[GB] Fox News breaches Ofcom’s Rule 9.2 by holding out advertising as editorial content

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On 19 December 2016 Fox News - broadcast on the digital satellite platform and owned by Fox News Limited Liability Company - was found to be in breach of Rule 9.2 of Ofcom’s Broadcasting Code for insufficiently distinguishing between its editorial content and an advertising segment in its “Fox and Friends” programme. “Fox and Friends” is a weekday news and general discussion programme broadcast from New York between 6 a.m. and 9 a.m. (EST) and simultaneously in the UK between 11 a.m. and 2 p.m. (GMT). Ofcom received a complaint concerning a “Fox and Friends” segment called “It’s Your Money” and broadcast on 28 June 2016.

The “It’s Your Money” section is a three-way discussion between the programme’s two presenters and Megan Meany, a representative of the website Mega Morning Deals. Each discussion focused on a particular product offered exclusively to “Fox and Friends” viewers at a discounted price. Apart from the dialogue between the presenters and the representative, there were several on-screen graphics detailing pricing and product information, including the original price and the discounted price.

Ofcom invited Fox News to comment on the allegation of it having breached Rule 9.2, which states: “Broadcasters must ensure that editorial content is distinct from advertising.”

Fox’s response included the observation that the programme had a relaxed informal tone and covered an array of subjects, with Mega Morning Deals segment offering helpful consumer advice and details of available discounts. Neither Fox News nor its presenters received any financial reward from the segment. Furthermore, the broadcaster considered that due regard should be had to the right to freedom of expression enshrined in Article 10 of the European Convention on Human Rights (ECHR). Although Fox News did recognise Ofcom’s obligations under the Communications Act 2003 regarding the setting of standards for broadcast content, Fox News said: “It remains an important principle that expression rights should be restricted only where it is necessary and proportionate to do so.”

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For the purposes of Rule 9.2, Fox News considered that the "It's Your Money" section was sufficiently differentiated from the regular editorial content by use of unique graphics and music to indicate to the viewer a shift between editorial and non-editorial content. Fox News said the section was not promotional as it was alerting viewers to available discounts rather than the products themselves. Also, it added that the section did not constitute advertising and no distinction under Rule 9.2 was required.

Ofcom responded by stating that its statutory duty is to set standards for broadcast content, including compliance with international obligations such as the Audiovisual Media Services (AVMS) Directive concerning advertising on television. The AVMS Directive places limits on the amount of advertising that broadcasters are permitted to transmit, and one of its provisions is designed to maintain a distinction between advertising and editorial content, and includes the requirement that television advertising be kept visually and or audibly distinct from programming. This requirement is reflected in Ofcom's Code on the Scheduling of Television Advertising (COSTA) and the Broadcasting Code. COSTA applies to advertising and the Code to programming itself. The requirement for a distinction between content and advertising was aimed at preventing content being controlled by advertisers and also preventing broadcasters from using editorial airtime for advertising purposes to subvert the AVMS Directive's limits on the amount of airtime allowed for advertising.

Ofcom said that the codes do not prevent broadcasters from offering and promoting goods and services that may be of interest to viewers. However, advertising and programming had to be distinct. Ofcom concluded that the segment on "Fox and Friends" was presented as content. Its regular presenters were in conversation with Megan Meany and the purpose of the section was to promote the sale of goods. The presenters reaction to the discounts ("Wow, what a saving") formed part of the promotional role and the overall content was akin to advertising. Although the segment was presented and classed as programming it did not detract from it being akin to advertising; more should have been done to make the differentiation between editorial and advertising, and the failure to do so was a material breach of Rule 9.2.

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https://www.ofcom.org.uk/__data/assets/pdf_file/0018/96012/Issue-319-of-Ofcoms-Broadcast-and-On-Demand-Bulletin,-to-be-published-on-19-December-2016.pdf

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