

Commercial References in Television Programming

Response of Channel 5 Broadcasting Ltd to Ofcom's proposals on revising the Broadcasting Code

Introduction

Channel 5's view of product placement has remained consistent over the last few years: we believe it could result in a modest new revenue stream for commercial television, although this will take some years to develop. And we believe appropriate and sensitive regulation will ensure product placement is acceptable to viewers and not undermine the editorial integrity of programmes.

We agree broadly with many of Ofcom's proposals and have suggested areas for further guidance and clarification where appropriate. However, we disagree fundamentally with the proposal to clarify that single dramas are a form of film made for television. In addition, we disagree with Ofcom's proposal to require audio signalling of product placement; we believe that Ofcom's definition of thematic placement is too wide; and we disagree with the proposal to prohibit product placement in specialist factual programming.

We believe further clarification is required on the issue of sponsor credits within programmes. We also believe the undue prominence rule to be unnecessary where products have not been placed and believe the opportunity should be taken to delete it from the Code.

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

- 1.1 *Do you agree that it is appropriate to apply product placement rules to paid-for references in programmes that are not included for a commercial purpose? If not, please explain why.*

Yes. We believe the application of the rules to paid-for references in programmes that are not included for a commercial purpose will provide clarity that such references are permitted, and consistency with references which are included for a commercial purpose. Furthermore, such an approach appears to be consistent with the definition of 'product placement' contained within the Audio Visual Media Services Directive which does not distinguish between inclusions or references for commercial and non-commercial purposes.

- 1.2 *Please identify any potential impacts of Ofcom's proposal that you consider should be taken into account, and provide evidence, wherever possible.*

We agree that extending the range of product placement opportunities to non-commercial placement also offers increased potential revenue sources for broadcasters although we, like Ofcom, are unable to estimate at this stage what the potential value of this proposal would be in terms of increased revenue. References to governmental departments, agencies, and campaigns – including those funded by the COI – would presumably fall within this area of permitted paid-for references.

- 1.3 *Please identify any areas of this proposal which, if it is accepted, you consider Ofcom should issue guidance on.*

The net effect of Ofcom's proposal seems to be that, provided they comply with the rules in the Code, any paid-for reference in a programme is permitted, regardless of its purpose. It may be useful to state this in guidance.

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

- 2.1 *Are there any impacts we have not identified above that you think would result from our proposal to clarify that single dramas are a form of film made for television? (See proposed Rule 9.8). If so, please provide evidence wherever possible.*

We believe Ofcom is fundamentally mistaken to suggest the introduction of product placement has to lead to a change in the way it administers COSTA. As Ofcom points out, there is no definition of the term “film made for television” in the AVMS Directive. More importantly, the references in Articles 11 and 20 are not identical:

Article 11 refers *inter alia* to “films and series made for audio-visual media services”, with ‘films’ and ‘series’ clearly identified as two separate types of genre.

Article 20 refers to “films made for television (excluding series, serials and documentaries)”. Here, ‘series’ is clearly a sub-genre of ‘films made for television’.

Therefore, it would be wrong to conclude they have exactly the same meaning: the phrase “film made for television” does not have a clear definition and is obviously used somewhat differently in the two Articles. We believe it is unnecessary, not to say perverse, for Ofcom to assume that the phrase should be interpreted in the way it proposes.

Secondly, the introduction of such a rule would represent a significant disincentive to the production and showing of single dramas on all commercial channels, such as the single dramas currently being shown on ITV1 (including the acclaimed *U Be Dead* and the forthcoming *Joe Maddison’s War* by the late Alan Plater) and such initiatives as Sky Arts’ *Playhouse: Live* series of live single plays. The loss of value caused by restricting the number of centre breaks cannot be compensated for by product placement; this year broadcasters will gain £3.2 billion in advertising revenue, while the most respondents to the recent DCMS consultation¹ believed product placement would add, after it had been in place for several years, was £175.5 million. Furthermore, unlike established dramas like soaps and returning series, single dramas are not particularly attractive for product placement. So the effect of what Ofcom is proposing would be a loss of advertising revenue from the restriction on advertising breaks in single dramas that would not be offset by any possible gains from product placement.

- 2.2 *Please identify any areas of this clarification which you consider Ofcom should issue guidance on.*

Ofcom should provide fresh clarification that makes clear the definitions in Articles 11 and Articles 20 are not linked, and issue appropriate guidance.

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

- 3.1 *Please identify any potential impacts of the rule prohibiting product placement in news, and provide evidence, wherever possible. (See proposed Rule 9.9(a)).*

There may be occasion where reference is made in UK-produced news programming to news programming produced overseas. For example, during the US presidential election, reference was often made to brief sequences from US news broadcasts. Similarly, when Susan Boyle’s appearance on *Britain’s Got Talent* was reported by the US news networks, reference was made in UK-news programmes to those appearances. In such circumstances UK broadcasters may have neither time to remove paid-for references (in the case of products appearing on the US news broadcast set – e.g. a branded coffee cup in front of a newsreader) or knowledge of any

¹ http://webarchive.nationalarchives.gov.uk/20100407120701/http://www.culture.gov.uk/images/consultation_responses/Consultation_Report_final.pdf

product placement deals which are in existence (in the case of non-branded products which appear naturally during the course of the programme – e.g. the suit worn by a news presenter).

Furthermore, UK news programmes may refer to non-news programmes containing product placement. It would not be unusual for a UK news programme to refer to the final episode of a series of *American Idol*. The clip in question may contain paid for references which, again, the UK broadcaster may have neither knowledge nor ability to edit.

The prohibition of product placement in news should not apply where a UK broadcaster is merely referring briefly to, or including a brief clip from, a non-UK programme for the purpose of reporting a current news event in the same way that broadcasters do not need to apply for permission to include such sequences for the purpose of avoiding copyright infringement.

3.2 *Please identify any areas of this rule which you consider Ofcom should issue guidance on.*

Ofcom has stated that licensees will need to ensure that they have systems in place to identify instances of product placement included in non-UK news programmes and “remove” the placement prior transmission. Ofcom should issue guidance on acceptable methods of “removal” of such placement; in particular to clarify whether blurring or pixellation of visual references and/or muting or bleeping of audio references would be sufficient, or whether Ofcom would require more intrusive editing of programmes containing such placement – for example, the removal of sequences containing any such placement in their entirety.

Proposal 4: Thematic placement

4.1 *Do you agree that clarification that thematic placement is prohibited is appropriate? (See proposed Rule 9.10). If not, please explain why.*

The AVMS Directive asserts that thematic placement should be prohibited where it influences the content of programmes in such a way as to affect the responsibility and the editorial independence of the media service provider. The DCMS consultation on product placement defined thematic placement as occurring where “a placed storyline, in which a scene, or a whole programme, is contrived so as to advertise a product or service”, and added that the Government considers that the AVMS Directive means that product placement is acceptable under EU law only where it involves products or services appearing in a wholly natural way that is entirely justified by the editorial context in which they appear.

So whilst we agree that storylines or items in programmes cannot be included simply because a third party has paid for them to appear, we do not agree that it follows that a storyline which appears naturally within the editorial of the programme cannot benefit from product placement. As the DCMS consultation noted, a broadcaster might be paid by a home insurance company or trade association to include a storyline featuring house insurance in a soap opera. Provided such a storyline would fit naturally within the editorial content of the programme, and provided that the responsibility and the editorial independence of the broadcaster is maintained, we do not believe that such an arrangement should be prohibited under the Code.

If, to take another example, a storyline in a soap opera involved a character having a day out somewhere we do not believe that the owner of a theme park or organiser of a music festival should be prevented from paying for a reference to their theme park or music festival if the producers decide that the character can visit their particular park or festival any more than a tomato ketchup or fruit juice manufacturer will be prevented from paying for a visual or verbal reference to their product whilst the family is eating breakfast in their kitchen, even if the producers had not originally envisaged tomato ketchup or orange juice being on the breakfast table.



We do not believe that the statement in the AVMS imposes a blanket ban on thematic placement. Instead, we believe the Code should simply clarify that storylines and items in programmes may not be distorted to accommodate paid-for references.

- 4.2 *Do you agree with Ofcom's proposed description of thematic placement? (See proposed Rule 9.10). If not, please explain why, and suggest drafting changes, if appropriate.*

Ofcom should simply clarify that product placement may not be used to distort programme content. There should be no suggestion that where a storyline, script, or programme features a particular issue or reference to a third party's aims, objectives, beliefs or interests that it will automatically be found to breach the rule preventing influence on the content or scheduling of a programme in a way that affects the broadcaster's editorial responsibility and independence.

- 4.3 *Please identify any potential impacts of Ofcom's proposal that you consider should be taken into account, and provide evidence, wherever possible.*

Ofcom's proposal goes further than the requirements of the AVMS and may have the effect of preventing what would otherwise be legitimate product placement. Provided the broadcaster is not contractually obliged to refer to a product or service *in any particular manner*, and provided the content of the programme has not been *distorted so as to accommodate the placement in a manner that does not appear to occur naturally within the programme*, it should be possible for placement to be included as a result of the involvement of the placer.

- 4.4 *Please identify any areas of this proposal which, if it is accepted, you consider Ofcom should issue guidance on.*

Influence on the editorial independence and responsibility of the broadcaster can be said to be unacceptable if it affects the script-writing of a programme, or artificially influences a programme's natural development. Unless the broadcaster or producer has assigned the right to place references to products or services to a third party, the broadcaster's editorial independence and responsibility will always be maintained because it will always be open to the broadcaster to edit out the placement or indeed not to transmit the programme containing it. Ofcom will be able to assess whether such responsibilities have been transferred by requesting copies of agreements between the broadcaster/producer and product placing party.

Proposal 5: Specialist factual programming

- 5.1 *Do you consider that it is appropriate to prohibit product placement in specialist factual programmes produced under UK jurisdiction? If not, please explain why.*

No. Rules that:

- a) prevent product placement from influencing the content and scheduling of a programme in a way that affects the responsibility and editorial independence of the broadcaster;
- b) prevent references to placed products, services and trade marks from being promotional or unduly prominent

will serve to maintain the editorial integrity of programmes. The DCMS consultation on product placement did not suggest "specialist factual programmes" as meriting special consideration, and the Act does not prohibit product placement in such genres of programme.

- 5.2 *Do you agree with the meaning for "specialist factual programmes"? (See proposed Rule 9.14). If not, please explain why, and suggest drafting changes, if appropriate.*

No. We do not believe it is possible to define a “specialist factual programme” particularly in light of the trend for factual programmes to entertain and educate audiences. Channel 5’s series *Extraordinary People*, for example, includes elements which are both investigative and entertaining in nature. It is unclear to us whether product placement would be prohibited in this series if it is prohibited in “specialist factual programmes”.

- 5.3 *Please identify any potential impacts of either permitting or prohibiting product placement in specialist factual programmes that you consider should be taken into account, and provide evidence, wherever possible.*

If product placement is not permitted in programmes covering educational, science, medical, or arts subjects, or those that are investigative in nature, such programmes may not be made by broadcasters who may prefer to commission programmes in which product placement is permitted. Permitting placement in these programmes will increase the revenue opportunities for broadcasters.

- 5.4 *Please identify any areas of this proposal which, if it is accepted, you consider Ofcom should issue guidance on.*

If Ofcom decides that a prohibition on product placement in specialist factual programmes is appropriate we believe clearer guidance is needed to define the types of programme that would be covered. As explained above, we do not believe it is possible to define this genre narrowly enough to provide the certainty broadcasters require, nor do we believe such a prohibition is necessary to achieve the requirements of the AVMS that programmes are not distorted for commercial purposes.

Proposal 6: Additional prohibited categories

- 6.1 *Do you agree that it is appropriate to prohibit the placement of those products and services that are not allowed to be advertised on television? (See proposed Rule 9.15). If not, please explain why.*

Yes.

- 6.2 *Do you consider that the wording of proposed Rule 9.15(f) is appropriate? If not, please explain why, and suggest drafting changes, where appropriate.*

Yes.

- 6.3 *Do you agree that it is unnecessary to apply advertising scheduling restrictions to product placement? If not, please explain why.*

Yes.

- 6.4 *Please identify any potential impacts of the proposals that you consider should be taken into account, and provide evidence, wherever possible.*

We have not identified any potential impacts that should be taken into account.

- 6.5 *Please identify any areas of this proposal which, if it is accepted, you consider Ofcom should issue guidance on.*

Ofcom should clarify that only those arrangements which result in the payment or passing of other consideration to any relevant provider or any person connected with a relevant provider would amount to prohibited product placement under these rules. In particular, it is important



to clarify that a reference to a product or service which cannot be advertised on television and has not been included as a result of any payment to the broadcaster or producer would not be prohibited.

Proposal 7: Signalling

- 7.1 *Do you consider it is appropriate to require broadcasters to identify product placement by means of a universal neutral logo and universal audio signal? (See proposed Rule 9.16). If not, please explain why, suggesting alternative approaches where appropriate.*

We agree that product placement should be identified by means of a logo, although broadcasters should be free to choose the precise form and design of the logo provided basic requirements (such as the letter P in an enclosed circle) are met to enable broadcasters to match the design of the logo to their own channel's branding and presentational requirements.

We are, however, opposed to the signalling of a product placement by means of an audio signal, universal or otherwise. We believe such a requirement would be a disproportionate response to the obligation to signal product placement to viewers and that the majority of viewers would find constant audio, as well as visual, signalling of product placement to be very annoying.

As Ofcom has stated in its consultation document, the RNIB estimates that there are nearly 2 million blind or partially sighted people in the UK. According to the Office for National Statistics' most recent figures, the population of the UK was 61,792,000 in mid 2009.² Therefore, approximately 3.24% of the population is blind or partially sighted. We believe the irritation to the great majority of viewers (including many blind and partially sighted ones) of regular announcements or other aural indicators of product placement will outweigh the benefit of signalling product placement to those unable to see an on-screen logo.

Ofcom should also bear in mind that the great majority of product placement is likely to be visual and therefore not evident to blind people. Furthermore, a mere audio signal that a programme contains product placement is unlikely to be of much use to partially sighted viewers who will not be given any information about which products or services have been placed. An audio announcement describing the nature and identity of any product placement would be likely to result in undue prominence, which is prohibited. We do, of course, want to do all we can to cater for those who have disabilities. However, in the circumstances, we do not believe that requiring signalling of product placement using audio would be a proportionate measure.

Furthermore, Audio Description on TV is available on digital television via Sky, Freesat, Virgin Media and certain Freeview devices.³ This service provides commentary which describes body language, expressions, and movements, making the story clear to viewers through sound. Product placement could therefore be signalled by means of an audio signal on this service. This would ensure that those who are blind or partially sighted were made aware of product placement without annoying other viewers.

- 7.2 *Please provide comments on the proposed criteria, and any additional or alternative criteria which you consider should define the visual signal, including views on the nature, size and duration of the signal.*

We agree broadly with Ofcom's proposed criteria for determining how any universal neutral logo looks but do not believe it is necessary for the circular shape to be coloured, as any one colour may suit the on-air presentational and branding style of one broadcaster but not of

² <http://www.statistics.gov.uk/cci/nugget.asp?id=6>

³ http://www.rnib.org.uk/livingwithsightloss/tvradiofilm/television/adtv/Pages/audio_description_tv.aspx

another. We do not see any need for there to be a maximum duration for the appearance of the logo.

We therefore suggest the following changes to the proposed criteria:

- the letter P, or letters PP, would be shown in a circular shape;
- the logo would be between 0.5% and 2% of the total screen size (or equivalent pixel size) (i.e. a similar size to many on-screen channel identification graphics/logos);
- it would appear in one of the corners of the screen (for example, opposite any channel or programme on-screen graphic/logo or other message); and
- it would appear on screen for ~~no less than 3~~ seconds.

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7.3 *Please provide comments on the proposed criteria for determining how any universal audio signal sounds, and any additional or alternative criteria which you consider should define the audio signal, including views on the nature and duration of the signal.*

Our reasons for opposing Ofcom's proposal for this requirement are outlined above. Furthermore, we are unable to identify any acoustic sound that would act as a universal signal that a programme contained product placement that would not risk confusion with any other sound that may appear naturally in a programme. Nor would it be proportionate to restrict broadcasters to using such a signal only in relation to the signalling of product placement. The proposal to broadcast a verbal announcement will, in our view, serve only to annoy viewers – particularly if the requirement is to play the audio signal at the start of each programme part.

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7.4 *Please provide comments on whether you consider that such criteria should be specified in the Code or in Ofcom's guidance. If you consider that the criteria should not be specified in either, please explain why.*

The criteria should be specified in Ofcom's guidance. Failure to comply with the letter of the criteria should not be a breach of a Code rule provided the spirit of the rule and requirement of the Act has been complied with, i.e. that the product placement has been signalled appropriately.

7.5 *Do you consider it is appropriate to require broadcasters to provide the audience with a list of products/services that appear in a programme as a result of product placement arrangements, either in the end credits or on the broadcaster's website? (See Rule 9.17(a) and (b)). If not, please explain why.*

We are not opposed to this proposal, although Ofcom should clarify whether the requirement will be to list the actual products/services that have been placed as well as the brands of the products or services. We would also wish to be able to credit the companies responsible for the product placement (which may be the case where an agency has been involved).

7.6 *Do you consider that the wording of proposed Rule 9.17(a) and (b) is appropriate? If not, please explain why, and suggest drafting changes, if appropriate.*

The wording of proposed Rule 9.17(a) and (b) should clarify exactly what should be listed. The wording should also clarify that where the product placement information is made available on the broadcaster's website as well as in the programme's credits the prohibition on scaling down the end credits will not apply. We suggest the following drafting changes:

- 9.17 Broadcasters must make available to the audience a list of those products, services or trade marks that have featured in a programme as a result of a product placement arrangement

and/or of the third parties who have paid for or arranged the product placement. This must be provided in a brief, non-promotional manner ✓

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- a) in the programme's end credits; and/or
- b) on the broadcaster's website, with a reference to this given at the end of the programme.

Product placement information included in the programme's end credits should not include any trade marks, logos or other distinctive signs. If the programme's end credits are likely to be minimised or scaled down, the product placement information should be positioned before this occurs to ensure that it is clear to the audience if the information is not also made available on the broadcaster's website.

- 7.7 *Do you agree that broadcasters should include additional description text alongside the visual and audio signal for the first month that they are transmitted? If not, please explain why.*

No. The obligation to signal to viewers that the programme contains product placement will be sufficient to satisfy the Act's requirements that product placement is signalled clearly. We agree with the proposal to transmit an audience awareness message if broadcasters show programmes that must be signalled during the first six months of the rules being in force and feel that will be sufficient to explain the meaning of the signals to viewers. Ofcom should balance the need to inform viewers with the irritation to them of constantly having to view intrusive text.

- 7.8 *Do you agree that broadcasters should transmit an audience awareness message if they show programmes that must be signalled during the first six months of the rules being in force? If not, please explain why.*

Yes.

- 7.9 *Please provide your comments on the proposals we have set out on the key messages, timing and duration of the audience awareness campaign.*

We agree with Ofcom's proposals on the key messages that the audience awareness campaign should include and although we agree Ofcom could provide a webpage that provides details of where viewers can find more information about product placement, broadcasters will also be free to provide their own source of information (perhaps on their own webpage).

We do not believe that broadcasters should be required to transmit an audience awareness campaign for the full duration of the six month implementation period and suggest that Ofcom's requirements should be drawn up to ensure viewers who are likely to watch programmes in which product placement occurs are those to whom any campaign should be targeted. Ofcom's formal requests should ensure broadcaster's campaigns are targeted only at viewers of programmes in which product placement occurs or is likely to occur, and should be no more than one month in duration.

- 7.10 *Please identify any potential impacts of Ofcom's proposals that you consider should be taken into account, and provide evidence, wherever possible.*

The use of broadcaster's promotional airtime inventory to educate viewers about product placement is costly and will prevent broadcasters from using this airtime to promote other programmes which may reduce the number of viewers to programmes and associated advertising revenue. It is therefore important to ensure that Ofcom's request is proportionate and targeted to ensure only those viewers who will watch programmes in which product placement has occurred are made aware of the meaning of the signals.

7.11 Please identify any areas of these proposals which, if they are accepted, you consider Ofcom should issue guidance on.

Ofcom's guidance should provide advice on the form and content of any list of products, services or trademarks that appears in the programme's end credits or on the broadcaster's website, particularly whether it is necessary to identify the branded or generic product or service that has been placed. For example, in the case of the placement of a breakfast cereal called *Oat 'n' Bran Clusters* made by the Tasty Breakfast Cereal Company and placed by an agency called Subtle Placements, there are a number of ways of complying with the proposal, e.g.:

Product Placement Breakfast cereal

or

Product Placement Oat 'n' Bran Clusters

or

Product Placement Tasty Breakfast Cereal Company

or

Product Placement Subtle Placements

or any combination of the above.

Proposal 8: Sponsor references (product placement) within programmes

8.1 Do you consider that it is appropriate to allow sponsors to product place in programmes they are sponsoring? If not, please explain why.

Yes. However, Ofcom's note explaining that 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 should clarify that this applies only where the reference appears as a result of a commercial arrangement with the broadcaster or a connected person for the reference to appear in the programme.

8.2 Please identify any potential impacts of Ofcom's proposal that you consider should be taken into account, and provide evidence, wherever possible.

Failure to include the clarification outlined above could imply that references to the sponsor that appear in a sponsored programme which do not appear as a result of a commercial arrangement with the broadcaster or a connected person (e.g. where a sponsored programme involves coverage of a sporting event which may include references to advertising and other signage already *in situ* at the event location), would be treated as product placement, which we do not believe to be Ofcom's intention. It is also important to clarify that only commercial arrangements for the reference to appear in the programme would be covered by this note as the broadcaster or producer may also, separately, be the organiser or producer of the event itself.

8.3 Please identify any areas of this proposal which, if it is accepted, you consider Ofcom should issue guidance on.

Ofcom should clarify that, where a sponsorship agreement also makes reference to the placing of the sponsor's products in the programme being sponsored, this will not amount to the

sponsor being deemed to having influence over the content and scheduling of the programme in a way that affects the responsibility and editorial independence of the broadcaster.

Proposal 9: Identifying sponsorship arrangements (sponsorship credits)

- 9.1 *Do you consider it is appropriate to replace the rule requiring sponsorship arrangements to be transparent with a requirement that all sponsorship credits include a clear statement informing the audience of the sponsorship arrangement? (See proposed Rule 9.22). If not, please explain why.*

Yes.

- 9.2 *Do you consider it is appropriate to amend those rules requiring sponsorship credits to be separated from editorial and advertising, to rules requiring that credits must be distinct from editorial and advertising? (See proposed Rules 9.23 and 9.24). If not, please explain why.*

Yes.

- 9.3 *Do you consider the drafting of proposed Rules 9.22, 9.23 and 9.24 is appropriate? If not, please explain why, and suggest drafting changes were appropriate.*

Yes.

- 9.4 *Please identify any potential impacts of Ofcom's proposals that you consider should be taken into account, and provide evidence to support these, wherever possible.*

We have not identified any potential impacts.

- 9.5 *Please identify any areas of these proposals which, if it is accepted, you consider Ofcom should issue guidance on.*

Ofcom's existing helpful guidance on the content of the sponsorship credits should be updated to reflect the new provisions of the Code.

Proposal 10: Allowing sponsorship credits during programmes

- 10.1 *Do you consider that it is appropriate for sponsorship credits to be broadcast during programmes? (See proposed Rule 9.25). If not, please explain why.*

Yes, although we are very unclear as to how Ofcom envisages this working in practice. Ofcom should make clear whether this rule would permit sponsorship credits to be broadcast at any point during a sponsored programme. For example, we are not clear whether this would allow some editorial content to appear followed by the sponsorship credit followed by the programme's title sequence. Nor are we clear whether this would permit sponsorship credits to be broadcast at various points throughout the programme, such as between scenes during a drama, between items during a magazine programme, as a caption during the programme similar to the "coming up next" captions commonly employed by broadcasters, or in or over an on-screen DOG. Would this proposal allow for sponsorship credits to appear around match statistic graphics during coverage of a sporting event? Would it be permissible to broadcast a neutral credit halfway through a programme as a caption at the bottom of the screen?

Ofcom says in its consultation document that it is proposing to introduce constraints in relation to the *scheduling* of sponsorship credits during programmes but, other than proposing that sponsorship credits shown during the programme may not coincide with sponsor references within the programme, does not outline further proposals in this regard.

10.2 Do you agree that sponsorship credits shown during programmes should not coincide with sponsor references (product placement) within the programme? (See proposed Rule 9.29). If not, please explain why.

Yes.

10.3 Do you consider the drafting of proposed Rules 9.25 and 9.29 is appropriate? If not, please explain why, and suggest drafting changes, where appropriate.

Rule 9.29 should be amended to read:

Where a sponsor has placed products/services in the programme it is sponsoring, sponsorship credits broadcast during the programme must not appear simultaneously with the appearance of the placed product/services.

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to avoid giving the impression that sponsorship credits cannot appear immediately before or after the appearance of the placed product/service.

10.4 Please identify any potential impacts of Ofcom's proposal that you consider should be taken into account, and provide evidence to support these, wherever possible.

We have not identified any potential impacts.

10.5 Please identify any areas of these proposals which, if they are accepted, you consider Ofcom should issue guidance on.

Ofcom must give guidance, either in the form of clearer drafting of this rule, or in non-binding guidance, on how it envisages the broadcast of sponsorship credits during programmes actually occurring to provide clarity to broadcasters and industry.

Proposal 11: Content of sponsorship credits during programmes

11.1 Do you consider that it is appropriate to limit the content of sponsorship credits broadcast during programmes? (See proposed Rule 9.27). If not, please explain why.

Yes, although Ofcom should clarify that it will continue to be permissible to separate sponsorship credits from editorial content in the case of sponsored programme items. This will ensure that existing (and any future) sponsorship arrangements that include provision for the broadcast of sponsorship credits containing more than the minimum information can continue.

11.2 Do you agree that sponsorship credits broadcast during programmes should not conflict with product placement restrictions? (See proposed Rule 9.28). If not, please explain why.

No. Sponsorship is a well established practice and well understood by audiences. The government has not placed the same restrictions on sponsorship as it has done on product placement and we do not consider that the broadcast of a sponsorship credit during a programme would circumvent the restrictions on product placement, particularly if Ofcom's proposal that any sponsorship credits broadcast during programmes must consist of a brief neutral visual or verbal statement identifying the sponsorship arrangement.

11.3 Do you consider the drafting of proposed Rules 9.27 and 9.28 is appropriate? If not, please explain why, and suggest drafting changes, where appropriate.

To address our concerns outlined in our answer to question 11.1 we suggest the following drafting amendment to proposed Rule 9.27:

- 9.27 Sponsorship credits broadcast during programmes which are not separated from the editorial content must not be unduly prominent. They must consist of a brief neutral visual or verbal statement identifying the sponsorship arrangement. This can be accompanied by only a static graphic of the name, logo, or any other distinctive symbol of the sponsor. There must be no advertising messages, calls to action or any other information about the sponsor, its products or services.

We believe proposed Rule 9.28 should be deleted.

- 11.4 *Please identify any potential impacts of Ofcom's proposals that you consider should be taken into account, and provide evidence to support these, wherever possible.*

As we have identified above, Ofcom must ensure that existing sponsorship arrangements (such as the sponsorship of a weather bulletin in a news magazine programme) are not affected by the new rules.

- 11.5 *Please identify any areas of these proposals which, if they are accepted, you consider Ofcom should issue guidance on.*

We have not identified any areas on which further guidance would be required.

Proposal 12: Principles

- 12.1 *Do you agree with the proposed revisions to the principles? If not, please explain why, and suggest drafting changes, where appropriate.*

Yes.

- 12.2 *Please identify any potential impacts of Ofcom's proposals that you consider should be taken into account, and provide evidence, wherever possible.*

We have not identified any potential impacts of the proposals that should be taken into account.

Proposal 13: Rule on distinction between editorial content and advertising

- 13.1 *Do you consider that the proposed Rule 9.2 requiring that there is distinction between editorial content and advertising is appropriate? If not, please explain why, and suggest drafting changes, where appropriate.*

Yes.

- 13.2 *Please identify any potential impacts of Ofcom's proposal that you consider should be taken into account, and provide evidence, wherever possible.*

We have not identified any potential impacts of the proposals that should be taken into account.

- 13.3 *Please identify any areas of this proposal which, if it is accepted, you consider Ofcom should issue guidance on.*

We would welcome guidance from Ofcom on what constitutes appropriate distinction in different circumstances, particularly in relation to the promotion of programme-related material and broadcasting-related services, integrated sponsorship credits/titles sequences, and on the identification of advertising breaks.

Proposal 14: Rules prohibiting surreptitious advertising

14.1 Do you consider it is appropriate to include a rule prohibiting surreptitious advertising? If not, please explain why.

Whilst we agree that it is appropriate to include a rule prohibiting surreptitious advertising, we believe that its inclusion permits Ofcom to remove Rule 9.5 preventing undue prominence. It is our understanding the undue prominence rule emanates historically from the prohibition of product placement and surreptitious advertising. Now that:

- a) product placement is permitted,
- b) surreptitious advertising is specifically prohibited,
- c) editorial and advertising elements of the service must be kept distinct, as opposed to separate, and
- d) the promotion of products and services is prohibited,

there does not appear to be any need or justification for the undue prominence rule other than in relation to product placement. The AVMS Directive's only reference to undue prominence is in relation to product placement. This would also mirror the requirements for on-demand programmes which are not required to comply with the undue prominence rule other than in respect of product placement. For example, the wearing of a branded football shirt during a football tournament, or the wearing by a presenter of a shirt bearing the 2012 Olympics logos, may be deemed "unduly prominent" under Ofcom's current rules but would not be product placement or surreptitious advertising and should sensibly be permitted.

14.2 Do you consider that the wording of the proposed rule and meaning is appropriate? (see proposed Rule 9.3). If not, please explain why, and suggest drafting changes, where appropriate.

In order to (a) reflect the AVMS Directive more accurately, (b) avoid giving the impression that surreptitious advertising is permitted in some circumstances, and (c) enable removal of the undue prominence rule, we propose the following amendments to the proposed Rule 9.3:

9.3 Surreptitious advertising is prohibited.

Surreptitious advertising involves a reference to a product or service within a programme, where such a reference is intended by the broadcaster to serve as advertising and this is not made clear to the audience. Such advertising ~~shall, in particular, be considered as intentional if it is~~ included in programmes in return for payment or other valuable consideration.

Deleted: may be

14.3 Please identify any potential impacts of the proposed rule that you consider should be taken into account, and provide evidence, wherever possible.

As we have stated above, we consider that the major impact of inclusion of the proposed rule would be to enable removal of the undue prominence rule. In addition, if the draft rule is not amended as we have suggested, it may give the impression that surreptitious advertising is permitted if it is included in programmes in return for payment or other valuable consideration, which is clearly not Ofcom's intention.

14.4 Please identify any areas of this proposal which, if it is accepted, you consider Ofcom should issue guidance on.

We believe it would be helpful to provide further clarification that a reference to a product or service in a programme will be considered to be surreptitious advertising only if it meets three



cumulative conditions, i.e. if it is (a) intended by the broadcaster; (b) done to serve advertising; and (c) capable of misleading viewers as to its nature.

Proposal 15: Removal of the virtual advertising rule

15.1 *Do you consider that it is appropriate to remove the virtual advertising rule? If not, please explain why.*

Yes.

15.2 *Please identify any potential impacts of the proposed removal of the virtual advertising rule that you consider should be taken into account, and provide evidence, wherever possible.*

We have not identified any potential impacts.

Relevant requirements of the AVMS Directive and the Act

16.1 *Do you agree that the explicit requirements of the AVMS Directive and the Act are reflected appropriately in the proposed rules for product placement, as set out in Part 4? If not, please explain why and suggest drafting changes, if appropriate.*

Other than where we have suggested drafting changes elsewhere in this response we agree that the explicit requirements of the AVMS Directive and the Act are reflected appropriately in the proposed rules for product placement.

16.2 *Are there any other relevant matters you consider that Ofcom should take into account in this Review? If so, please provide details, with supporting evidence, wherever possible.*

No.

Alternative approaches

16.3 *Do you wish to suggest an alternative approach to the regulation of product placement, and its impact on sponsorship, and other rules in the revised Section Nine of the Code?*

If so please outline your proposals, which must comply with the Communications Act 2003 (as amended by The Audiovisual Media Services (Product Placement) Regulations 2010), the AVMS Directive, Article 10 of the European Convention on Human Rights and Schedule 1 of The Consumer Protection from Unfair Trading Regulations 2008.

No.

New Code rules in force

16.4 *Do you agree that the revised Section Nine of the Code should come into force on the same date it is published by Ofcom? If not, please explain why.*

Yes, although proposals which impose new restrictions on broadcasters, such as the proposal to classify single dramas as a form of film made for television (if accepted), and to require that all sponsorship credits include a clear statement informing the audience of the sponsorship arrangement should not come into force immediately to allow broadcasters sufficient time to prepare for compliance with them. Furthermore, broadcasters must be made aware of Ofcom's requirements in respect of any audience awareness campaign in respect of product placement prior to the publication of the new Code.

16.5 If you would prefer that the revised Section Nine of the Code does not come into force at the time it is published, to allow a period of preparation/ implementation, how long would you prefer this period to be? Please give reasoning.

We would require a period of no less than 3 months to ensure we could comply with any classification of single dramas as a form of film made for television, and 3 months to ensure our sponsorship credits include a clear statement informing the audience of the sponsorship arrangement.

Channel 5 Broadcasting Limited

17 September 2010