

The UK's Response to the European Commission's issues for discussion paper on the update of the Commission's interpretative communication on certain aspects of the 'Television without Frontiers' Directive



A Joint Response by the Department for Culture, Media and Sport (DCMS) and the Office of Communications (Ofcom)



17 September 2012

1) Introduction

- 1.1 **DCMS**¹ is the Government Department with responsibility for broadcasting policy and the broadcasting regulatory framework for the UK.
- 1.2 **Ofcom**² is the independent regulator and competition authority for the UK communications industries, with responsibilities across television, radio, telecommunications, wireless communications and postal services. Its core duties are to further the interests of citizens and the interests of consumers in relevant markets, where appropriate by promoting competition.
- 1.3 DCMS and Ofcom welcome the opportunity to provide a joint UK response to the European Commission's questionnaire on the possible update of the "Interpretative Communication on Certain Forms of Television Advertising" ("the Communication"). In addition to responding to the specific questions and issues raised by the Commission, the UK would like to make some preliminary observations on: the purpose of the interpretative communication; its role in the context of the rapidly changing advertising market in light of the UK experience; and the approach the UK considers most appropriate for the Commission to take should it decide to proceed and update the Communication.
- 1.4 In summary, the UK agrees that significant market changes since 2004 mean the current Interpretative Communication has less relevance to today's broadcasting market. However, **the case for the Commission to provide new detailed guidance in a revised Communication has yet to be made.** On the contrary, we consider there are significant risks with such approach, particularly in light of the unpredictable nature of developments in the advertising market and the audiovisual sector overall over the coming years.
- 1.5 We are concerned that setting out detailed guidance on specific practices, or indeed attempting to predict which practices will be relevant a few years from now:
- risks undermining existing and well established approaches and increasing legal uncertainty;

¹ <http://www.culture.gov.uk/>

² <http://www.ofcom.org.uk/>

- could result in an unduly restrictive approach being applied to certain provisions of the Directive where there is freedom for Member States to adapt and apply the requirements, in a way that reflects market developments within their own national frameworks;
- risks adding significant pressure to the current challenge of maintaining adequate levels of funding to ensure a continued high quality standard of European production and certain programme genres;
- risks creating inconsistencies in the application of certain provisions across linear and on-demand services; and
- does not offer the ability to recognise the diversity that exists in different European markets or maintain flexibility to keep pace with technological change more widely.

1.6 **The UK therefore proposes that if the case can be made to review the Interpretative Communication, that the Commission does so as part of its wider engagement and review of the broadcasting and media industries.** In particular, we would invite the Commission to initiate dialogue with Member States, regulatory authorities and other interested stakeholders on the high level principles derived from EU legislation that should underpin the future regulation of commercial communications across Member States. Such a dialogue, we believe, would also be of value in the context of the Commission’s wider strategic assessment of Connected TV and related developments, and the on-going European debate about the future of the sector. It will help ensure that these important initiatives support, complement and are consistent with one another.

1.7 The sections below set out in further detail some of the issues which could form the basis of this future dialogue, including those referred to in the Commission’s Questionnaire, and describe the current approach to advertising regulation in the UK.

2) **The purpose of the Commission Interpretative Communication**

2.1 The Communication was issued in 2004 following the 1997 amendment of the 1989 Television without Frontiers (“TVWF”) Directive. At the time industry and national regulatory authorities had called on the Commission to clarify how some provisions of the Directive as amended applied to new emerging advertising techniques such as telepromotions, mini-spots and product placement. There was also a broad consensus among all parties in favour of considering these new advertising techniques to be compatible with the TVWF Directive, while also acknowledging the importance of ensuring consumer protection in this area.

2.2 The Communication therefore helped increase legal certainty for economic operators and national regulators, whilst recognising the importance of maintaining

the necessary flexibility in national implementation and the *in dubio pro libertate* principle, as recognised by the Court of Justice of the European Union³.

2.3 **The UK considers the principle of national flexibility to have been a fundamental pillar of the Communication and believes it should guide and remain at the core of any future update, should any update be appropriate..** This is critical to ensure the compatibility between this instrument and Member States' freedom to implement the Directive, in accordance with Article 288⁴ of the Treaty on the Functioning of the European Union, through their own national regulatory frameworks and based on their particular market circumstances, and to adopt more detailed or stricter rules for broadcasters under their jurisdiction.

3) Changes in the advertising market

3.1 Television advertising remains one of several important and strong sources of revenue. In the UK in 2011, the proportion of revenue in the UK TV industry generated by advertising was 29% (this compares to 22% by public funds and 42% generated by subscription revenues). This combination of sources contributes to ensure the quality of programming that the UK and Europe prides itself for. If Europe is committed to maintaining such standards and encouraging indigenous production, we need a regulatory framework that supports such variety of business models and is conducive to competition and continued investment (particularly in some programme genres such as news and children's programming), whilst also ensuring adequate levels of consumer protection.

3.4 Substantial change has occurred in the EU advertising market since the 2004 communication was issued. For instance, emerging practices which featured prominently in the Communication, such as split screen advertising, have not been considered to be at the cutting edge of advertising techniques for some years. Each market has also developed within its own national regulatory framework, for example in the UK telepromotions are generally not broadcast, while in other Member States these remain a relatively regular feature of the television advertising landscape.

3.5 Importantly, funding from commercial communications is by no means guaranteed in the current economic climate – as evidenced by the slow establishment of the product placement market in the UK and other Member States, and the proliferation of online advertising which has placed significant pressure on broadcast advertising revenues. The imposition of any additional restrictions on forms of commercial communication at this time could pose a substantial threat to programme funding.

3.6 We have also started to see the development of Connected TV and Over the Top ("OTT") services. In the UK, about 5% of UK households own an internet connected

³ C-6/98, *ARD v Pro Sieben*, [1999] ECR I-7599

⁴ "A directive shall be binding, as to the result to be achieved, upon each Member States to which it is addressed, but shall leave to the national authorities the choice of form and methods".

“smart TV” (and 65% of those said they used their internet connection in their TV)⁵. We expect this figure to rise, as smart TV set sales have doubled in the past year and now represent a fifth of all TV sales. Ofcom’s *Media Tracker* (2011) measures different methods of viewing content from the internet on a TV set, and shows that 11% of respondents had connected their set to the internet via a games console. Additionally, 11% of respondents had connected their TV to the internet via a laptop/PC⁶. Redshift Strategy has analysed the platform data and estimates that connected set-top boxes had a penetration rate of 15% in the UK in May 2012⁷.

- 3.7 This increase in consumption of IP-delivered audiovisual content will bring about further change into the audiovisual market in the years to come, including in the area of commercial communications, as providers experiment with more sophisticated forms of advertising. If Europe is to maintain a competitive and thriving broadcasting industry, such forms of innovation should be supported and further encouraged, and we should maintain the necessary space for exploration of new advertising techniques.
- 3.8 Whilst it is difficult to anticipate which current trends in advertising will become longstanding and what future trends in brand and advertiser investment through connected devices might be, these developments need to be recognised and considered as part of the debate about any future Interpretative Communication; although we urge the Commission to be mindful of the dangers of inadvertently pre-empting future market developments. National regulatory authorities must also be well equipped to respond swiftly to such changes so that they are in a position to ensure continued high levels of consumer protection in accordance with their national circumstances.
- 3.9 The UK also further notes that since the Communication was introduced, the regulation of audiovisual commercial communications has been extended under the Audiovisual Media Services (“AVMS”) Directive to include such communications in on-demand audiovisual services. Recital 58 of the AVMS Directive makes clear that such services are different from linear television broadcasting with regards to their impact and therefore lighter regulation of on-demand services is justified. The UK is unclear whether any new or revised Communication would set out to cover both linear and on-demand services. However, even if it were limited specifically to linear television broadcasting only, there is a danger that this might raise issues of inconsistency given that many of the relevant provisions of the AVMS Directive (e.g. product placement, sponsorship) apply to both linear and on-demand services. The UK would therefore welcome further clarification from the Commission on this point.

⁵ ‘Smart TV’ refers to a standalone television set with inbuilt internet functionality. Users connect a broadband router directly into the TV. Smart TVs are produced by consumer electronics manufacturers like Samsung, Sony, Panasonic and LG. This term has not been established as industry-wide usage, but will be treated here as a generic name for all such devices. This is different from ‘Internet-enabled TV’, which is an umbrella term covering any TV set connected to the internet via a third-party device, such as a set-top box, a games console or a laptop/PC.

⁶ Source: Ofcom *Media Tracker*, fieldwork conducted by BDRG Continental, October to November 2011. Base: Adults aged 16+ (890).

⁷ Source: Redshift Strategy analysis based on platform data, May 2012.

3.10 For further information on the nature and state of the advertising market in the UK, including latest revenues and trends, please see Ofcom's 2012 Communications Market Report⁸. For a specific review of the UK's Public Services Broadcasters, please see Ofcom's 2012 Public Service Broadcasting Annual Report⁹.

4) A principles-based approach

4.1 In light of our experience to date and the considerations above, **the UK questions whether the approach and style of the Interpretative Communication remains appropriate going forward**. In particular, we believe the Commission still needs to make a case for why a greater degree of guidance on specific practices is beneficial, specifically when such guidance would need to predict which practices will be relevant a few years from now. It could also unduly restrict the flexibility of operators and the potential for market innovation, which is likely to manifest itself differently in different Member States. We also seek reassurance that any future considerations will protect Member States' discretion at national level and the well established approaches already operating within Member States (we elaborate on the UK approach further below).

4.2 Furthermore, the Questionnaire seems to suggest the Commission is considering the inclusion in a revised Communication of new definitions of certain concepts (e.g. spot advertising, news/current affairs, undue prominence of product placement, significant value etc.), which the European legislators deliberately left open in the last review of the AVMS Directive. If this is the intention the UK would question the appropriateness of the Commission introducing additional definitions in an instrument of this nature, particularly if these go above and beyond definitions set down under EU legislation in the Directive itself.

4.3 Therefore, the UK is **inviting the Commission to adopt a fundamentally different approach to this review, and to initiate a dialogue with Member States, regulatory authorities and other interested stakeholders on the high level principles derived from EU legislation that should underpin the future regulation of commercial communications across Member States**. Such a dialogue, we believe, would also be of value in the context of the Commission's wider strategic assessment of Connected TV and related developments, and the on-going European debate about the future of the sector. It will help ensure that these important initiatives support, complement and are consistent with one another.

4.4 We believe that the precise detail of how these principles should be applied is a matter for individual Member States and regulatory authorities, in accordance with their own national regulatory frameworks and particular market circumstances. We recognise, however, the importance and value of maintaining a regular dialogue between the Commission, Governments and regulatory authorities (for example through platforms such as the Contact Committee, the Audiovisual Regulators' Group and the European Platform of Regulatory Authorities - EPRA), to exchange

⁸ <http://stakeholders.ofcom.org.uk/market-data-research/market-data/communications-market-reports/cmr12/>

⁹ <http://stakeholders.ofcom.org.uk/binaries/broadcast/reviews-investigations/psb-review/psb2012/section-a.pdf>

best practices and increase the consistency of approaches across the EU. This, however, is by necessity a bottom-up, iterative and deliberative process, inspired by on-the-ground experience of individual cases and practices.

5) The UK's approach to 'audiovisual commercial communications'

5.1 In the remainder of this response, we set out the UK's broad approach to implementing the Directive's requirements in relation to audiovisual commercial communications, with particular reference to the high level principles Ofcom applies through its relevant codes and extensive guidance in the case of the different types of commercial communication.

5.2 In respect of the regulation of advertising overall, it is important to note that the UK regulatory system is a mixture of self-regulation for non-broadcast advertising, and co-regulation (with Ofcom) for broadcast advertising and advertising included in on-demand programme services by the Advertising Standards Authority. For instance, the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (the CAP Code) applies in full to marketing messages online, including the rules relating to misleading advertising, social responsibility and the protection of children. The UK has found self-regulation of these emerging advertising practices to be a useful and effective approach.

5.3 The relevant UK codes and guidance can be found at:

- The Ofcom Broadcasting Code, which includes the Cross-Promotion Code: <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/>
- Guidance on the Ofcom Broadcasting Code: <http://stakeholders.ofcom.org.uk/broadcasting/guidance/programme-guidance/bguidance/>
- The Ofcom Code on the Scheduling of Television Advertising: <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/advert-code/>
- The UK Code of Broadcast Advertising: <http://www.cap.org.uk/The-Codes/BCAP-Code.aspx>
- ATVOD Statutory Rules and Non-Binding Guidance for Providers of On-Demand Programme Services (ODPS): http://www.atvod.co.uk/uploads/files/ATVOD_Rules_and_Guidance_Ed_2.0_May_2012.pdf
- The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (CAP Code): <http://www.cap.org.uk/The-Codes/CAP-Code.aspx>

5.2 While there are specific requirements in the Directive that apply to particular forms of audiovisual commercial communications, the UK notes that these are underpinned by the following fundamental principles:

- **Protection from harm** – to ensure that commercial communications do not cause harm, especially to children and the vulnerable.
- **Editorial independence** – to ensure that broadcasters are not unduly influenced by advertisers and maintain control over programming.
- **Distinction** – to ensure that there is a clear distinction between editorial content and advertising.
- **Transparency** – to ensure audiences understand when they are being sold to, and to protect them from surreptitious advertising.

5.3 It is with these principles in mind that the UK has drafted its rules that govern:

- references in television programmes to products, services and trade marks (as set out in Section Nine of Ofcom’s Broadcasting Code);
- content in television programmes that could result in harm to children or the audience (as set out in Sections One and Two of Ofcom’s Broadcasting Code);
- television advertising and teleshopping (as set out in The BCAP Code: The UK Code of Broadcast Advertising);
- the scheduling of television advertising (as set out in the Code on the scheduling of television advertising “COSTA”); and
- content on on-demand programme services (as set out in ATVOD Statutory Rules and Non-Binding Guidance for Providers of On-Demand Programme Services and The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing).

5.4 With particular reference to Section Nine of the Ofcom Broadcasting Code governing television programmes, Ofcom has drafted very detailed guidance¹⁰ for broadcasters setting out clearly how the UK intends broadcasters to comply with its rules, and making specific reference to the relevant EU and national legislation and fundamental principles. There is also detailed guidance to support Sections One (protection of children) and Two (Harm and Offence) of the Broadcasting Code in a similar way, although it should be noted that these guidance documents are currently under review.

6) The Commission’s questionnaire

¹⁰ The guidance specifically to Section Nine of the Broadcasting Code is available here: <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section9.pdf>

- 6.1 This section sets out the UK's response to the specific questions and issues raised in the Commission's questionnaire (*which are replicated in italics for ease of reference*). In a number of cases we have also set out where the basis of the question is unclear and where greater clarification from the Commission would be welcomed.

Advertising

Notion of spot advertising: Is it necessary to define an advertising spot in line with the Court jurisprudence?

- 6.2 The UK is unclear whether this question relates to the possible inclusion of a definition of a 'spot advertisement' or of an 'advertising spot'.
- 6.3 The UK understands the Commission's reference to the relevant Court jurisprudence in relation to 'spot advertisements' is to the judgment of the Court in the RTI case¹¹ (12 December 1996). The principal concern of the Court in this case was whether telepromotions, which the UK understands are a common and specific feature of Italian television, would fall within the TWVF Directive's provision for "other forms of advertising" (expressed in the original version of the Directive which was in force at the time as "forms of advertisements such as direct offers to the public for the sale, purchase or rental of products, or for the provision of services").
- 6.3 In its judgment on this case, the Court acknowledged that the Directive itself does not describe spot advertisements. However, for the purposes of the case under its consideration, the Court defined such spots in the judgment as "*forms of promotion usually lasting a very short time, having a very strong suggestive impact, generally appearing in groups at varying intervals or between programmes...*". Further, it noted that spot advertisements are "*...produced either by those who supply the products or services or by their agents, rather than by the broadcasters themselves*" [see paragraph 31 of the judgment].
- 6.4 The UK notes that the RTI case preceded both Directive 97/36/EC and the 2004 Communication, but the Court's view on spot advertisements was not referred to in either, nor indeed in the AVMS Directive or its Recitals. The UK is therefore unclear about the rationale behind the Commission's desire to now make reference to it in an updated Communication.
- 6.5 In relation to 'advertising spots', the UK understands the Commission's reference to the relevant Court jurisprudence in this area to be to the case of the European Commission vs Kingdom of Spain¹². In the case, the Court was of the opinion that any type of television advertising broadcast between programmes or during breaks constitutes, as a general rule, an advertising spot, unless:

¹¹ Cases C-320, 328-329, 337-339/94, RTI and others v Ministero delle Poste e Telecomunicazioni, [1996] ECR I-6471.

¹² Case C-281/09 [2011].

- the type of advertising concerned is covered by another form of advertising expressly governed by the Directive; or
- it requires a duration greater than that of advertising spots, because of the way it is presented. This exception would however only apply when the application of the hourly time limit set out in the Directive for advertising spots would, without valid justification, amount to disadvantaging the form of advertising concerned compared to advertising spots.

6.6 The UK notes that this jurisprudence was specific to the particular circumstances of the case before the Court and, as such, refers to television advertising broadcast between programmes or during breaks. It does not necessarily address the appearance of advertising simultaneously with programmes (for example, split screen advertising). The UK further notes that the term ‘television advertising spots’ is used in Article 23(1), which limits the amount of television advertising within a given clock hour. If the Commission were to include the Court’s definition of ‘advertising spots’ in a new or revised Communication, national regulators might be encouraged not to apply advertising limits to television advertising which appeared simultaneously with programmes. This would create a risk that consumers would be exposed to excessive amounts of such advertising and the integrity of programmes could be damaged as a result. For this reason, and for the reasons set out in paragraph 4.2, we consider any new or revised Communication should not include the Court’s definition of ‘advertising spots’.

Self- and cross-promotion and programme-related material

Self-promotion/cross-promotion: How to distinguish them? Should editorial responsibility be the criterion of distinction?

Announcements made in connection with one's own programmes and with ancillary products directly derived from these:

- Concerning one's own programmes: How to define one's own programme?
- Ancillary products directly derived from the programmes: products intended specifically to allow the viewing public to benefit fully from, or to interact with, the programme concerned. How should this link with The programmes be made?

6.7 The UK addresses these questions together as it considers that the concepts of self- and cross-promotion derive from the reference to “announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived from those programmes ...” in Article 23(2) of the AVMS Directive .

6.8 The UK is of the view that for material to be subject to the derogation in Article 23(2), and therefore be exempt from the television advertising and teleshopping limits set out in Article 23(1), it must in the first instance meet the Directive’s definition of either television advertising or teleshopping. Some announcements made by broadcasters will meet one of these definitions, but others will not. For

example, the UK notes that Recital 96 states that in particular: “Trailers consisting of extracts from programmes should be treated as programmes”.

- 6.9 Further the UK considers that Recital 98 provides Member States with sufficient clarity with regards to the scope of this derogation.
- 6.10 Given the clarity and detail of the definitions set out in Article 1 of the Directive, particularly in respect of advertising, and the associated Recitals as set out above, the UK does not believe there is a need for further detail to be provided on this area in a new or revised Communication.

Principle of separation

What are the limits of this principle "television advertising and teleshopping shall be kept quite distinct from other parts of the programme by acoustic and/or spatial means"? How clear must the separation be? What about overlay of advertising when the programme is still running? How should they be included in the 12 minute limit? How to ensure that the integrity of the programmes is not harmed?

- 6.11 The UK notes that Article 19 of the Directive provides flexibility in respect of the means by which advertising is kept distinct from other parts of the programme. It states that such distinction may be achieved “by optical and/or acoustic and/or spatial means” [emphases added].
- 6.12 The UK therefore considers that the overlaying of advertising on programmes is not necessarily incompatible with the Directive. Transparency is key: viewers must be able to easily distinguish between the advertising and editorial content. Where advertising is subject to volume limits (e.g. it does not fall into the derogation set out in Article 23(2)), the UK considers that these limits will continue to apply regardless of whether the advertising is featured in a separate advertising spot or shown simultaneously with a programme.

Sponsorship

Identification of the sponsor: How should the link with the sponsor be made? How to avoid the sponsoring credit to qualify as an advertising spot?

- 6.13 The UK’s comments above on the notion of spot advertising and advertising spots should be noted. Further, we note that Article 23(2) explicitly exempts sponsorship announcements from the volume limits that apply to advertising spots. In addition, Article 10(1)(b) requires that sponsored programmes must not “directly encourage the purchase or rental of goods or services in particular by making special promotional references to those goods or services”.
- 6.14 In respect of identifying the sponsor, Rule 9.19 of the Broadcasting Code requires sponsorship credits to make clear: the identity of the sponsor by reference to its name or trade mark; and the association between the sponsor and the sponsored content.

- 6.15 Rules 9.22(a) and (b) set out detailed requirements that limit the extent to which sponsorship credits can promote the sponsor, including its goods or services.
- 6.16 The UK has also provided broadcasters with detailed guidance on how they should achieve compliance with these rules (see paragraphs 1.148 to 1.155 and 1.158 to 1.167 of the Guidance to Section Nine of the Broadcasting Code¹³).

What type of programmes can be sponsored? How to define news/current affairs programmes?

- 6.17 Ofcom's Broadcasting Code defines a current affairs programme as "one that contains explanation and/or analysis of current events and issues, including material dealing with political or industrial controversy or with current public policy". The Code does not define 'news'.

Product placement

Undue prominence: under what criteria should it be assessed?

- 6.18 In the UK, whether the prominence of a reference to a product or service is deemed to be undue is judged on a case by case basis, against the editorial context in which the reference appears. We consider in particular whether there is sufficient editorial justification for the inclusion of the reference and the manner in which it appears. For example: a product that is integral to the editorial content of a scene may justify a higher degree of product exposure. In all cases the placement should fit within editorial content and not dominate it.
- 6.19 The UK has again provided broadcasters with detailed guidance (paragraphs 1.94 to 1.102 of the Guidance to Section Nine of the Broadcasting Code) to assist their compliance with the relevant Broadcasting Code rule (Rule 9.10).
- 6.20 Given the importance of context and the consequent need to carefully judge each instance on a case by case basis, the UK considers that any attempt to list specific criteria for assessing 'undue prominence' will be not only very difficult, but also of limited overall benefit in practice.

Product placement / surreptitious advertising: What is the difference between surreptitious advertising and product placement? Is the promotional and misleading effect the key element? ("when such representation is intended by the media service provider to serve as advertising and might mislead the public as to its nature")

- 6.21 We consider this issue is covered adequately by the Directive, in particular by the very clear definitions provided in Article 1 for surreptitious audiovisual commercial communications and product placement.
- 6.22 In the UK's view, the extent to which an instance of product placement is promotional is not relevant when assessing whether the placement amounts to

¹³ <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section9.pdf>

surreptitious advertising: the key criterion is whether viewers are appropriately informed of the existence of the placement. This is made clear in Recital 90 of the Directive, which states the “prohibition of surreptitious audiovisual commercial communication should not cover legitimate product placement within the framework of this Directive, where the viewer is adequately informed of the existence of product placement”.

- 6.23 While the UK is of the opinion that promotional impact is irrelevant when judging whether an instance of product placement amounts to “surreptitious advertising”, we nonetheless recognise that the extent to which a placed product or service can be promoted is limited by Article 11(3), which states that product placement “shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services”.

Thematic product placement/surreptitious advertising: What is the difference?

- 6.24 The UK notes that the term ‘thematic placement’ does not feature in any of the Directive’s Articles but instead is referred to in Recital 93, which states “sponsorship and product placement should be prohibited where they influence the content of programmes in such a way as to affect the responsibility and editorial independence of the media service provider. This is the case with regard to thematic placement”.

- 6.25 While there is no definition of ‘thematic placement’, we believe that the intention of the Recital is to make clear the need to protect the editorial independence of the broadcaster and the programme-maker, and to prevent programmes being used as promotional vehicles for placed products. The link raised by the Commission between surreptitious advertising and thematic product placement is therefore unclear. Further, given that there is a clear definition of surreptitious audiovisual commercial communications in the Directive, the UK does not consider there is any need for discussion of the difference between surreptitious advertising and thematic placement within a new or revised Communication.

- 6.26 However, the UK accepts that the product placement of generic (i.e. non-branded) references to products and services carries a potentially increased risk of surreptitious advertising and/or the distortion of editorial content for promotional purposes. The UK has therefore issued guidance in this area to clarify that, while generic product placement will be subject to the UK’s product placement signalling rules, broadcasters should consider taking additional steps to ensure adequate signalling of generic placements (for example, it may be appropriate to list the name of product placers in a programme’s end credits). This is because viewers are less likely to associate a generic, non-branded reference with product placement.

Virtual advertising or digital product placement/traditional product placement: How to distinguish between them?

- 6.27 The UK understands this question to relate to distinguishing between references to products and services that are product placed in situ (i.e. on location) during filming and the product placement of digital references to products and services in programmes during the post-production or editing process. Recital 91 makes clear

that the “definition of product placement laid down in the Directive should cover any [emphasis added] form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or a trade mark thereof so that it is featured within a programme in return for payment or for similar consideration”.

- 6.28 In view of this, the UK considers it unnecessary to distinguish between these types of product placement in any new or revised Communication. To do so would suggest that the regulatory requirements differ based on the type of product placement. There is nothing in the Directive to suggest this is the case.

Props and prizes: How is significant value defined? Should any guidelines be given? Would a ratio between the price of the goods/services and the cost of the broadcast be an appropriate criterion as an alternative to an absolute figure? Or a combination of both approaches?

- 6.29 As previously stated, the UK considers that, in line with the Commission’s stated position on the 2004 Interpretative Communication, any ambiguity in the Directive’s provisions should be construed in favour of a broad discretion for Member States when implementing its provisions. The example of the term ‘significant value’ is a good one in this respect. The Directive provides no definition of the term and the concept is not referred to in any of its Articles. Instead it is used in Recital 91 to help Member States differentiate between prop/prize placements that meet the definition of product placement and those that do not. Therefore it should be a matter for individual Member States to determine how to define and apply ‘significant value’, taking appropriate account of the principles and purposes of the Directive.

- 6.30 The UK is aware that many Member States have now reached their own conclusions on how to define and apply ‘significant value’ in the context of the Directive’s requirements for product placement. The UK has also introduced a specific legislative definition of the term, and this has been implemented in Ofcom’s Broadcasting Code (in Section Nine of the Code¹⁴) and associated guidance since 28 February 2011.

- 6.31 As such, the UK would question the value of the Commission seeking now to introduce a specific definition of the term at EU level, or indeed any guidelines on a particular approach to defining it.

What type of programmes can include product placement? How to define light entertainment programmes?

- 6.32 The UK reiterates its view on the statement made in the 2004 Interpretative Communication that where the Directive’s provisions are left open to interpretation, and in the absence of relevant case law, the approach of the Communication rests on the *in dubio pro libertate* principle.

- 6.33 Given the absence of any case law, and the subjective nature of the term ‘light entertainment’, the UK considers it is a matter for individual Member States to

¹⁴ <http://stakeholders.ofcom.org.uk/binaries/broadcast/831190/section9.pdf>

decide what programmes fall within this genre. Ofcom has provided guidance on this issue to UK broadcasters in its guidance to Section Nine of the Broadcasting Code (see paragraph 1.65 of the guidance¹⁵).

Brands as producers of content: How is editorial independence to be understood? How to distinguish between sponsorship and product placement in these cases?

- 6.34 The UK notes that where a brand owner funds a programme with a view to promoting its name, trade mark etc. and the brand owner is not a broadcaster or programme producer, such funding arrangements will meet the definition of sponsorship and are subject to the relevant rules. The UK would also consider any reference to the funder's products, services or trade marks during such programmes to be subject to the UK's product placement rules.
- 6.35 The UK observes that the definitions of 'sponsorship' and 'product placement' arguably do not cover circumstances in which a brand owner is the producer of a programme in which its brand features. This is because both definitions rely on payment (or similar consideration) to a third party (usually the broadcaster or programme producer).
- 6.36 However, the UK also believes that such production arrangements may fall within the wider definition of an 'audiovisual commercial communication'. For this reason, in these circumstances, the UK would apply rules that:
- require broadcasters to maintain editorial independence (in effect meaning that broadcasters must make the final decision on which references appear in the programme) (see Rule 9.1 of the Broadcasting Code);
 - ensure that editorial content is distinct from advertising (Rule 9.2);
 - prohibit surreptitious advertising (Rule 9.3);
 - prevent programmes promoting products and services (Rule 9.4); and
 - prevent programmes giving undue prominence to products and services (Rule 9.5).

Teleshopping

Constitutive elements: What elements need to be present to constitute a teleshopping offer? Object/price/link or place to buy? Link to the advertiser's website? SMS number to order?

- 6.37 In the UK, for an advertisement to be treated as teleshopping it must feature a direct offer to the public. Direct offers are those capable of being taken up by viewers without the need to seek information or other material from any other place. A direct offer must clearly identify the particular product or service which is available, the price and a means of purchase.

¹⁵ <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section9.pdf>

- 6.38 Further, the character of teleshopping must be one in which the presentation of direct offers is the principal purpose of the broadcast; other material included that does not itself contain direct offers must be justifiable as related to the direct offers and be appropriately limited.

Teleshopping / longer forms of AV commercial communications: What type of longer forms of advertising do you see?

- 6.39 In the UK, most long form advertising is teleshopping. Common examples of this include psychic, daytime chat and adult chat genres. Telepromotions are not generally featured on UK television. However, the UK does have a small number of self-promotional channels, devoted to the promotion of the products and services of the licensee.

Teleshopping/ interactive advertising: how to distinguish between these two notions?

- 6.40 The UK understands interactive advertising to be a form of promotion of products and services which involves mutual action between consumers and advertisers. In particular, as set out in the 2004 Interpretative Communication, this form of advertising allows the viewer to supply information to the advertiser by an interactive return path or to explore an interactive environment via the advertising. Such advertising may or may not involve a direct offer of sale (see paragraphs 6.37 and 6.38 above). Only if a direct offer was present would the UK consider interactive advertising to meet the definition of teleshopping.
- 6.41 The UK notes that while there are no specific provisions in the Directive for interactive advertising, this was not an area subject for discussion by the EU legislators in the last review and experience to date does not suggest this being problem. We therefore do not understand what issues the Commission is seeking to address in this regard with a revised Communication
- 6.42 In conclusion on this section, as illustrated above, the UK has provided very detailed and extensive guidance to broadcasters in the area of audiovisual commercial communications – we are aware that this is also the case in other Member States, where the approaches may differ. In our experience, this has helped broadcasters in their understanding and compliance with the rules, and we have had, to date, a relatively limited number of consumer complaints in this area. **We therefore do not see a need for either further guidance of this nature or additional clarifications at EU level.**

7) Concluding remarks

- 7.1 The UK acknowledges the useful clarity and detail provided by the 2004 Interpretative Communication at a time when a number of new advertising techniques were emerging and their compatibility with the amended TWVF Directive may have been unclear.

- 7.2 However, the UK also notes the substantial change in circumstances since 2004, and reiterates the view expressed above that it is not convinced that the approach and style, which underpinned the 2004 Communication, remains appropriate.
- 7.3 The UK considers that, given the speed at which the advertising market and the audiovisual sector overall are developing, it is difficult for the Commission to future-proof any such Communication. Furthermore we see significant risks associated with setting out detailed guidance on specific practices, or indeed in attempting to predict which practices will be relevant a few years from now. This approach:
- risks undermining existing and well established approaches and increasing legal uncertainty;
 - could result in an unduly restrictive approach being applied to certain provisions of the Directive where there should be freedom for Member States to adapt and apply the requirements, in a way that reflects market developments within their own national frameworks;
 - risks adding significant pressure to the current challenge of maintaining adequate levels of funding to ensure a continued high quality standard of European production and certain programme genres;
 - risks creating inconsistencies in the application of certain provisions across linear and on-demand services; and
 - does not offer the ability to recognise the diversity that exists in different European markets or maintain flexibility to keep pace with technological change more widely.
- 7.4 For these reasons we would invite the Commission to initiate a dialogue with all relevant stakeholders on high level principles that should underpin the future regulation of commercial communications. If the case can be made for a revision to the Communication, then we believe any such amendments would be better restricted to these high level principles. They should also be integrated into the wider strategic discussions about Connected TV and the future of the sector in Europe.
- 7.5 Should the Commission wish to discuss or explore further any of the views set out above, DCMS and Ofcom are, of course, most willing to assist it in any way.

The Department for Culture, Media and Sport & Ofcom

17 September 2012