

Consultation on Product Placement on Television

Response to DCMS from Endemol UK plc



8th January 2010

About Endemol UK plc

Endemol UK (“**Endemol**”) is the largest independent production company in Britain and annually produces over 5,000 hours of output. It incorporates a number of production brands including Remarkable Television, Initial, New State and Zeppotron. These brands specialise in a broad range of genres including comedy, gameshows, entertainment, specialist factual and scripted series. The UK group has offices in London and Bristol and employs up to 1000 people at any one time.

Endemol also recently acquired Tiger Aspect, Tigress and Darlow Smithson, whose combined portfolio spans drama, comedy, animation, children's programming, entertainment, factual, features and feature films.

Endemol is part of Endemol Group, a global leader in entertainment with an international network of companies that spans over 20 countries on five continents.

Introduction

Endemol welcomes the opportunity to submit a response to the DCMS’s consultation on Product Placement on UK Television. Endemol submitted a response to the DCMS’s initial consultation regarding the implementation of the AVMS Directive in 2008 and argued in that submission that a controlled permission of product placement in suitable programme genres, with safeguards to maintain editorial integrity and avoid undue prominence, as envisaged by the AVMS Directive, could make a significant contribution to the ongoing growth and vibrancy of the UK’s television production sector.

In particular we emphasised the following key points:

- We believe that product placement could make a significant financial contribution to UK television production at a time when the sector is severely challenged by the recession and the ongoing impact of digital technologies.
- The implementation of product placement in the UK would create a ‘level playing field’ for UK producers, enabling us to compete more effectively with producers in Europe and the US where product placement is allowed.
- The AVMS Directive contains a robust set of safeguards to protect viewers and can be effectively combined with some of the key principles already contained within Ofcom’s Broadcasting Code to protect the editorial integrity of programmes originated in the UK.

Endemol is still firmly of this view and therefore welcomes the Government’s statement that it “is minded to permit product placement on UK television, subject to safeguards.”¹

Response to DCMS Questions on Product Placement

1. What, if any, viewer and other safeguards should there be, additional to those required by the AVMS Directive?

Ofcom’s current Broadcasting Code already prohibits television producers and broadcasters from:

- Giving undue prominence to any product or service;
- Allowing a programme sponsor to influence the content and/or scheduling of a channel or programme in such a way as to impair the responsibility and editorial independence of the broadcaster;

¹ DCMS Consultation on Product Placement on Television, November 2009, p.4

- Including promotional references in programmes to sponsors' products or services that encourage, or are intended to encourage, the purchase or rental of those products or services.²

These principles are extremely well understood by UK producers and broadcasters and are rigorously observed. They apply equally to advertiser-funded programmes where the entire cost of producing the programme is funded by an advertiser / sponsor and offer extensive protection to viewers at present.

Both the spirit and detailed language of the AVMS Directive regarding product placement are therefore extremely close to a number of existing UK regulatory principles. In particular the Directive is absolutely clear that:

- The inclusion of product placement in a particular programme should not "affect the responsibility and editorial independence of the media service provider."
- Programmes containing product placement should "not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services."
- Programmes containing product placement "shall not give undue prominence to the product in question."
- "Viewers shall be clearly informed of the existence of product placement."

Endemol therefore believes that the viewer safeguards put forward by the AVMS Directive with regard to product placement are fully appropriate and are highly likely to be effective and well understood by producers, broadcasters and viewers because they are so close to existing regulation that has worked well in the UK for many years.

Endemol also welcomes the AVMS Directive's stipulations:

- That product placement shall not be allowed under any circumstances in children's programmes;
- That tobacco and prescription medicine may not be 'advertised' via product placement on television;

Article 3e of the AVMS Directive will also apply to product placement, imposing "additional requirements in relation to human dignity and behaviour, discrimination, and protection of minors ... [and] in particular ... any product placement of alcoholic drinks must not be aimed specifically at minors and must not encourage immoderate consumption."³ As discussed in more detail below, Endemol believes that the Directive's guidance in this area can best be achieved by prohibiting any product placement of HFSS foods, alcoholic drinks and gambling products in any programme with a disproportionately high child audience.

Endemol therefore believes that, in the round, the measures in the AVMS Directive (and their compatibility with a number of key principles already enshrined in Ofcom's Broadcasting Code) and the adoption of specific measures relating to HFSS foods, alcoholic drinks and gambling will provide a very robust set of viewer safeguards.

Most EU territories have already adopted the AVMS Directive's principles on product placement more or less *verbatim* and have not applied additional safeguards beyond the measures contained in the Directive. The UK Government has likewise directly inserted the key principles of the Directive into its legislation of product placement on on-demand services in its Audiovisual Media Services Regulations 2009. Endemol believes that this approach, which has already been deemed sufficient by other EU territories for TV product placement and for on-demand services in the UK, should also be sufficient for product placement on television in the UK.

² Ofcom Broadcasting Code 2008, Sections 9 and 10.

³ DCMS Consultation on Product Placement on Television, November 2009, p.14

2 How should those additional safeguards be imposed - by law, or by means of the Ofcom Code?

As discussed above, Endemol does not believe additional safeguards are required, beyond the wide range of measures already contained in the AVMS Directive. As an over-arching principle, though, Endemol's preference is that the AVMS Directive should be formally adopted in law by the UK Government and then regulated by Ofcom via amendments to its Broadcasting Code.

Commercial advantages

3. Is the range of figures for the potential financial benefit of introducing television product placement set out in Part 3 of this document (between £25m and £140m p.a.) still broadly applicable?

As discussed in more detail in our answer to question 4 below, Endemol believes that the range of figures provided by DCMS is still applicable but Endemol's own estimate is towards the higher end of this range.

4 Is it possible to narrow this wide range of estimates?

As Endemol argued in its submission to the DCMS's initial consultation on the AVMS Directive, the value of product placement to the UK television production sector could be up to £140m p.a. We reached this estimate by comparing the size of the product placement markets in the USA and Australia to the size of the television spot advertising markets in those countries and applying that relative size (approximately 4-5%) to the UK market. This resulted in an estimated market size of £140m p.a. but we noted at the time that the imposition of a regulatory regime in the UK that will be tighter than those of US or Australia might reduce this number slightly and in any case it may take some time for the product placement market to mature fully in the UK.

5 Are there grounds for thinking that the potential benefits have increased or decreased since last year?

We believe that the potential benefits to the UK television production sector have increased since last year. The commercial television market has come under even more severe pressure in 2009, for a number of reasons:

- The UK television spot advertising market has contracted sharply in 2009, adversely affecting commercially-funded broadcasters and their production partners. Recovery in 2010 is forecast to be fitful and the television industry needs to explore alternative funding models as quickly as possible.
- 2009 has provided further evidence that commercially-funded television faces longer-term structural challenges as well as acute near-term cyclical pressures:
 - o Ongoing growth in internet penetration has continued and internet advertising has now exceeded television advertising in market size.
 - o On-demand viewing, via Digital Video Recorder (DVR), and broadband-enabled Video on Demand services, continues to increase, putting downward pressure on the volume of commercial impacts delivered by traditional linear television.

6 Has any new evidence emerged about the possible benefits since the earlier consultation?

There is robust evidence to support the trends outlined above:

- Advertising revenues for the commercially-funded PSB groups have fallen by c.11% in 2009 and are forecast to be no higher in 2014 than they were in 2007.⁴
- Two-thirds of UK homes now have broadband internet access⁵ and in H1 2009, internet advertising grew by 4.6% to £1.8bn (despite an overall contraction in the UK of 16.6% in the same period) and has now overtaken TV to become the UK's single biggest advertising medium.⁶
- 27% of UK homes now have a DVR, a 35% increase on 2008, and 76% of viewers with a DVR 'always or almost always' fast-forward through television advertisements.⁷

These trends are working in combination to put the revenues of commercially-funded broadcasters under severe pressure. The commercially-funded PSBs, who together with the BBC commission c.90% of all new UK television programmes each year, have made correspondingly severe cuts in their programme budgets: ITV has reduced its programme budget by £65m, Channel 4 by £40m and Five by £55m, a 25% reduction.

Endemol does not see the potential introduction of product placement as a panacea, but anything that counteracts the £160m decrease in investment in new UK television programmes that occurred in 2009 alone would be a valuable contribution to ensuring that the UK production sector remains a vibrant world-leader and a significant part of the UK's overall creative economy.

Programme genres

7. If product placement is allowed in programmes made by or for UK television, should any of the programme genres permitted by the AVMS Directive be excluded?

The AVMS Directive provides scope for Member States to allow product placement in 'cinematographic works, films and series made for audiovisual media services, sports programmes, and light entertainment programmes' and Endemol does not see any reason to exclude any of these genres if product placement is to be permitted in the UK.

8. Should UK controls on product placement be more specific as to what is meant by 'films and series' in which product placement can appear?

9. Are there definable types of 'films and series' in which product placement either should or should not be permitted?

10. Should UK controls on product placement be more specific as to what is meant by 'sports programmes' in which product placement can appear?

11. Is there any reason to restrict product placement in particular types of sports programming?

12. Should UK controls on product placement be more specific as to what is meant by 'light entertainment' programmes in which product placement can appear?

13. Is there any reason to restrict product placement in particular types of 'light entertainment' programme?

Endemol believes it would be extremely difficult to achieve watertight definitions of particular programme genres and sub-genres, given the way in which many popular television shows straddle multiple genres. Likewise, excluding product placement from some types of sports or light entertainment programmes but allowing it in others appears to be a recipe for overly complicated and confusing regulation.

⁴ *The Next Five Years? UK Media in the On Demand Age*, Oliver & Ohlbaum Associates, p.23

⁵ *Communications Market Report 2009*, Ofcom, p.1

⁶ <http://www.iabuk.net/en/1/adspendgrows300909.mxs>

⁷ *Communications Market Report 2009*, Ofcom, pp40-49

14. Should there be a specific prohibition of product placement in

- religious programmes
- news programmes;
- current affairs programmes;
- consumer programmes; or
- any other specific type of television programme?

Endemol's preference would be:

- To exclude product placement from news and current affairs programmes, to align the regulation of product placement as closely as possible with existing Ofcom regulation that prohibits commercial sponsorship of these programme genres.⁸
- To allow product placement in consumer programmes, subject always to the wide range of viewer safeguards set out in the AVMS Directive and Ofcom's Broadcasting Code.

Children

15. Should any or all product placement be restricted or prohibited in programmes with a disproportionately high child audience?

Endemol sees that there is a virtue in aligning the regulation of product placement with the key principles of the UK's existing regulatory regime for audiovisual commercial communication. We therefore believe that the current prohibitions on placing advertising and sponsorship messages for HFSS foods, gambling and alcoholic drinks adjacent to programmes with a disproportionately high child audience should also be applied to product placement.

But for other product categories, we do not see any rationale for applying additional restrictions or prohibitions to product placement above and beyond the wide range of measures contained in the AVMS Directive.

16. If so, how should that assessment be made in advance of a programme being broadcast?

Endemol does not believe that this is the place to prescribe the details of how such assessments should be made in advance of a programme being broadcast. If the Government and Ofcom decide that there should be no product placements of HFSS foods, alcoholic drinks or gambling products in programmes with a disproportionately high child audience, then it should suffice to state this simply in the relevant regulation. Broadcasters and producers will then be obliged to observe this prohibition and answer to Ofcom if they are found to be in breach.

This approach would be fully aligned with Ofcom's overall approach to regulation of television programmes and services. The Broadcasting Code does not describe in detail *how* to avoid undue prominence, partiality in news programmes, breaches of privacy etc; it simply requires broadcasters and producers to avoid such breaches and Ofcom investigates and punishes any breaches on the rare occasions that they occur. This keeps the regulation concise and unambiguous and puts the onus for compliance squarely onto producers and broadcasters.

17. How could a 'disproportionately high child audience' be defined?

⁸ Ofcom Broadcasting Code 2008, clause 9.1

As noted above, Endemol is in favour of a consistent set of regulations on this issue across spot advertising, sponsorship and product placement and therefore believes that the methodology used by Ofcom for spot advertising and sponsorship should be extended to product placement.

- 18. Should there be restrictions on placing certain types of products (e.g. HFSS foods or alcohol) in programmes with a disproportionately high child audience?; and if so**
19. Should those restrictions be the same as or greater than those which are currently in place for the scheduling of spot advertising of those products?

As noted in our response to question 15, Endemol believes that product placement of HFSS foods, alcoholic drinks and gambling products should be prohibited in programmes with a disproportionately high child audience but this prohibition need not go further than existing regulation regarding television advertising / sponsorship of HFSS foods, gambling and alcoholic drinks.

Editorial independence; undue prominence

- 20. How could 'undue prominence' be avoided, given the commercial imperative for audiences to recognize the products and services that have been placed?**

To comply with the existing requirements of section 10 of Ofcom's Broadcasting Code, UK television producers and broadcasters already negotiate the issue of undue prominence on a very regular basis, either where products are included in a programme as a result of a prop placement arrangement or where the product has been acquired at fair market value by the producer.

Endemol does not believe there is any reason to add to an existing regulatory principle that is clearly formulated, has been in place for a long time and is well understood by Ofcom, broadcasters and producers.

- 21. At what point should the Government, or Ofcom, draw the line between legitimate paid placement of goods or services and illegitimate 'direct encouragement' to purchase or hire them?**

Again, section 9 of Ofcom's Broadcasting Code, dealing with programme sponsorship, already addresses a very similar issue, by prohibiting programmes from making 'promotional references' to a sponsor's brand, products etc. In this context, 'promotional references' are defined as references that encourage, or are intended to encourage, the purchase or rental of a product or service'.⁹

As UK producers and broadcasters already work with this principle on a very regular basis, for example when producing and broadcasting advertiser-funded programmes, Endemol believes that a clear and concise prohibition by Ofcom of product placements that make any direct encouragement to purchase or hire goods and services, for example via direct promotional references, would be fully understood and observed by UK producers and broadcasters.

In addition, product placements that are unduly prominent and / or that compromise a programme's editorial independence will in any event be prohibited; it seems likely to us that a product placement that made a 'direct encouragement to purchase or hire goods or services' would also fall foul of the undue prominence and editorial independence safeguards.

⁹ Ofcom Broadcasting Code 2008, clause 9.5

22. Are rules – in addition to those that prevent ‘undue prominence’ and the promotion of placed products – needed to safeguard editorial integrity? If so, what should these be?

As proposed by Pact¹⁰ in its submission to the previous DCMS consultation on product placement, Endemol agrees that giving both the producer and the commissioner / broadcaster of a programme a mutual veto on any proposed product placement could be a useful additional safeguard against any potential erosion of editorial integrity. If either party is proposing a product placement deal that risks undermining the programme’s editorial integrity, the other party can exercise its veto and the product placement will not occur. Beyond this veto, Endemol notes that the Directive’s overall prohibition on any product placement that would affect ‘the responsibility and editorial independence of the media service provider’ is also already a key principle enshrined in clause 9 of Ofcom’s Broadcasting Code, which currently applies to the commercial sponsorship of TV programmes. Safeguards of the responsibility and integrity of programmes, producers and broadcasters are therefore already a well-established part of UK broadcasting regulation and practice and can act as the ultimate backstop on this issue.

Tobacco, alcohol, HFSS foods, gambling

23. Should television placement of smoking accessories such as cigarette papers and pipes be prohibited?

Endemol believes that the regulation of product placement of ‘smoking accessories’ should be aligned with the current regulations that are applied to television advertising of such accessories.

24. Should television placement of alcohol, HFSS foods or gambling be subject to an outright prohibition; or, if not prohibited, should it be subject to restrictions of some kind?

Endemol does not believe that television placement of alcohol, HFSS foods or gambling should be subject to an outright prohibition.

We do, however, recognise that these categories are seen as ‘higher risk’ than other product categories and, as such, they are already subject to a set of special rules that govern how brands in these categories can advertise on TV. As set out in our answers to questions 15-19 above, Endemol believes that the product placement of HFSS foods, alcoholic drinks and gambling products should be completely prohibited in programmes with a disproportionately high child audience.

25. If it is not practicable to apply the detail of the BCAP Code rules on alcohol advertising to alcohol product placement, would the simple AVMS Directive rules that alcohol advertising must not be aimed specifically at minors and must not encourage immoderate consumption provide adequate safeguards?

In assessing the practicability of applying the detail of the BCAP Code to alcohol product placement, we believe it is important to note the differences in context and presentation between television programmes and television advertisements. For example, clause 11.8.1(g) of the BCAP Code states that “References to, or suggestions of, buying repeat rounds of drinks are not acceptable. (Note: This does not prevent, for example, someone buying a drink for each of a group of friends. It does, however, prevent any suggestion that other members of the group will buy any further rounds.)” Whilst showing the purchase of more than one round of drinks in the

¹⁰ The UK trade association representing and promoting the commercial interests of independent feature film, television, digital, children's and animation media companies

context of a 15- or 30-second spot advert could appear to encourage immoderate consumption, it may well be editorially justifiable in the context of a television drama which contains a scene that takes place in a pub.

Given the many differences in context and presentation between television programmes and television advertisements, Endemol believes that the AVMS Directive rules that alcohol advertising must not be aimed specifically at minors and must not encourage immoderate consumption provide adequate safeguards. Endemol also notes that this is the position that the UK Government has adopted for product placements in on-demand programme services in its recently-enacted Audiovisual Media Services Regulations 2009.¹¹

26. Are there any alternative forms of safeguard that may be appropriate?

Taken in the round, we believe our response sets out a very robust set of viewer safeguards and we do not propose any additional forms of safeguard beyond these three key principles:

- The overarching safeguards contained in the AVMS Directive, for example with regard to undue prominence, that will apply to all product placements;
- A prohibition on any product placement of HFSS foods, alcoholic drinks or gambling products in programmes with a disproportionately high child audience;
- A requirement that any product placement of alcoholic drinks or gambling products in adult programmes should not encourage immoderate drinking or gambling.

Monitoring

27. What methods of assessment and monitoring would be most effective in ensuring that there was accurate and reliable information about the actual effects of any introduction of product placement in these areas?

Assuming Ofcom leads the regulation of product placement, Ofcom can determine in the future whether any ad hoc or regular monitoring of product placement is appropriate, as it has, for example, in its regulation and monitoring of advertising of HFSS foods. Beyond Ofcom's ongoing regulatory analysis, we do not see any immediate need for Government-sponsored assessment and monitoring of product placement.

28. Would it be possible or desirable to levy a charge on product placements to enable monitoring and/or research to take place?

We do not support the idea of any form of charge on product placement, particularly as any such charge would undermine one of the key rationales for introducing product placement, which is to provide incremental funding for the production of new, UK-originated television content. We would rather see all the revenues from product placement re-invested in new UK television programmes than see a portion diverted into research and monitoring initiatives.

Other types of product

29. Are there any other product or service categories whose placement should be subject to prohibition or restriction?

30. If so, what, and why?

¹¹ The Audiovisual Media Services Regulations 2009, clause 368H, sub-section 5

We have not identified any other product or service categories whose placement should be subject to prohibition or restriction.

Terms of trade

31. If television product placement is allowed, what models might there be for revenue sharing between broadcaster and producer?

We believe that revenues from product placement should be shared between broadcaster and producer on a 50:50 basis.

32. Does the industry anticipate that the commercial negotiation of product placement arrangements would form part of the terms of trade between broadcasters and producers?

Endemol anticipates that the commercial negotiation of product placement arrangements would form part of the Terms of Trade between broadcasters and producers, where the broadcaster in question is a Public Service Broadcaster required to offer minimum Terms of Trade to independent production companies and where the producer in question is a qualifying independent producer. This will give greater transparency to producers, broadcasters and the public as to how product placement deals are to be negotiated, as the Terms of Trade are publicly available documents.

Prop placement market

33. What impact would allowing television product placement have on the existing prop placement market, and on the ability of broadcasters to source props and services in this way?

At the moment, brands looking to place their products into UK TV programmes can only do so via a prop placement arrangement. If product placement is permitted in the UK, brands can continue to offer their products as props, or they can directly approach producers and broadcasters to negotiate commercial deals to secure placement of their product. The introduction of product placement therefore gives brands an alternative marketing channel but does not invalidate the existing prop placement market and we do not believe the ability of broadcasters to source props and services via the prop placement market will be adversely affected.

Signalling product placement to viewers

34. How should television product placement be notified to viewers?

We believe any notification should be clear but not intrusive. For example, a Digital On-Screen Graphic (also known as a 'DOG' or 'BUG') could be displayed in a corner of the screen at the times required by the AVMS Directive. The Graphic could be standardised across broadcasters to give viewers a uniform experience across channels and services.

35. When should it be notified to viewers – should we go beyond the EU requirement for notification before and after the programme and after any ad breaks?

Endemol believes that notifications before and after the programme and after any ad breaks will keep viewers fully informed.

36. Should notifications to viewers mention the product(s) which has or have been placed?

We do not believe these notifications to viewers should mention the product(s) by name; this process could make the notifications overly intrusive and could inadvertently raise the prominence of the product being placed.

37. Do you have any other views about alerting viewers to the presence of product placement in a television programme?

We have no further views on this issue beyond the position set out in response to questions 34-36.

Thematic placement

38. Should the prohibition of ‘thematic placement’ extend to placements which feature only generic products and services or types of product and service rather than branded ones?

Generic thematic placements could be allowed, subject always to the AVMS Directive’s safeguards regarding the responsibility and the editorial independence of the media service provider. In practice, it may be challenging to achieve a generic thematic placement that does not compromise editorial independence, but if the producer and broadcaster can achieve a generic thematic placement that does not contravene the Directive’s overarching principles then there should be no reason to prohibit it.

39. Should the prohibition of ‘thematic placement’ extend to the placement in a programme of references to the beliefs, policies, aims or objectives of the placer?

Endemol has no objection to product placements that refer to the beliefs, policies, aims or objectives of the placer, provided that these product placements are fully compliant with the viewer safeguards recommended by the AVMS Directive and Ofcom’s regulatory regime.

Negative and simulated placements

40. If television product placement is to be allowed, should there be rules which prevent negative placements?

The Advertising Standards Authority’s BCAP Code states that “advertisements must not discredit or unfairly attack other products or services, advertisers or advertisements either directly or by implication.”¹² Endemol believes it would be appropriate to extend the ASA’s current principles regarding denigration to product placement.

41. Should the regulation of television product placement, if it is to be allowed, contain specific controls on the use of simulated products?

Endemol believes that it would not be appropriate for simulated products to be used to circumvent regulations restricting the placement of actual products. For example, it would not be appropriate for an HFSS food to be promoted via the placement of a product that closely resembled an actual

¹² Clause 5.4.3, BCAP Television Advertising Standards Code

product, in circumstances where regulations were in place to prevent the placement of the actual product. Beyond that, however, we do not believe that specific controls should be placed on the use of simulated products above and beyond the regulations that will apply to product placement in the round.