



Response by the Campaign For Press and Broadcasting Freedom to the Ofcom Consultation Broadcasting Code Review: Commercial references in television

14 September 2010

The Campaign For Press and Broadcasting Freedom

The Campaign for Press and Broadcasting Freedom is the UK's leading independent organisation campaigning for a more democratic, accountable and plural media. Formed in 1979, the CPBF has campaigned consistently in favour of media freedom, for public service broadcasting and for greater equality of representation in, and accountability of, public media. The CPBF brings together members of the public and people working within the industry in an ongoing dialogue about the media and its role in society.

General comments

We oppose the liberalisation of product placement rules. We think that product placement should continue to be prohibited across UK audiovisual regulation. Product placement would allow programme agendas to be distorted for commercial purposes and would give advertisers unhealthy control over decisions about what content is made, shown and commissioned. The UK should therefore follow Denmark's lead in maintaining a total ban on product placement for television services within its jurisdiction. However, the UK Government has introduced legislation to permit product placement and Ofcom is now consulting on the details of implementation. While we remain totally opposed to product placement we take this opportunity to give our views on what rules and procedures should govern product placement were it to be authorised.

UK and European television regulation has rested on the principles that editorial and advertising material should be kept separate (the separation principle) and that advertising (commercial communications) should be readily recognisable as such (the identification principle). The revision made in the EU Audiovisual Media Services Directive (AVMSD), jettisons the principle of separation in regard to product placement. The separation principle is now limited exclusively to 'television advertising and teleshopping' (Chapter VII, AVMSD), a significant change that enables product placement to be authorised. With only a few exceptions, most EU member states considered product placement to be outlawed under the previous EU Television Directive, as a form of surreptitious advertising. While 'surreptitious advertising' remains banned under the new Directive, product placement has now been distinguished from surreptitious advertising.

The removal of the separation principle and the redefinition of product placement as distinct from surreptitious advertising have provided the legal-regulatory rationale for authorising product placement. In both cases, clear principles that have governed European broadcasting have been revised and reformulated to accommodate practices that breach them without those principles being disavowed altogether. The reformulations seek to affirm values of consumer welfare, editorial independence and cultural/artistic autonomy that policy-makers are reluctant to disavow, or even be seen to neglect. The results is a contradictory, confusing and unclear set of rules that allow the blurring of advertising and media content.

Liberalisation has been driven by lobbying from marketers, marketing agencies and commercial broadcasters. This liberalisation has been fiercely resisted, by MEPs with the Parliament and some governments, by consumer welfare and protection organisations, public interest media organisations, such as the CPBF and Voice of the Listener and Viewer in the UK, by health, children's welfare, educational bodies and civil society organisations seeking the responsible use of media for advertising and socially responsible marketing practices. As a result, the final Directive contains restrictions and safeguards on the manner and extent to which PP may be liberalised. These are important but we believe that the safeguards proposed are so permissive of commercial communications that they not only neglect but also further devalue the very values to which they pay qualified homage. This arises in regard to three main reformulations

1. The replacement of the separation principle by the notion of 'distinction'
2. Transparency
3. Editorial independence

We recognise that Ofcom's consultation engages with these new provisions and invites responses accordingly. However, we consider that, notwithstanding some important safeguards, the approach adopted by the UK government in its legislation, and Ofcom in its consultation proposals, is unduly permissive. The proposals will allow marketers to pay for presence in media content. They will also programme agendas to be distorted for commercial purposes. They will allow more extensive and more invasive commercial communications that will result in the loss of an audiovisual culture valued in Britain and across the world.

The AVMS Directive allows member states the right to prohibit product placement altogether. We will continue to urge that the UK prohibits product placement to the maximum extent possible.

In keeping with some of the thinking that shapes the new Directive important principles are revised so that they not longer function as a guide or a suitable means to set limits on audiovisual services. What is common to all these reformulations, is a partial effort to assuage critics, an effort to avoid presenting the new rules as abandoning well entrenched safeguards altogether. One can speculate about the motivations for these changes, but our focus here is on their meaning and consequences as regulations.

1. The Separation Principle

Product placement clearly breaches the principle of separation and so the latter has been replaced by a new concept of distinction. Ofcom's new rules would state as a principle 'To

ensure that there is distinction between editorial content and advertising'. This will replace the currently stated principle 'To ensure that programming and advertising remain distinct (separation). The new text is identical in substantive meaning. To revise it appears to send a sophisticated message to the industry about liberalization while failing to provide the public with a clear account of what, if anything, distinguishes the two. Of course, Ofcom does propose very significant alternations to the extent to which marketing communications are 'distinct' from editorial content. If brands can pay for presence in content then it cannot be claimed that a 'distinction' between advertising and content can be assured for viewers unless that term is rendered so elastic as to be meaningless.

2. Transparency

Transparency has suffered the most explicit shift in meaning. The principle of transparency is that marketing communications should be readily recognisable as such. This is compatible with the presence of brands within media content. However, it is not compatible with the paid placement of brands in content since the latter is a form of marketing communications designed to serve and or promote the brands featured. Instead of transparency continuing to refer to the manner in which advertising matter is displayed (supporting rules prohibiting advertising that is not transparent), the term has come to mean merely the availability of information to viewers/users that audiovisual content contains commercial communications.

3. Editorial independence

Neither commercial nor other third party payments should interfere with the editorial independence of programme makers or AV service providers, This principle of editorial independence, most important for news and opinion on public affairs, but also for cultural creation and artistic integrity, is affirmed in the new AVMSD and by Ofcom. However, we believe that the proposals fail to provide adequate safeguards for editorial independence. The proposals will allow commercial influence on content and editorial decisions to such an extent that the espoused notion of editorial independence is itself devalued. If sponsors can buy presence in the programmes they sponsor then to suggest that this must, and can, be achieved without detriment to editorial independence is to narrow and devalue the meaning of 'editorial independence'.

We oppose relaxation of rules prohibiting product placement. We have set out our opposition in our response to the European Commission issues paper on commercial communications¹, our response to Ofcom's consultation in 2006², our response to the Government's consultation on Implementing the AVMS Directive, and the Consultation on Product Placement (November 2009)³, and elsewhere.

We believe the key principles that should guide policy are:

i. Separation of editorial and advertising

¹ CPBF Response to the European Commission Issues Paper on Commercial Communications. Available at <http://www.europa.eu.int/comm/avpolicy/revision-tvwf2005/2005-contribution.htm>.

² CPBF response to Ofcom's consultation on Product Placement in 2006 on product placement available at http://www.ofcom.org.uk/consult/condocs/product_placement/responses/.

³ Submission by the Campaign for Press and Broadcasting Freedom (CPBF) to the DCMS Consultation on Product Placement on Television (November 2009). Available at www.commercialwatch.co.uk.

Advertising (commercial communications) and editorial content should be clearly separated in a manner that is recognisable and explicit for users. Wherever such separation is not clear, due to the development of new media forms and channels, content providers must satisfy regulatory standards which ensure separation and should be required to give guidance to users regarding separation in accordance with the promotion of media literacy.

ii. Transparency and identification

Users of all audiovisual services, linear and non-linear, should always be aware when they are in a selling environment. To achieve this all providers of services have an obligation to ensure that commercial communications are clearly identified as such, and distinguished from other media content.

ii. Editorial integrity and independence

Editorial content and programme agendas should not be distorted by external commercial interests or by the commercial business interests of content providers. There should be no restriction or impediment to the exercise of professional journalism from internal sources or from unfairly promoting the economic interests of advertisers, sponsors or business partners.

We believe that product placement represents a serious erosion of the separation of content and advertising and will also lead to a deepening commercialisation of television content in the UK. Permitting product placement will also undermine the existing capacity for effective regulation of programme content, advertising content, and rules governing marketing communications. The focus on ‘safeguards’ masks the extent to which permitting PP creates significant new problems because it radically revises some of the core aspects of media regulation and practice, namely i) Rules governing advertising (marketing communications); ii) Rules governing media content including protection of freedom of expression (see CPBF submission to the DCMS Nov. 2009)

Consultation questions

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. Any paid-for references must be subject to strict regulation.

We agree that it is right to expand the rules to cover any paid-for reference, whether by commercial or non-commercial interest. However, it is essential that these rules cover not only payment but also include ‘other valuable consideration’. The latter encompasses economically beneficial exchanges even where no money changes hands, for instance in

cross-promotional marketing arrangements. The history of product placement is as much a history of barter arrangements as payment⁴, so while the extension to any third-party interest that pays for references is welcome, it is important that this also covers exchanges for ‘valuable consideration’ not just payment.

As audiovisual services evolve, there might be arguments for the integration of ‘public service announcement’ type material into content, but there are various ways to avoid this being paid placement. In future, a new exemption may be required so that rules do not serve to restrict the communication of public service information.

- 1.2 *Please identify any potential impacts of Ofcom’s proposal that you consider should be taken into account, and provide evidence, wherever possible.*
- 1.3 *Please identify any areas of this proposal which, if it is accepted, you consider Ofcom should issue guidance on.*

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 oppose product placement in all audiovisual content. If PP is permitted in cinematographic films then the exclusion of single dramas may be considered anomalous. However, there are important considerations that the consultation fails to address. As they have evolved on UK television ‘single dramas’ tend to be associated with certain qualities and viewer expectations. These include high quality, artistic merit and integrity, and realism. Of course these qualities do not adhere to all drama, and the associations are likely to change and diversify in a more commercial multichannel and globalised TV culture. Nevertheless, single dramas still carry viewer expectations and often attract harder to reach audiences that make them particularly attractive to marketers. We believe that many who might tolerate product placement in a high-budget entertainment film would not welcome marketers paying for presence in a single drama. We believe no decision should be taken in the absence of much more extensive research and deliberative polling.

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

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)).*

We welcome the clearly stated prohibition on product placement in news.

⁴ See Segrave, K. (2004) *Product Placement in Hollywood Films: A History*, McFarland & Company

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.*

It is very important that there is a clearly stated prohibition on any form of thematic placement. This raises important issues of definition and application however.

Thematic placement is defined by Ofcom as ‘the creation of scripts/storylines as vehicles for the purpose of featuring the aims, objectives, beliefs or interests of a third party funder’ and is prohibited (see Part 4, Proposal 4). We believe that any display of ‘the aims, objectives, beliefs or interests’ of a third party that has paid for inclusion in editorial content should be prohibited. The adoption of this rule would restrict the overwhelming majority of paid placements for whom it is precisely the aim of marketers to display the ‘interests’, if not also the ‘aims, objectives, beliefs’ of a third party. The underlying rationale for paid placement is to feature the interests of a third party funder. What Ofcom proposes, however, appears more limited in scope and application. The opening part of the definition focuses on creators rather than marketers. This leaves open to (legal) dispute the relationship of brand presence in the final product to its presence in various stages of creation. Production companies, broadcasters, and marketers will argue about the sequence of creation in order to avoid charges of thematic placement. The processes of brand involvement are notoriously complex and opaque, as numerous case studies show⁵. The second problematic concept is that of being a ‘vehicle’. This is an indistinct category. For example, under the current rules, featuring a particular brand of car in a drama (for instance Toyota cars in ITV’s *Primeval*) is subject to rules prohibiting paid placement and rules on undue prominence. Under the proposed new rules Toyota cars could undertake paid placement in such a show. However it may be argued that their vehicles are precisely a ‘vehicle’ to further the interests of a third party. The cars are associated with speed, strength and ruggedness (racing to stop dinosaurs, etc). They features in story lines and plot (speeding down airport runways etc.). Advocating product placement, a leading scriptwriter for *Primeval*, Adrian Hodges acknowledged that the ‘series regularly featured a particular brand of car, and thereby promoted it, even though ITV and the production company had not benefitted financially’. ⁶ Had this been paid placement, however, we consider that it would have been thematic placement, and so should be prohibited.

We therefore believe that if product placement were to be permitted, a strong prohibition on thematic placement would be very important. The current proposals, however, do not clarify precisely what will be prohibited so as to enable concerned citizens, viewers and others to identify prohibited placements.

⁵ See Galician M.-L. (ed.) (2004) *Handbook of Product Placement in the Mass Media*, Binghamton, NY: Best Business Books.

⁶ Hemley, M. (2009) ‘Primeval writer Hodges calls for product placement ban to be lifted’, *The Stage* (25 March). Available at <http://www.thestage.co.uk/news/newsstory.php/23926/primeval-writer-hodges-calls-for-product> (accessed 15 September 2010)

Ofcom states ‘It is our understanding that this term refers to placement arrangements which involve a third party funder paying for a specific plot line or theme to be included within a programme, but not necessarily the inclusion of an identifiable product or service’ (Consultation, 4.46). The definition of thematic placement needs to be expanded to include ‘or other valuable consideration’ since such arrangements may involve barter and exchanges other than money. If thematic placement is limited to paid placement (as the term funder implies) then this creates incentives for regulatory avoidance by the parties involved by making agreements that do not involve direct payment. Under the current rules thematic placement is outlawed under the ban on product placement but also by the undue prominence rule. While deal making between producers and marketers is not generally accessible to the public, by contrast, the undue prominence rule is accessible. Yet, while it remains in place, the effectiveness of the undue prominence rule can only be expected to diminish when operating alongside the authorised payment for presence by brands in audiovisual content. We share Ofcom’s view that thematic placement should be explicitly prohibited. As Ofcom notes, some thematic placement does not involve branded products in ways that the undue prominence rules are designed to capture. However, the need for this explicit prohibition is testament to the expected weakening of undue prominence rules in future.

So, we agree that thematic placement should be prohibited but we believe there needs to be much more detail regarding where thresholds will be set therefore on the following

- a. Integration of third party interest in creation-production process
- b. The extent to which content serves as a vehicle for third party interest
- c. The extent to which a paid placement is deemed to serve the interests of third party funders

The prohibition on thematic placement would appear to restrict content and storylines that incorporate brands or third party interest in a prominent manner. The tie-in between ABC’s *The View* and Campbell’s soup would be an example of content that would appear to breach the rule as the deal involved scripted segments. The ‘successful’ placement by Subway in NBC’s *The Biggest Loser* would also appear to be a clear example of thematic placement that would be prohibited. Somewhat less clear, under the new rules, would be practices such as the characters in NBC’s *Chuck* who uttered ad slogans from Subway. While the latter might be expected to be considered thematic placement, there are innumerable examples of brands buying exclusivity and integration into storyline, plot, and the visual or aural aspects of a programme. For example, an episode of CW’s “90210” involved ‘characters going on a road trip with a cooler filled only with Dr Pepper. At one point, one of the main characters uttered the line: “We’re on a road trip! Drinking Dr Pepper is practically a requirement.”’⁷

⁷ Steinberg, B. (2009) ‘Series Let Advertisers ‘Boldly Go’ Where Few Have Gone Before From ‘Star Trek’ on ‘Lost’ to Subway’s ‘Chuck’ Campaign, Broadcasters Become More Blatant With Brand Integrations’, *Advertising Age* (7 May). Available at http://adage.com/madisonandvine/article?article_id=136507 (accessed 8 May 2009)

So, we believe that the prohibition on thematic placement is very important (if product placement is authorised, but that more precise description and detailed guidance is required. We propose that any form of promotion that would not be permitted under the current undue prominence rules should be deemed to be thematic placement and so prohibited unless two conditions are met. First, that the presence is editorially justified and second that it can be demonstrated that no arrangement has been made for economic benefit or other valuable (economic) consideration between any of the parties involved.

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.*

See above

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

See above

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

See above

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.*

Yes, product placement should be prohibited in specialist factual programmes. However Ofcom's definition is too narrowly drawn. Ofcom defines specialist factual programmes as 'purely factual programmes covering educational, science, medical or arts subjects, or those that are investigative in nature'. Some 'serious' programme genres will thus be insulated from product placement, while popular programme genres such as cookery, DIY, lifestyle and other kinds of 'factual' programme will be fair game. We oppose this cultural double-standard, which evades the key issues of editorial independence and integrity that should apply to all television services.

Factual programmes are not specifically included in the categories within which product placement is permitted under the AVMS Directive. We believe that all factual programmes should be excluded from product placement. It is not appropriate to have paid placement in any programmes, but particular concerns arise in respect of non-fiction programmes that include factual information, advice and opinion. Germany has prohibited product placement in news, political and current affairs programmes, advice and consumer programmes. We believe that marketers should continue to be permitted to advertise between programmes, to sponsor programmes. Branded goods and services should continue to be permitted to feature in programmes provide their presence is editorially justified and not unduly prominent, but marketers should not be permitted to

pay for their products to be featured. Allowing paid placement would undermine the editorial independence and editorial integrity of programme output across the television system as a whole and, with varying degrees of intensity and importance, within individual programmes.

In the United States programmes such as ‘How to clean your house’ are vehicles for extensive product placement. Cooking programmes, DIY and other genres are significant vehicles for product placement. We consider that product placement should not be permitted in such programmes, made by or commissioned for UK service providers. In addition to the impact on editorial independence such placement raise concerns regarding the extent to which advertising rules can and should apply to product claims made in editorial. Under the current system the ASA distinguishes between ‘marketing communications’ and ‘editorial’, applying its rules only to the former, while ‘editorial’ material is governed by Ofcom’s codes. As the Committee on Advertising Practice puts it⁸:

The ASA regulates advertising; it does not regulate editorial content. The boundary between the two is an important one: it ensures advertising remains legal, decent, honest and truthful and editorial freedom is preserved

Once marketing communications are permitted within editorial content (as they are under the authorisation of product placement) these rules require extensive revision.

The prohibition on specialist factual programmes is therefore also important to maintain.

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.*

See above. The definition is too narrow. If product placement were to be permitted in fiction there should be a total ban on product placement in factual programmes, not a two-tier system that serves principally to distinguish ‘serious’ from ‘popular’ rather than to protect editorial values across programme services as a whole.

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, it is very important that rules do not allow any bypassing of advertising restrictions.

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.*

⁸ CAP ‘Say it loud and say it proud: “I am an Advertisement”’, 29 October 2009. Available at <http://cap.org.uk/Media-Centre/2009/Say-it-loud.aspx> (accessed 4 January 2010).

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

No. We believe that any product placement should be permitted only in strict conformity with advertising scheduling restrictions. No marketer should be able to use product placement to by-pass regulations governing marketing communications. There are particular concerns here regarding marketing to children. We share the concerns of a wide range of civil society organisations that marketers should not be able to bypass rules on advertising to children by means of product placement. There are significant limitations in the current advertising rules as these fail to limit HFSS advertising in general programmes watched by children.

Maintaining a ban on PP in children's programmes will not be sufficient to serve the intended purpose. According to an OFCOM report children spend 71% of their TV viewing time outside of children's airtime.⁹ Were product placements to be allowed in popular family entertainment shows, such as *The X-Factor*, that are extremely popular amongst young viewers, the messages would reach a larger number of children than watch designated children's television. Such data is now well publicised and well understood. Therefore we are very concerned about the vague and confusing use of the term disproportionate in the consultation. The question that should be asked is in regard to programmes with a significantly high child audience. Children tend to make up a small share of the total audience for some programmes, such as *Emmerdale*, but a numerically large audience compared to children's programmes. The question, as phrased, seems designed to limit restrictions on PP and avoid the very real prospect of marketers (such as those for HFSS foods) targeting programmes that reach a large audience of children where they are permitted to do so. The central issues here are:

1. Marketers promoting brands that are deemed harmful or socially undesirable in programmes watched by a significant audience of children.
2. Marketers seeking to evade restrictions on marketing to children by marketing in programmes watched by significant numbers of children.

We agree that it would be wrong to curtail the range and content of programmes available to adults merely because of concerns for these be available for children to view. However, the freedom of viewers to enjoy media culture should not be simply conflated with the freedom of marketers to promote brands. As stated above, we do not oppose the presence of brands in programmes; we oppose marketers paying for their brands to be presented in a way that allows programme agendas to be distorted for commercial purposes. We share the concerns of health and children's organization both about the marketing of specific products like HFSS foods as well as the promotion of commercialism and the commercialization of childhood. We do not believe that safeguards can be draw up that would be sufficiently effective and responsive to audience patterns and marketers' strategies in the absence of a total ban on product placement.

Proposal 7: Signalling

⁹ Ofcom (2004) *Child Obesity: Food Advertising in Context*, July, London: Ofcom

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 reject the view that notification provides an adequate safeguard for product placement/integration in programmes. This frames the issue far too narrowly in terms of viewer identification, and displaces a broader set of concerns about editorial independence, artistic integrity, and the distortion of programme agendas.

If PP is permitted, then signalling and identification become critical issues. First, there needs to be both visual and aural signalling. Second, there needs to be monitoring of output to determine level for compliance and to review practices. As well as ongoing monitoring, there also needs to be research studies undertaken to examine both practice and to review audience awareness, understanding and attitudes towards the new practices and the effectiveness of the signalling.

Some countries have introduced transitional arrangements whereby there is progressive diminution in signally. We argue that no diminution of signalling should occur before an appropriate range of commissioned and independent research has been conducted.

We believe that the principles underlying signage should be that no viewer/user should be in any doubt that a programme service includes product placement. Identification should be clear before and after the programme and should not require viewers/users to access any other information in order to determine that the programme contains product placement.

We believe that the public should have access to full information about product placement. It should therefore be the responsibility of programme-makers and broadcasters to supply this information and to fund the creation of an accessible manner in which this information can be accessed online. This will aid members of the public and researchers and will make an important contribution to supporting media literacy activities for adults and children.

We continue to propose that product placement signalling requirements should apply to all acquired programmes containing product placement.

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.*

Audience awareness messages should be incorporated for all programmes that include product placement. There should be no modification or diminution in signage and any change should only occur after appropriate research in to viewer/user awareness and attitudes has been completed.

Proposals 8-11 : 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.*

We strongly oppose the proposal to allow sponsors to undertake paid placement in programmes they sponsor. What is proposed would be a very significant liberalisation that runs counter to the careful efforts, since the introduction of television sponsorship, to try to ensure that editorial independence is not damaged and that programme agendas are not distorted for commercial purposes.

The economic importance of programme sponsors makes them powerful. Sponsors also pay for a particular set of privileges and benefits. They can promote themselves and associate with programming, but must not have any detrimental effect on the editorial independence of the programme. We do not believe that product placement deals involving such sponsors can occur without undermining editorial independence. Sponsors might exercise pressure on those responsible for editorial but just as importantly programme-makers or service providers might act to retain or increase the economic benefits of sponsors. Given such pressures, how can editorial independence be assured? How might it be independently verified, beyond claims made by the interested parties themselves?

Under the Directive programmes containing PP are prohibited from directly encouraging the purchase or rental of good or services. The same precondition applies in the case of sponsorship. The Commission, in its Interpretative Communication in 2004 reiterated that no explicit reference may be made to the sponsor during the broadcast of the sponsored programme to the products or services of the sponsor, except where such a reference had the sole purpose of identifying the sponsor and making explicit the link between the sponsor and the programme. Under the new Directive, sponsors are permitted to undertake product placement. The purpose appears to be to protect sponsorship income while opening up PP income, and to remove any disincentive for sponsors who will be able to benefit from all kinds of authorised marketing communications surrounding programmes they sponsor. The outcome however is that sponsors will be able to exercise significantly greater influence on programme agenda and will be permitted to have even greater promotional presence. Such presence is incompatible with the restrictions on undue influence, and undue promotional effect. They are also likely to fail to meet the condition on undue prominence too. A combination of sponsor ids surrounding programmes, combined with product placement within programme should be deemed a breach of the undue prominence rule. We argue that sponsors should not be permitted to undertake any product placement in programmes they sponsor.

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.*

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

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.*

As stated earlier the key to liberalization of PP has been the removal of the separation principle, which prevented commercial communications being inserted into content. The new concept of distinction is misleading, and is likely to be confusing for consumers and citizens, as well as for industry and regulators. By a common sense interpretation if advertising is to be 'distinct' from editorial content then it must be separated by visual and acoustic means. If not, then it is not clear what is meant by distinction.

- 13.2 *Please identify any potential impacts of Ofcom's proposal that you consider should be taken into account, and provide evidence, wherever possible.*
- 13.3 *Please identify any areas of this proposal which, if it is accepted, you consider Ofcom should issue guidance on.*

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.*

Yes, Ofcom should introduce a new prohibition on surreptitious advertising. We believe that Ofcom is required to do so, so that the UK complies with the AVMS Directive. It is curious that this is included as a matter for consideration in this the consultation given that the AVMS Directive requires that such a rule is enforced. The AVMS Directive prohibits 'surreptitious audiovisual commercial communications'. There is a contradiction, however, in the AVMS Directive. The liberalization of PP is accompanied by removal of the separation principle. At the same time surreptitious advertising is retained. Before the AVMS Directive most EU member states, including the UK, considered that product placement was not compatible with the surreptitious advertising rule. Indeed for many states, product placement was defined as a form of surreptitious advertising. We do not consider that it is possible to maintain a meaningful prohibition on surreptitious advertising while allowing paid-for brand presence in editorial content. The only effective and consistent position would be to maintain the ban on product placement. Ofcom should establish a rule prohibiting surreptitious advertising. Our fear is that this important measure can only become weakened if it is combined with the authorisation of product placement.

- 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.*
- 14.3 *Please identify any potential impacts of the proposed rule that you consider should be taken into account, and provide evidence, wherever possible.*
- 14.4 *Please identify any areas of this proposal which, if it is accepted, you consider Ofcom should issue guidance on.*

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.*

We oppose the removal of the virtual advertising rule. There appears to have been no research undertaken to inform the review on industry practices or the opinions of consumers and citizens. There should be no change made until further research is conducted into operations, public opinion, and viewer/user awareness and attitudes.

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.*

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.*

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.*

Product placement and VOD

We recognise that the government has permitted PP in non-linear, on-demand services. However, we believe that PP should be restricted in all non-linear audiovisual services. Product placement should not be permitted in any VOD service. For acquired programmes that contain product placement there should be a mandatory notification given to viewers. In addition, there should be a prohibition on any product placement being added to acquired VOD. All VOD material, including acquired material should be subject to undue prominence rules. The Directive excludes from its scope electronic versions of newspapers and magazines. We think that this exclusion is increasingly anomalous and is serving to undermine rules for television regulation, in particular impartiality rules and rules on election coverage.

We do not believe that the expansion of new media services provides justification for weakening public service obligations and other content regulation for linear television services. On the contrary, we believe that both linear and non-linear AV services should be regulated to serve the needs of citizens and consumers

Prop placement

We think the best approach here would be to set a threshold above which permission for prop placement must be sought from Ofcom- with all decisions, transactions and reasoning for the decision taken being made publicly available. For any company not willing to do this then prop placement would only be permitted up to a specific threshold. Austria has set a threshold of EUR 1000 for the maximum value of prop placement. We think a suitable threshold would be £500.