



**OFCOM CONSULTATION ON  
BROADCASTING CODE REVIEW: COMMERCIAL REFERENCES IN TELEVISION PROGRAMMING**

**Submission by the Satellite and Cable Broadcasters' Group**

**8 September 2010**

The Satellite and Cable Broadcasters' Group (SCBG) is the trade association for multichannel broadcasters who are independent of one of the main terrestrial broadcasters in the UK. Its members are responsible for over 100 channels in the UK and in addition broadcast many more services from the UK to continental Europe and beyond. Many member companies are pan-European broadcasters, producing and commissioning content for different national markets.

SCBG channels provide citizens and consumers with programmes and services for a diverse range of audiences across a wide range of genres and audiences, including entertainment, factual, educational, history, music, nature, art and science. Our member companies make and show programmes for children and young people, and for ethnic minorities in their own languages. Their channels are available in almost 50% of UK homes.

SCBG members operate in an extremely competitive and volatile environment, without privileged access to scarce Government-controlled spectrum or to the must-carry status afforded to terrestrial networks. They are therefore unable to attract mass advertising revenues, and – with a couple of notable exceptions – do not benefit from public funding.

Satellite and cable broadcasting has been the fastest growing sector in the UK television industry, and according to a 2008 Deloitte study made a total economic contribution to the UK economy in 2007 of over £2.2 billion and employed 24,000 full time equivalents.

SCBG members are Bloomberg TV, BSkyB, Chinese Channel, CNBC, Discovery Networks, Fox International/National Geographic, Living TV Group, NBC Universal, QVC, SBS, Teachers TV, Turner Broadcasting, UKTV, Viacom (MTV, Comedy Central, Nickelodeon).

## Introduction

### **Ofcom's Broadcasting Code should go no further than UK legislation in regulating product placement**

Our primary message to Ofcom is that it should amend the Broadcasting Code with the sole aims of implementing the rules on product placement as laid out in UK legislation and making subsequent additional changes to rules relating to commercial references in programming, rather than looking to introduce additional safeguards. We also feel that there may be instances where Ofcom is proposing an over-cautious interpretation of that UK legislation.

### **UK legislation already goes further than AVMS requirements on product placement**

As Ofcom will be aware, in previous submissions on product placement (Ofcom consultation on product placement, 2006; DCMS consultation on AVMS, 2008, DCMS consultation on product placement, 2010) SCBG strongly supported the liberalisation of these rules as a way of providing broadcasters with the opportunity to secure additional revenue for commissioning and acquiring high quality content. As such, while we are pleased with the previous Government's decision to allow product placement in a limited set of genres under the AVMS Directive's derogation, we were disappointed that it chose to go much further than AVMS in a number of respects, to further limit the range of options open to broadcasters. These additional restrictions already mean that UK-based broadcasters are more limited than many other EU member states in terms of the range of product placement opportunities open to them, something that runs counter to the original rationale for liberalising these rules in the first place – to create a more level playing field between EU broadcasters and those operating in the rest of the world. It also disadvantages UK broadcasters who engage in international co-productions and distribution deals. While SCBG warmly welcomes the proposed liberalisation of sponsorship rules, we would therefore strongly oppose any further restrictions in relation to product placement that would disadvantage UK broadcasters against their overseas competitors.

### **UK legislation has already addressed public policy concerns**

There was considerable public debate around the time of the latest DCMS consultation on product placement, as well as around previous consultations, about the principle and practice of product placement, when all stakeholders had the opportunity to voice their opinions. While SCBG may not agree with all of the decisions that the previous Government took in this respect, it is clear that many of these concerns, particularly in relation to the prohibition of certain categories of products, are addressed in the legislation that followed. SCBG argues that it is now the role of Ofcom to implement this legislation in the most practicable way possible rather than seek to address any lingering public policy concerns.

### **The editorial and commercial incentive to place products responsibly is the primary safeguard**

SCBG's argument against additional safeguards over and above those provided in AVMS has always been that there exists a very strong in-built restraint against inappropriate and misleading practice – the fact that it is not in a broadcaster's, producer's or advertiser's interest to place products in a programme in a manner or context that is unsuitable for the intended audience; that negatively interrupts the natural flow of a programme; or that questions the honesty of the content. Indeed broadcasters' ultimate consideration is to viewers, who will collectively and individually switch off if broadcasters and producers do not handle product placement in a responsible way. With the knowledge that this is broadcasters' primary concern, we do not believe that Ofcom should be looking to second guess potential loop holes or bad practices before they have appeared. To the contrary, the initial months after the introduction of product placement will see a lot of "bedding in", as industry seeks to establish practices that work best for advertisers, producers/broadcasters and viewer, while all the time working within legislative

boundaries and with the interests of viewers centre-stage. During this initial period, we believe that Ofcom should seek to apply the new rules in a common sense and flexible way that allows the industry to find its feet, rather than stifle this new practice with unnecessary and potentially confusing regulations. We also suggest that Ofcom may want to work with a cross-industry review board in the months preceding and following the introduction of the new rules so that any problems can be easily resolved.

## **Consultation questions**

### **Proposal 1: Applying the rules to placement for a non-commercial purpose**

SCBG supports Ofcom's intention to apply the rules to paid-for references that are not included for a commercial purpose, and seeks clarification from Ofcom that this would mean that placements would be permitted from organisations such as the COI.

### **Proposal 2: Clarification that product placement is permitted in single dramas**

SCBG strongly welcomes Ofcom's aim to allow product placement in single dramas, given that this genre could provide valuable revenue opportunities but is not explicitly provided for in the legislation. However, Ofcom's proposal presents considerable negative knock-on effects, such that we cannot support it as it stands.

By re-classifying single dramas as "films made for television" and therefore also applying that genre's break patterns to single dramas, those programmes would lose their ability to advertise per clock hour, thereby undermining their ability to generate revenues. As such, any gains made by being able to place products in that programme would be wiped out by the losses encountered because of the different break pattern.

We also believe that Ofcom's approach does not accord with the Directive. Article 11 refers to "films and series made for audiovisual media services" but Article 20(2) refers to "films made for television". In our view "single dramas" will not only be broadcast on television but will be included on VoD services. Therefore a single drama is not necessarily just a "film made for television". As a result it is perfectly permissible and in compliance with the Directive for Ofcom to classify single dramas as falling within the permitted categories of programming in respect of which product placement is allowed but it does not necessarily follow that Ofcom is required or indeed permitted to classify such programming as being caught by the requirements of Article 20 as transposed into UK law by the COSTA rules.

SCBG therefore believes that single dramas should be classified as "films made for television", but *for the purposes of product placement classification only*, i.e. that the product placement classification need not also be applied to the rules on advertising break frequencies. We believe that this difference can exist without conflicting with the intentions of Article 20 of the Directive.

### **Proposal 3: Clarification of the prohibition of product placement in news**

Given that neither the Directive nor the Act refer explicitly to product placement in relation to news programmes we would ask that Ofcom ensure that any prohibition is interpreted in the narrowest form possible and/or that provision is made for those circumstances when a news broadcaster has limited editorial control. While it would not be the intention for any Ofcom regulated news broadcaster to

include product placement in commissioned and/or acquired content, there could be instances (such as newsworthy footage from permitted [pp] genre programmes or international live feeds) where a blanket prohibition could prevent content and/or acquired news programming from being broadcast, or place the broadcaster in breach of the rules. Furthermore, we would also assume that any news programme prohibition does not apply to genres such as Showbiz or Sports news.

#### **Proposal 4: Thematic placement**

In our view, the reference to thematic placement in Recital 93 to the Directive serves as an illustration of a practice that would breach the mandatory requirement of the Directive that product placement (and indeed sponsorship credits) shall not breach the fundamental principle of editorial independence.

The Recitals are not binding upon the Member States and as such there is no need for the incorporation of the ban on thematic placement in the Broadcasting Code. It would be sufficient for Ofcom's guidance to be updated to elaborate that "thematic placement" is a practice that is likely to compromise the editorial independence of the broadcasters.

However, as has become clear in discussions around both this and the DCMS consultation, the issue of how to define that practice is challenging. While SCBG can understand that a scenario where a story-line has been distorted by a third party funder would be potentially misleading for the viewer and damaging to the editorial integrity of the programme, we do believe that there are many instances where broadcasters/producers might work closely with a third party funders to discuss storylines and potential product placements where the resulting plot is wholly editorially justified within the narrative.

We suggest that the wording that is proposed in the consultation (which we suggest, as above, should feature in Ofcom's guidance and not in the Code itself) should be amended to better reflect this distinction, between what we see as acceptable and unacceptable practices.

#### **Proposal 5: Specialist factual programming**

The proposal to prohibit this genre of programming – over and above what is required in AVMS and UK regulation – is an example, in SCBG's view, of Ofcom unnecessarily and unjustifiably seeking to address as-yet unfounded concerns or problems. It also discriminates against a whole sub-sector of the TV industry and as such we strongly oppose it.

As Ofcom itself acknowledges there are practical difficulties with the proposed definition. Factual programming, and even "specialist factual programming", covers an enormously wide range of programming. For example, is a historical programme caught within the definition? Does the reference to "those [programmes] that are investigative in nature" refer to programmes within the named subjects (educational, science, medical or arts subjects) or is it wider in its scope so as to cover any investigative programme? For example, would an investigative programme into sports be caught? The parameters of the proposed prohibition are exceedingly unclear and therefore are not in line with best regulatory practice.

More importantly, and aside from the challenges of adequately defining this sub-genre, we can well imagine that there are any number of valid product placement opportunities within these programmes that could be taken without calling the producer/broadcasters' editorial integrity into question. Ofcom should not be looking to prohibit an activity ahead of any proof of a problem. Once again, we believe

that the judgement about what is and what is not an appropriate product placement should be left to broadcasters and producers, who will have the editorial integrity of their factual programme, and their viewers, front of mind.

By prohibiting product placement in specialist factual programming Ofcom would be preventing a whole section of the industry from exploring this entirely editorially justified revenue stream, something which would have a considerable impact on the financing and availability of those programmes. The genres to which this prohibition would apply already face funding-challenges, despite the fact that they often perform an important public service function. Educational and documentary-style programming, for example, often relies on the funding and good-will of the participants in the programmes, and it can well be imagined that references to those funders in the programme could take place without jeopardising editorial integrity, while at the same time securing funding. Without the additional revenue that product placement could create fewer specialist factual programmes will be made, as broadcasters explore other genres, something which would be a very serious outcome of the supposed liberalisation of the regulation of commercial references.

#### **Proposal 6: Additional prohibited categories**

We do not believe it is desirable or necessary for Ofcom to extend the prohibition of product placement to products and services prohibited to for the reasons already outlined above, but also because this would represent a fundamental misclassification of product placement as advertising, something which it is not. It is the case that product placement derives revenues as advertising does, but it exists in an editorial context and so should be regulated as such and not in a way that implied it is analogous to advertising.

#### **Proposal 7: Signalling**

While SCBG accepts that AVMS requires broadcasters to alert viewers to the presence of product placement in a programme, it is important that broadcasters – many of whom operate in a wide number of territories where product placement regulations will vary widely – have the flexibility to make viewers aware in way that best suits those viewers and that does not substantially increase broadcasters' regulatory burden.

SCBG is concerned that the current proposals do not allow for this much-needed flexibility. For example, it is our understanding that AVMS does not require *both* an audio and a visual signal, as Ofcom proposes. In our view this double requirement is something that would be unacceptable both to viewer and broadcaster. From a viewers' perspective, we feel that this would cross the line from being informative to irritating and would also result in rendering the placement unduly prominent or something to be worried about. From a broadcaster's point of view, the requirement for both an audio and visual signal doubles the difficulties of distributing programming to international territories. We do not therefore support this proposal.

We do, however, appreciate that Ofcom needs to cater for visually impaired viewers and so we would be happy to have further discussions with Ofcom about how broadcasters can alert their visually impaired audience members in a way that is proportionate.

We support the proposal for a universal logo, but question the length of time – “between 3 and 7 seconds” – that Ofcom proposes it appears on screen, which is longer than other access service

requirements, and sends out the message that product placement is something to be worried about. SCBG feels that 2 seconds would seem proportionate.

SCBG asks for flexibility with regards the requirement for listing the products placed within a programme and at the very least it should be left to broadcasters' discretion as to whether this list appears *either* at the end of the programme *or* on a website.

SCBG broadcasters are happy to assist Ofcom in the awareness campaign for the new rules but feel that 6 months is an overly long time, during which audiences will very quickly understand the new system before finding the additional message irritating and intrusive. We suggest that 1-2 months is more than adequate to communicate the message effectively.

#### **Proposal 8: Sponsor references (product placement) within programmes**

SCBG is very supportive of this proposal, which we believe will create some innovative and valuable revenue opportunities.

#### **Proposal 9: Identifying sponsorship arrangements (sponsorship credits)**

SCBG supports Ofcom's aim for transparency about sponsorship arrangements, but does not believe that it is necessary to mandate a "statement informing the audience of the sponsorship arrangement". The very nature of the commercial arrangement means that it is in both sponsor and broadcaster's interest to establish clearly a connection between programme and sponsor. We also believe that audiences can easily understand the sponsorship arrangements that are presented to them, without additional extensive information. We think that it should be left to the broadcasters' discretion to decide how to present the sponsorship arrangement and that clunky and over-prescriptive requirements in this respect are not required, and could in some instances result in over-crowding the screen or confusing the viewer.

#### **Proposal 10: Allowing sponsorship credits during programmes**

SCBG is very supportive of this proposal, which we believe will create some innovative and valuable revenue opportunities, although we do have strong concerns about the proposed content restrictions as below.

#### **Proposal 11: Content of sponsorship credits during programmes**

While we support the liberalisation of sponsorship rules in principle, we have very strong objections to the two instances where Ofcom is proposing that sponsorship credits cannot occur -- during programmes that are prohibited from containing product placement (eg children's programmes) and in programmes where the sponsor would be prohibited from placing its products (ie alcoholic drinks) -- even though sponsorship of those products/in those genres is itself permitted.

Ofcom's rationale for singling out these two circumstances is that "it may be inappropriate" and that "it is appropriate for the rules on the appearance of sponsorship credits within programmes to mirror the product placement restrictions". This logic, to treat sponsorship credits as product placement, completely contradicts other Ofcom statements on the same issue in the very same consultation document. In paragraph 5.17 of the document, Ofcom says that "*with the exception of sponsorship*

*credits*, any reference to a sponsor that appears in a sponsored programme...will be treated as product placement and must therefore comply with the relevant rules" [*my italics*]. In paragraph 5.46 Ofcom says that "these references to the sponsor [sponsorship credits] would be treated separately from sponsor references (product placement)". In paragraph 5.40 Ofcom says that "the purpose of a sponsorship credit is to tell the audience when a programme is sponsored and by whom" – Ofcom does not say that sponsorship credits are analogous to placing a product in a programme in exchange for payment: we do not therefore believe it should be regulated as such.

Ofcom therefore appears to have singled out children's programming (as well as the other genres/products to which these exceptions apply), without proper justification. The Government may have indicated that it does not support product placement in certain genres, but it has not indicated that those prohibitions should also relate to sponsorship credits. In doing so Ofcom's regulatory approach cannot be described as "proportionate, consistent and targeted only at cases in which action is needed" as it should be. Instead this proposal would introduce an inconsistent and confusing rule, which heavily discriminates against the children's TV industry, which has already had to cope with significant additional regulatory burdens in recent years.

#### **Proposals 12 - 15: Principles**

We support the proposed changes.

#### **Additional Questions: New Code rules in force**

SCBG would support a period of grace after the publication of the new Code before the new rules come into force, as is allowed for B/CAP Code changes, in order that current sponsors have time to adapt.

#### **Cross-industry review board**

SCBG believes that it may be useful for Ofcom to work with a small cross-industry review board in the run up to the rule changes and in the immediate months which follow it, who can work quickly and flexibly with Ofcom to ensure that product placement is introduced in a smooth manner which benefits both broadcasters and viewers. SCBG is happy to work with Ofcom to co-ordinate such a group.

For further information please contact Vicky Read – ~~XXXXXXXXXXXXXXXXXXXX~~

