcom's use of introductory text –which contains unnecessary detail such as “*most 'promotions' arranged by radio sales and promotions ("S&P") teams are sponsored listener competition features*” – and the need for accompanying guidance notes (Sections 9 and 10 are currently accompanied by 20 pages of guidance), further duplicates and complicates.
- 5.4.10. Commercial Radio's proposed Section 10 instead has two clear principles, which are elaborated upon by a handful of rules. Guidance to aid interpretation of these principles and rules is integrated into the Code Section itself. In comparison to Ofcom's proposed revised Section 10 (which equates to approximately 10 pages, excluding guidance), the industry's proposed Section 10 is one page in length.

An inconsistent and inflexible approach

- 5.4.11. Ofcom's proposals equate to a list of 'approved mechanisms', which essentially dictate the type of commercial opportunities that stations can offer to advertisers and agencies. This denies the industry the flexibility to innovate new commercial arrangements with advertisers, to the benefit of listeners, advertisers and radio broadcasters. We therefore disagree with Ofcom that the proposed rules “*are likely to enable substantial scope for creative development*”¹¹³.
- 5.4.12. This inflexibility is evident throughout the nearly 50 pages that it takes for Ofcom to set out its proposed amendments to regulation of commercial references in radio programming. Too often, Ofcom strays into dictating how station's programming should sound, a requirement that goes beyond its regulatory remit.
- 5.4.13. Targeted relaxations of this type also mean that certain types of commercial references are more heavily regulated than others, an outcome which is at odds with Ofcom's regulatory requirement to be consistent and proportionate.
- 5.4.14. Our interpretation of Ofcom's proposed Section 10 is that it contains the

¹¹² Ofcom, Broadcasting Code Review, p. 76

¹¹³ *Ibid.*, p. 95

following inconsistencies:

- Ofcom proposes that sponsored listener competitions may contain advertising claims (as can sponsorship credits already), whilst these are prohibited in content-related promotions (and therefore venue-sponsored outside broadcasts).
- Sponsorship credits for public information programming may not contain advertising messages, whilst other sponsorship credits can.
- Outside broadcasts and sponsored competitions allow stations to refer to the sponsor within editorial, but this continues to be prohibited within other types of sponsored programming. Ofcom states that it does not "*consider that there is sufficient evidence that listeners would be as tolerant to sponsor references in other types of programming*"¹¹⁴. However, we note in Chapter 5 that Ofcom did not actually test this assertion in its consumer research.

5.4.15. We also believe that this inconsistent approach ignores the most important perspective: that of the listener. From the listener perspective, for example, if advertising messages within sponsor credits may be presenter-read, there is little reason why advertising messages within content-related promotions must be pre-recorded. Similarly, if sponsored competitions may contain advertising claims, listeners may find it difficult to understand why content-related promotions cannot.

5.4.16. These regulatory inconsistencies are compounded by the fact that, in pursuing an 'approved mechanisms' approach whilst not addressing the need to revise regulatory principles, Ofcom's proposals entail allowing stations to breach the principles that are supposed to be at the heart of the revised Section 10 (the principles of editorial independence and the separation of programming and advertising).

Examples of breaches of the principle of editorial independence:

- Ofcom stresses that the funder of Public Information Programming "*must not influence the content and/or scheduling of the programming in such a way as to impair the responsibility and editorial independence of the broadcaster*"¹¹⁵. However, if the purpose of the programming is "*to educate or inform the audience on matters in the public interest*"¹¹⁶, it is likely that the non-for-profit entity will have some input in the content.
- Ofcom proposes that the sponsor of broadcast competitions "*may form an integral part of the competition itself (e.g. by involvement in its execution or as the subject of the question)*"¹¹⁷.

Examples of breaches of the principle of separation:

- Content-related promotions, sponsored outside broadcasts and sponsorship credits may contain advertising messages.
- Sponsored broadcast competitions may contain advertising claims, thus breaching the separation principle.
- Public information programming will be allowed to include reference to the interests and/or activities of the funder, to publicise advice and services that contribute towards the delivery of social gain objectives.

¹¹⁴ Ofcom, Broadcasting Code Review, p. 95

¹¹⁵ *Ibid.*, p. 85

¹¹⁶ *Ibid.*, p. 2

¹¹⁷ *Ibid.*, p. 84

- 5.4.17. We believe that, if principles are to have any weight and respect, there can be no exceptions under which they can be breached and therefore consider that these principles must be inappropriate.

Insufficient distinction between radio and TV

- 5.4.18. We welcome Ofcom's decision to replace the current Section 9 (sponsorship) and Section 10 (commercial references in programming) with discrete rules for radio and television. Specifically, we welcome Ofcom's recognition that the statutory framework differs for radio and television, and that radio is ultimately subject to more relaxed requirements in regards to sponsorship and commercial references.
- 5.4.19. We also welcome the consequential move to amalgamate rules on sponsorship and commercial references. As Ofcom acknowledges, sponsorship is just one way in which references to commercial activities can be included in broadcasting. We believe that separate sections for commercial references in radio and television programming goes some way to making the Code more user-friendly and coherent.
- 5.4.20. However, some of Ofcom's current proposals suggest that the regulatory regimes to be applied to radio and television may not be as distinct as first appears to be the case.
- 5.4.21. Ofcom includes the concept of product placement in its proposed Section 10, having slightly amended the AVMS Directive's definition. This states that "*product placement is the inclusion of, or reference to, a product or a service so that it is featured within programming, in return for payment or for similar consideration*"¹¹⁸. Ofcom states that "*although the AVMS Directive does not apply to radio, Ofcom considers it appropriate to use consistent definitions of product placement for both radio and television*"¹¹⁹. We dispute this; if Commercial Radio were to abide by this requirement, this would preclude all commercial references in radio programming (including a number of Ofcom's proposals, a fact acknowledged by Ofcom itself), and we therefore suggest that it is inappropriate and unnecessary to include it.
- 5.4.22. The Code Review consultation document states that "*stakeholders should be aware that proposed rules relating to the promotion of premium rate services within programming are included in the proposed Section Ten but will be subject to Ofcom's consultation on Participation Television planned for autumn 2009*"¹²⁰. As radio has been subject to a separate 'Audience Participation in Radio Programming' consultation, we question why this is the case.
- 5.4.23. Ofcom states that it is likely to reach a decision on public information programming "*that will apply to both television and radio*"¹²¹. We question whether this is appropriate.
- 5.4.24. Ofcom emphasises that the proposed meanings of radio sponsorship are consistent with those proposed for television¹²². We feel that this consistency is unnecessary, and risks potentially blurring the proposed distinct regulation of commercial references in radio and TV programming.
- 5.4.25. It is therefore important that, alongside separate Code sections for commercial references in radio and television programming, Ofcom adopts

¹¹⁸ Ofcom, Broadcasting Code Review, p. 80

¹¹⁹ *Ibid.*, p. 109

¹²⁰ *Ibid.*, p. 77

¹²¹ *Ibid.*, p. 40

¹²² *Ibid.*, p. 116

distinct regulatory approaches to the two media.

Additional Comments

- 5.4.26. We note that Ofcom proposes updating and revising the guidance that accompanies the current Sections 9 and 10, to bring it in line with the revised regulatory framework. As a matter of good regulatory practice, we do not think that it is appropriate that this revised guidance is not also being consulted upon.
- 5.4.27. We believe that Ofcom's approach to revision of Section 10 – continuing to regulate against commercial references in radio programming, aside from a small number of specific exceptions – has resulted in a Code Section that is more ambiguous and lacking in clarity than the existing Sections 9 and 10.**

6. COMMERCIAL RADIO'S PROPOSED SECTION 10

Starting with the principles that we believe will create a regulatory framework that is 'fit for purpose', the industry has drafted an alternative Section 10 (Commercial References in Radio Programming). This includes rules which establish how the principles should be implemented, and guidance which assists in the interpretation of these rules.

Principles

- All programming must be executed with **editorial integrity**
- Any commercial influence over editorial must be **transparent**

Rule 1: Radio broadcasters must retain editorial control over all programming content (*despite any input or influence from an advertiser*).

Rule 2: Promotional or non-promotional references to a brand, product or service in editorial output must be editorially justified (*that is, in deciding the level and nature of the advertiser's involvement in the programming content, the broadcaster can demonstrate that the involvement was determined on editorial grounds, despite the existence of a commercial arrangement*).

Categories of activity which may be compatible with this rule, depending on transparent execution and editorial justification, include (but are not limited to):

- *Public service campaigns*
- *Interviews with entertainment figures as part of a promotional campaign, for example, for a film or book.*
- *Premium-rate numbers which allow interaction*
- *Inducements for listeners to access further content (including commercial content) via the radio station's or third parties' websites*
- *Promoting the availability of the music heard on a radio station for download*
- *Promoting odds or ticket sales information relating to events*
- *Scene setting at outside broadcasts*
- *Promotion of material which is directly linked to or derived from programming*
- *References to sponsors within sponsored programming*
- *References to sponsors within sponsored competitions*

Rule 3: If the inclusion of references to a brand, product or service in programming is influenced by a commercial arrangement between a station and a third party, this must be made transparent to listeners throughout the relevant programming and in all programme trails.

Transparency may be achieved through

- *Sponsor credits (pre-recorded or live)*
- *Presenter explanations*

Rule 4: Sponsor credits may include short sales messages without the need for editorial justification.

Rule 5: Any commercial references included in programming must comply with all the relevant requirements of the BCAP Broadcast Advertising Standards Code.

Guidance:

- *all advertising claims within programming (including within credits and trails) must be pre-cleared, either internally or (for special categories) by the RACC.*
- *no third party that is prohibited from advertising may sponsor programming, nor influence programming content.*

7. PROPOSED NEXT STEPS

- 7.1. In this response we have urged Ofcom to reconsider its approach for the regulation of commercial references in radio programming, as we believe that its proposed Section 10 would not be 'fit for purpose'. We have asked Ofcom to adopt the regulatory approach that has the backing of the whole Commercial Radio industry; one that permits commercial references in radio programming, as long as they abide by the principles of editorial integrity and transparency.
- 7.2. We note that Ofcom is required to revise the Broadcasting Code, in order to implement the requirements of the AVMS Directive into UK legislation before 19 December 2009. We also note that Ofcom suggests that *"making all changes to the Code by the AVMS Directive implementation deadline of 19 December 2009, reduces any risk of confusion over the revisions and optimises both citizen understanding, and industry's implementation, of the changes"*¹²³.
- 7.3. However, we urge Ofcom to prioritise the critical need to secure the most appropriate regulatory framework for Commercial Radio, above practical considerations.
- 7.4. Commercial Radio therefore requests a short follow-up consultation, once Ofcom has had time to amend its proposals for Section 10 of the Broadcasting Code. RadioCentre is clear that the short term delay in implementing regulatory amendments will be significantly outweighed by the long term benefits for the industry, advertisers and listeners.

¹²³ Ofcom, Broadcasting Code Review, p. 4

8. RESPONSE TO CONSULTATION QUESTIONS

Questions relevant to Section 10:

- 8.1. The separation of rules for TV and radio (Question 26)
- 8.1.1. RadioCentre has consistently argued the need for regulation to be sympathetic to the characteristics of different media. We therefore agree that separate and distinct rules for commercial references in television and radio programming are appropriate, and welcome the introduction of a proposed Section 10 dedicated to commercial references in radio programming. We also welcome the consequential merging of rules on sponsorship and commercial references into one section; as S&P activity becomes more sophisticated, the distinction between the two becomes somewhat arbitrary.
- 8.1.2. We believe that separate sections for commercial references in radio and television programming go some way to making the Code more coherent and concise.
- 8.1.3. We hope that Ofcom's suggestion to separate rules on commercial TV and radio will mean that the approach to regulating the two media will also differ. However, some of Ofcom's current proposals suggest that the regulatory regimes to be applied to radio and television may not be as distinct as first appears to be the case (discussed in full in 5.4).
- 8.1.4. **We welcome Ofcom's recognition that the statutory framework for radio and television differs, and that radio is ultimately subject to more relaxed regulatory requirements in regards to sponsorship and commercial references.**
- 8.2. Content-related Promotions (Question 27)
- 8.2.1. As set out above, RadioCentre believes that Commercial Radio should be able to include commercial references in programming, so long as there is editorial integrity and the commercial arrangement is transparent to the listener.
- 8.2.2. We therefore welcome the rationale behind the proposed introduction of content-related promotions; allowing greater flexibility to include promotional references in radio programming, to offer added benefit to the listening experience. These will offer limited opportunity to offer new commercial activity to clients.
- 8.2.3. However, CRPs amount to an Ofcom-approved mechanism, which essentially dictates the type of commercial opportunities that stations can offer to advertisers and agencies. As discussed in full in Chapters 4 ('The right regulatory principles') and 5 ('Ofcom's proposed Section 10') we believe that a Section 10 which, as a point of policy, continues to prohibit commercial references in radio programming but which allows for certain approved exceptions to that policy, is not 'fit for purpose'.
- 8.2.4. We feel that Ofcom unnecessarily restricts the format of CRPs, limiting their effectiveness, ease of implementation and overall appeal. The regulatory rules for CRPs include such requirements as: only products/services "*directly associated with specific content*" may be promoted; the prohibition of advertising claims; and the requirement that advertising messages must be pre-recorded and must not be presenter-read. We believe that, in proposing these rules, Ofcom had a number of specific examples in mind (i.e. song downloads and tickets for events).
- 8.2.5. Not only would these highly inflexible requirements hinder a station's ability to execute programming creatively, we do not believe that they are

necessary for consumer protection (discussed in full in 5.3). In addition, from the listener perspective, if advertising messages within sponsor credits may be presenter-read, there is little reason why advertising messages within content-related promotions must be pre-recorded. Similarly, if sponsored competitions may contain advertising claims, listeners may find it difficult to understand why content-related promotions cannot.

- 8.2.6. We note that the *"issue of separation was not considered a key concern among listeners, as they were able to identify that the offer was subject to a commercial arrangement – particularly as it was pre-recorded and not voiced by the presenter"*¹²⁴ (emphasis added). However, we believe that transparency can be as (or even more) effectively conveyed by presenters themselves, and does not require pre-recording. We note that the Radio Authority 'Advertising and Sponsorship Code' allowed for presenter-read sponsorship promotions within radio programming: *"A presenter may front or voice a sponsorship promotion or tag during his/her programme as long as the item is clearly not a part of normal editorial. This separation or distinction can be achieved by voice inflection, pauses, tone or jingles. Listeners must clearly be able to understand that this is a 'sell', set apart and distinct from normal output, and stations and presenters should not attempt surreptitious endorsement or product placement within programming."*¹²⁵
- 8.2.7. We also note in 4.4 that listeners want *"editorial content to flow as seamlessly as possible"*¹²⁶ and prefer sales messages to be further *"integrated"* into programming.
- 8.2.8. Ofcom's proposed allowance of 'content-related promotions' would breach its own principle of separation. As discussed in Chapter 5, we believe that this inconsistent regulatory approach is both confusing, thus hindering effective compliance, and unnecessary.
- 8.2.9. **We welcome the rationale behind the proposed introduction of regulatory rules for Content Related Promotions, but believe instead that it should be up to radio stations to determine how to include commercial references within radio programming, as long as they abide by the principles of editorial integrity and transparency.**
- 8.3. Outside Broadcasts (Question 28)
- 8.3.1. Up until now, stations have been unable to operate outside broadcasts sponsored by the venue/event due to restrictions contained within the Code. Rule 9.5 of the current Code not only prohibits promotional references to the sponsors but also requires that non-promotional references to the sponsor are both editorially justified and incidental. As Ofcom states, *"any references in a sponsored outside broadcast to the venue, where the venue is a sponsor of that outside broadcast, is unlikely to be incidental"*.¹²⁷
- 8.3.2. Outside broadcasts are valued by listeners and stations alike; producing entertaining and compelling output, whilst allowing stations to increase their visibility in their community. As the Ofcom-commissioned consumer research revealed, listeners were surprised at the current levels of restrictions surrounding outside broadcasts.

¹²⁴ Essential Research, p. 4

¹²⁵ Radio Authority, 'Advertising and Sponsorship Code' (last revised March 2001), p. 3

¹²⁶ *Ibid.*, p. 21

¹²⁷ Ofcom, Broadcast Bulletin 134 (26/05/09)

❖ *"It seems daft if you're at a venue not to mention the venue and its products."*¹²⁸ Cardiff 35-44yrs

- 8.3.3. We therefore welcome Ofcom's proposal that *"sponsorship arrangements for outside broadcasts may result in sponsor references being included within the sponsored programming"*. However, these must be *"editorially justified and must not be overtly promotional or unduly prominent"*.
- 8.3.4. However, we are still dissatisfied by some of the restrictions that will continue to be placed on outside broadcasts. As discussed in 4.6, we believe that the concepts of 'undue prominence' and 'overtly promotional' are redundant, if the principle of editorial integrity is abided by. We also question how the involvement of representatives of the sponsor in the outside broadcast will be regulated under Ofcom's proposals.
- 8.3.5. We also believe that the way in which the audio was presented to the consumer research respondents may have impacted on their understanding of how OB activity would sound on air; for example, despite the fact that respondents were asked to imagine that the four 'theme park' audio clips were spread across a typical three-hour breakfast show, hearing them consecutively is likely to have had a bearing on their perceptions of 'overtly promotional' and 'unduly prominent'.
- 8.3.6. We also disagree with the suggestion that editorially justified references to the sponsor within outside broadcasts should be permitted, whilst editorially justified references to sponsors of programming recorded within a studio should be prohibited.
- 8.3.7. **We believe commercial references within radio programming should be allowed, regardless of where the programming the recorded, as long as they abide by the principles of editorial integrity and transparency.**
- 8.4. Sponsored Listener Competitions (Question 29)
- 8.4.1. Commercial Radio has long felt the requirement that *"references to brands within competitions must be brief and secondary"*¹²⁹ is both illogical and highly restrictive when negotiating commercial deals. It also offers little meaningful consumer protection: as the consumer research found, *"respondents struggled to see how such promotion could result in any kind of harm to listeners ... they also tended to support the right of a sponsor ... to some degree of promotion within the sponsored programming"*¹³⁰.
- 8.4.2. We therefore welcome Ofcom's proposal to allow sponsor references to form part of the sponsorship arrangement in listener competitions. We note that this suggestion is supported by the consumer research which found that respondents were comfortable with more overt promotional messages – even to the point of specific sales offers – as long as the promotional material was relevant and was not felt to impede programming¹³¹.
- 8.4.3. We note that some participants had some concerns regarding the quality of the sponsored listener competitions; we believe that these are addressed by our principle of editorial integrity and agree that *"the sponsorship arrangement should not be permitted to overtake the competition itself"*¹³².

¹²⁸ Essential Research, p. 33

¹²⁹ Rule 10.11, Ofcom Broadcasting Code

¹³⁰ Essential Research, p.27

¹³¹ *Ibid.*, p.30

¹³² *Ibid.*, p.5

- 8.4.4. We also welcome Ofcom's suggestion that the sponsor "may form an integral part of the competition itself (e.g. by *involvement* in its execution or as the subject of the question)"¹³³ (emphasis added). We presume that this suggestion arises from the consumer research finding that "a significant degree of sponsorship *involvement* in sponsored competitions was expected"¹³⁴ (emphasis added).
- 8.4.5. However we note the suggestion that sponsors may be able to influence the conduct of a listener competition breaches Ofcom's principle of editorial independence. We also note that sponsored broadcast competitions may contain advertising claims, thus breaching the separation principle. As discussed above (5.4), we believe that this inconsistent regulatory approach is inappropriate.
- 8.4.6. **We welcome Ofcom's proposal to relax rules around sponsored listener competitions, but believe that, rather than being the subject of separate rules, such competitions should be subject to the regulatory framework of the industry's proposed Section 10.**
- 8.5. Public Information Programming (Question 30)
- 8.5.1. We believe that there is much worth in Ofcom's proposal to allow Public Information Programming (PIP), which seeks to educate or inform the audience on matters in the public interest. Ofcom's proposals recognise that not requiring absolute editorial independence can deliver listener benefits.
- 8.5.2. However, we believe that the scope of this category is unnecessarily restrictive in terms of its subject matter and funding, and that this is indicative of an inconsistent regulatory approach. We also believe that programming which has as its purpose the public interest, need not necessarily derive from a non-commercial or not-for-profit organisation.
- 8.5.3. **Public information programming can deliver benefits for listeners and industry alike, but should be delivered through the regulatory framework proposed by the industry.**
- 8.6. Proposed new meanings (Question 31)
- 8.6.1. We agree with the proposed new meanings for "programming", "commercial references" and "products and services", and agree that a revised Section 10 would benefit from the inclusion of these new meanings.
- 8.6.2. However, we suggest that the rest of Ofcom's proposed introductory section for Section 10 is revised in line with the industry's proposed Section 10.
- 8.7. New Principles (Question 32)
- 8.7.1. Discussed in full in Chapter 4 of this submission.
- 8.7.2. In addition to seeking the removal of the principles of editorial independence and separation, we do not believe that the principle "to ensure that unsuitable sponsorship is prevented" is required, as this will be covered by compliance with the BCAP Code. We also suggest that the principle related to consumer protection ("to ensure that audiences are protected from the risk of financial harm") is grouped with all other rules related to listener participation.

¹³³ Ofcom's proposed Section 10 (p. 84 of Ofcom, Broadcasting Code Review)

¹³⁴ Essential Research, p.27

- 8.8. Amended Rules (Question 33)
- 8.8.1. We agree that proposed General Rules 10.1 to 10.5 are broadly the same in terms of both scope and intent as current rules 10.1 - 10.4 and 10.12. However, as we discussed in full in 5.4 ('A failure to clarify and simplify') we believe that the use of three tiers of guidelines – **Principles, General Rules** and **Specific Rules** – is unnecessarily complicated.
- 8.8.2. Instead, we believe that Section 10's principles can and should be expressed in such a way as to negate the need for General Rules. We urge Ofcom to consider adopting the industry's proposed Section 10, which would remove the need for Rules 10.1 – 10.5, 10.7 – 10.8 and 10.13 – 10.16.
- 8.8.3. We agree with the proposed Rule 10.6 concerning listener competitions, although we encourage Ofcom to consider whether all rules on listener participation can be brought together in a single place within the Code, ideally Section 2.
- 8.9. Product Placement (Question 34)
- 8.9.1. We note that Ofcom has slightly amended the AVMS Directive's definition of product placement so that it is applicable to radio. However, as discussed in 5.4.19, we believe the inclusion of the concept of product placement in a revised Section 10 to be inappropriate and unnecessary. We note that Ofcom states that "*Ofcom considers it appropriate to use consistent definitions of product placement for both radio and television*"¹³⁵; we dispute this. The proposed new meaning of product placement was written with audio-visual media in mind, and is consequentially not applicable to radio.
- 8.9.2. Were the definition to be included in Section 10 it would effectively preclude all methods by which commercial references are made in radio programming (including the Ofcom proposed content-related promotions, sponsored listener competitions, sponsored outside broadcasts etc.).
- 8.9.3. **We do not believe that the definition of product placement should be included in a (radio) revised Section 10.**
- 8.10. Premium rate services (Question 35)
- 8.10.1. We agree with Ofcom that it is crucial that listeners are protected from potential financial harm. We therefore agree with the wording of the proposed Rule 10.10, and believe that it is in line with current industry best practice. However, the appropriateness of the rule depends to a large extent on Ofcom's interpretation of it; we await the outcome of the 'Audience Participation in Radio Programming' consultation before this can be judged.
- 8.10.2. However, as discussed in greater detail in 4.9, we note that Ofcom is proposing to include rules on listener interaction in both Sections 2 and 10. We believe that it is preferable for the rules on audience communications, voting and competitions to all appear in a single place. In particular, we question the need for a set of rules headed 'Broadcast competitions and voting' in Section 10 whilst it is proposing a separate Section entitled 'Competitions and voting' in Section 2.
- 8.11. Competitions and Voting (Question 36)
- 8.11.1. We agree with proposed rules 10.11 and 10.12, which reflect existing good practice in the promotion of competitions and publication of terms

¹³⁵ Ofcom, Broadcasting Code Review, p. 109

and conditions. We agree that the BBC and commercial radio should be subject to the same requirements in relation to competitions and voting.

8.11.2. However, as stated in 4.9 and 8.10.2, we believe that all rules related to listener participation should be handled in a single place within the Code, and do not fit in a revised Section 10.

8.12. Programming-related material (Question 37)

8.12.1. We are concerned that Ofcom's proposals increase restrictions on the promotion of programming-related material. We note that, under the current Section 10, programme-related material may be sponsored and the sponsor may be credited. However, under Ofcom's proposed revised rules for programming-related material, there is no mention of sponsorship opportunities, and:

- *"the promotion of which [programming-related material] should not be funded by, or otherwise dependent on a commercial arrangement with a third party"*
- *"No reference must be made on air to any third party involved in funding the production of programming-related material"¹³⁶.*

8.12.2. Ofcom states that, *"given the new opportunities afforded to radio broadcasters by the introduction of content-related promotions ... Ofcom is not proposing to allow on-air references to third parties involved in funding the production of programming-related material (which includes sponsors of the material itself). This is intended to avoid any confusion to listeners concerning paid-for commercial messaging"¹³⁷*. We believe that this proposal only enhances confusion, rather than mitigating it, and unnecessarily hinders stations' ability to produce programming-related material in collaboration with commercial partners.

8.12.3. If the industry's proposed Section 10 was adopted, Ofcom's proposed rules for programming-related material would be rendered redundant.

8.13. Meaning of sponsorship (Question 38)

8.13.1. We do not have particularly strong feelings either way as to Ofcom's current and proposed definitions for radio sponsorship, although we question whether such lengthy introductory explanations are necessary, or could instead be provided as guidance, which is integrated into the body of the revised Section 10.

8.13.2. Rather, it is the essence of Ofcom's rules on sponsorship of radio programming that we disagree with. We note that Ofcom states that the proposed meanings of radio sponsorship are consistent with those proposed for television¹³⁸; we believe that this consistency is inappropriate.

8.14. Content of sponsored output (Question 39)

8.14.1. As set out above, we believe that the existing rules 9.4 and 9.5 have unnecessarily restricted Commercial Radio's ability to offer creative commercial solutions to advertisers. As discussed at length above, whilst Ofcom's proposed rules 10.28 – 10.30 appear to offer the industry new commercial opportunities, we believe that they are unnecessarily restrictive and indicative of an inconsistent regulatory approach.

8.14.2. Ofcom's proposed rules 10.28-10.30 would not be necessary if the

¹³⁶ Ofcom's proposed Section 10 (p. 113 of the Broadcasting Code Review)

¹³⁷ Ofcom, Broadcasting Code Review, p. 114

¹³⁸ *Ibid.*, p. 116

industry's proposed Section 10 were adopted; we urge Ofcom to consider this approach.

8.15. Question 42

- 8.15.1. We agree with Ofcom's proposal to introduce Rule 10.25 in place of the existing Rule 9.1 but believe that the regulatory objectives which lie behind existing Rules 9.2, 9.3, 9.6, 9.7, 9.8, 9.9, 9.11, 10.5 will be met by the provisions of the industry's proposed rules. We therefore disagree with the introduction of new rules 10.26, 10.27, 10.35, 10.36, 10.37, 10.39 and 10.7.

Questions related to other Sections of the Code:

8.16. Competitions and Voting Rules (Questions 7 - 9)

- 8.16.1. Commercial Radio is committed to ensuring that all listener interaction is executed with the principles of honesty, fairness, transparency and accountability.
- 8.16.2. We therefore agree that the introduction of new rules in relation to competitions and voting is appropriate, to guarantee fairness and openness in competition activity, and support Ofcom's proposed wording.
- 8.16.3. In relation to the proposed introduction of new meanings for "*broadcast competition*" and "*voting*" we note that a) not all competitions have a prize, and b) not all voting is undertaken to decide or influence the outcome of a contest. We believe that the meanings should be amended accordingly.

8.17. Sections of the Code where no revisions are proposed (Question 44)

- 8.17.1. We note the wish of one of our members, to revise the Code so that it delivers greater clarity and consistency in the regulation of impartiality in radio programming across national and local radio.

9. BACKGROUND TO RADIOCENTRE

- 9.1. RadioCentre is the industry body for Commercial Radio. Formed in July 2006 from the merger of the Radio Advertising Bureau (RAB) and the Commercial Radio Companies Association (CRCA), RadioCentre's membership comprises the overwhelming majority of UK Commercial Radio stations, who fund the organisation. RadioCentre is governed by a board of eight directors, representing a cross section of the industry and including all the major Commercial Radio groups.
- 9.2. The role of RadioCentre is to maintain and build a strong and successful Commercial Radio industry - in terms of both listening hours and revenues. RadioCentre operates in a number of areas including working with advertisers and their agencies, representing Commercial Radio companies to Government, Ofcom, copyright societies and other organisations concerned with radio. RadioCentre also provides a forum for industry discussion, is a source of advice to members on all aspects of radio, jointly owns Radio Joint Audience Research Ltd (RAJAR) with the BBC, and includes copy clearance services for the industry through the Radio Advertising Clearance Centre (RACC).

**RadioCentre
September 2009**