



**ITV plc RESPONSE TO DCMS CONSULTATION ON PRODUCT
PLACEMENT ON TELEVISION NOVEMBER 2009**

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Introduction

There can be few areas of the UK's creative economy which are both as important to the future prosperity of the UK and, in terms of the final product, as important to the lives of the people of the UK as original television programming. Moreover, there are few other areas of the UK's economy where the issues and future economic challenges are clearer – the recent Ofcom PSB Review and government's Digital Britain initiative have created a detailed and coherent evidence base on which to base policy decisions.

There are many facts from these recent reviews which will frame policy and regulatory debates in the sector over the coming years but there are perhaps five that are most telling:

- The UK's public service television channels continue to represent over 90% of all spend on original UK television programming in areas other than sport and these channels are still by far the most popular on UK television accounting for much of the total television viewing.
- Ofcom's research showed that over four-fifths of people think that it is important for the main television channels to provide programmes that are made in the UK and reflect life in the UK.
- Research by Oliver and Ohlbaum for Ofcom in the context of the PSB Review suggested that television advertising may decline by close to 20% in total in real terms between 2006 and 2012 and may well not return in real terms to its previous levels.
- Ofcom have found that nearly two thirds of the implicit subsidy for commercial PSB will have disappeared between 2003 and 2012 – a decline from £520m in 2003/4 to £185m by 2012/13. This will put acute pressure on the ability of commercial PSBs to continue to invest in original, high quality, UK produced content – a pressure which is reflected in increasingly thin margins for ITV1.
- Ofcom's analysis showed that on a range of likely scenarios there would be a funding gap of between £145m to £235m by 2012 in investment in public service content.

Whilst ITV is investing in a new business model to sustain as high a level of investment in original UK produced content as possible in the digital age, achieving that objective will also involve an imaginative approach to regulatory reform to reflect the passing of the analogue era. If the development of new sources of revenue such as product placement is not at least part of the solution to sustain investment in UK content then there needs to be very clear and rapid direction from government as to

the sort of measures it believes will help sustain investment in original UK production given the broad consensus on the importance of that objective.

A particular advantage of product placement as a potential revenue stream is that it is effectively hypothecated to entities which are making and/or investing in original content. Like programme sponsorship before it, there is no reason to think that it would not grow over time to become an important part of an overall funding mix for commercial PSB in the UK.

In addition, product placement offers the chance for commercial PSBs to innovate in the offering of a mature product (commercial television) in competition with new entrant service providers. In particular, broadcasters would be able to offer a “full service” proposition in competition with online operators who, in any scenario, will be able to offer multiple unregulated product placement opportunities outside of traditional TV like content (as well as regulated product placement options in TV like content delivered on demand).

Moreover, it is perfectly possible to see product placement being marketed (at least by commercial PSBs with high audience reach) as a premium product in a way which would potentially allow those broadcasters to access different budgets of advertisers – for instance sales promotion or PR delivering brand enhancement rather than a simple selling opportunity. Although the business model for product placement is clearly still being developed, this approach would result in the generation of incremental revenue for broadcasters rather than simply substituting advertising revenue. It is clear from approaches we have already had from clients that there is considerable interest in the opportunity.

The views of audiences

The available evidence (for instance that commissioned by Ofcom in 2005/6 and more recent Ipsos Mori research for Clearcast submitted to government during the previous product placement consultation) suggests that levels of concern amongst viewers about product placement are low and, in the case of the Ofcom research, that viewers accept controlled product placement as a means of continuing to fund television and would prefer it to more advertising.

The continued presence of product placement on UK television channels in acquired content

As has been widely noted, product placement in acquired programming from outside the UK is already seen by audiences, to no obvious ill effect, every night of the week on most mainstream television channels in the UK. It is illogical given this fact to continue to ban product placement. Indeed, to ban product placement only in UK content is the worst of all worlds – handicapping UK producers in competition with overseas content producers, incentivising advertisers to reach UK audiences with product placement included in non-UK programming whilst only partially protecting audiences.

The requirement for a strict regulatory regime for product placement

The regulatory framework set out in the Audio Visual Media Services Directive (the “Directive”) which was debated at length by the EU institutions, if implemented effectively in the UK, would provide a rigorous framework to protect UK viewers. This framework would (a) protect the interests of viewers by safeguarding editorial integrity, (b) ensure that viewers are informed about the presence of product placement (c) ensure that there is no undue prominence on screen and (d) significantly restrict the genres in which product placement is permitted. Accordingly, pursuant to the Directive the UK is simply not permitted to adopt the unregulated approach to product placement which prevails in the USA and under which significant amounts of content currently shown on UK television is produced.

The European legislative process involved a lengthy debate which carefully balanced competing public interests and resulted in a balanced framework for product placement. The European process concluded prior to the economic difficulties of 2008/9 and it is instructive that almost all other European countries plan to permit product placement and are not proposing to add further restrictions beyond those contained in the Directive.

Against this backdrop there should be a presumption against further restricting the introduction of product placement in the UK beyond the restrictions already required by the Directive. In particular, there is a compelling case against blanket restrictions on the placement of HFSS products, gambling products or alcoholic drinks in programming primarily made for and aimed at adults given that the Directive itself will require a ban on any product placement in children’s programmes. In summary the arguments against a blanket ban on placement of such products are as follows:

- The products in question are perfectly legal and decisions about whether to purchase and consume them are rightly decisions which can be freely made by adults.
- Outright bans on placing particular products in a way which affects the entire television audience in order to attempt to protect a relatively small proportion of that audience to whom the programmes are not primarily aimed, is, almost by definition, disproportionate and will very significantly limit the commercial opportunity which liberalisation offers.
- Many of the products that some might suggest should be banned from all programmes would include products of little interest to children – e.g. pasta sauces, cheese ready meals etc. A blanket prohibition against some such products would again seem wholly disproportionate.
- Adult programming which attracts children to view is in most cases watched by other family members too and therefore any product placement can (if necessary) be placed in context by adults viewing at the same time.
- The rules required by the Directive around product placement will ensure that any placed product is editorially relevant (in order not to be unduly prominent). Accordingly, if the characters in fiction or the presenters in real life would believably, as part of the programme, be consuming a particular product or be in a particular place the fact that such a product or location is

potentially identifiable rather than being generic would seem to add little but realism to the situation. So, if a particular character would in the context of a piece of fiction drive a fast car or have breakfast cereal (in most cases an HFSS product) in the morning the precise identity of the car or cereal would at most seem to direct brand choice rather than stimulating demand for a particular type of product per se. There is no suggestion that breakfast cereals, alcoholic drinks, or fast food should not appear on television as part of normal programming so it seems inconsistent that where such things are editorially appropriate in programming it would not be permissible for particular brands of those products to be identifiable if product placement as a whole was permitted. It is not clear what additional material harm is likely to be caused through the presence of an identifiable brand in a programme that is not already present as a result of the realistic portrayal by television of life in contemporary Britain.

- The point about brand presence is reinforced by the prohibition in the Directive (which must be reflected in the UK rules) on direct encouragement of the purchase or rental of goods or services in particular by making special promotional references' to them. In other words, product placement will be quite distinct from spot advertising where an overt sales message is permitted and designed to persuade the audience to purchase that product. In many ways product placement will be designed to flow with an existing and legitimate programme narrative and give presence to a particular brand in a particular circumstance rather than seeking to increase consumption of a particular product overall.

Notwithstanding these arguments we appreciate that the introduction of product placement in the UK is a significant change in longstanding rules governing programme content and therefore, at least for an initial period, we recognise that there may be a case for a differentiated approach to implementation in a few key areas. In particular:

- First, ITV recognises the issues raised by the possibility that the regime set out in the Directive could permit product placement in religious programmes, news programmes and current affairs content which deals with issues of political, economic/business or social controversy. ITV recognises that the policy and audience drawbacks of placement in such content might outweigh the (probably relatively limited) economic benefit that might arise as a result of such placement. However, this is subject to the caveat that there are some programmes (for instance extended magazine programmes such as *This Morning*) which from time to time contain current affairs type content which may on occasion deal with issues of political, economic/business or social controversy in which product placement would not be appropriate. We do not believe that product placement should be prohibited entirely in such programmes given that they are not predominantly current affairs programmes.
- Secondly, we can also see a case for prohibition in content offering consumers comparative advice on different products or in content which performs a "watchdog" function on behalf of consumers where consumers would expect

the advice to be uninfluenced by commercial considerations. However, we do not believe that a blanket prohibition in “consumer advice programmes” would be either precise enough or justifiable (given the broad range of content that might be covered) provided that content offering consumers comparative advice on different products and watchdog type content was marked out as a prohibited type of content for product placement.

- Thirdly, whilst we believe that potential concerns in relation to product placement are different from those in relation to spot advertising (not least because there can be no active promotion of placed products) we recognise the concern around the placement of HFSS products as well as gambling offers and alcoholic drinks/brands in programmes of particular appeal to children. Whilst the Directive prohibits product placement in programmes for children, we can see some arguments, at least initially, in favour of ensuring consistency between a regime for product placement and the existing regime for spot advertising and sponsorship in relation to the inclusion of HFSS products, gambling and alcohol products and brands in adult programmes which are predicted to be of particular appeal to children using the established predictive 120 indexing system ultimately overseen by Ofcom.
- Fourthly we believe there also a very few other products where a strong policy case can be made not to permit placement – for instance cigarette accessories such as cigarette papers.
- Finally, we do not believe that, initially at least, either thematic placement or negative placement should be permitted.

In this context, as we set out in our previous response to the product placement consultation ITV has been working with PACT to develop an agreed Code for product placement on television which goes further than the requirements of the Directive and which would for instance, ensure that there was no anomaly in relation to the placing of certain products (HFSS food, alcohol or gambling) in programmes of particular appeal to children (identified pursuant to the well established 120 index approach) around which spot advertising and sponsorship would not be permitted. We enclose a copy of the ITV/PACT code at Annex 1.

Should product placement be included within the terms of trade?

It will be an important part of the successful and reliable implementation of product placement in the UK that those entities with the legal and regulatory obligations in relation to compliance (the broadcasters) have full visibility of any commercial deals that are struck and are principals in such deals. This is important to the transparency of the operation of the product placement regime overall. In circumstances where products are being placed commercially under a carefully supervised regulatory regime where the regulatory jeopardy (and audience opprobrium) rests with the broadcaster it is clearly vital that the broadcaster has control over the placement of products in programmes it is transmitting.

In addition to this, control of the opportunity by broadcasters is almost certainly the most effective way of ensuring that the product placement opportunity remains a

premium addition to advertising tapping into corporate budgets other than advertising rather than being marketed by producers as a cheaper alternative to the advertising opportunity offered by the broadcaster thus further imperilling the economics of advertising financed television.

Of course we would expect there to be a commercial negotiation with producers in relation to the product placement that the broadcaster is prepared to see included in the programmes that it broadcasts. As is the case with the supply of many programmes there will be a negotiation in relation to the licence fee, rights and revenues associated with programmes which might be acquired by the broadcaster and product placement revenue will clearly be part of this negotiation.

In this context and given the radically changing television broadcasting and production markets, ITV can see no case for the inclusion of the product placement opportunity within the terms of trade. As ITV has submitted separately to government as part of the Digital Britain process there are compelling grounds now to dispense altogether with the Terms of Trade framework which has now served its purpose in UK broadcasting.

In particular the current regulatory regime was designed for a world that has now past in which broadcasters could earn substantial profits potentially at the expense of independent producers, and in which the latter were small businesses in need of support from a statutory regime. But the world has now changed – the independent sector has grown and is now far stronger, while at the same time a combination of structural and cyclical pressures has created a crisis in free to air broadcasting.

Rather than adding to the terms of trade arrangements ITV is concerned that, if the current terms of trade/Code of practice arrangements are allowed to continue at all, they will have critical damaging effects:

- They will perpetuate and intensify an increasingly inequitable relationship in which the commissioning broadcaster bears the risk of a commission, while the independent producers gains a risk-free profit margin and most of the upside benefits if the commission is successful
- This inequitable relationship – in which the commissioning broadcaster cannot secure proper value from the programmes it funds – will severely curtail the commercial PSBs' ability to invest in original content. This would be to the detriment of UK viewers, and to the independent production sector.

The incentives of broadcasters investing in original UK content are aligned with the interests of the audience

UK television audiences now have more choice of television and other content than would have been imaginable even 15 years ago. Put simply, if audiences do not like a programme they will not watch it and if they do not watch it the broadcaster will generate less advertising revenue. Moreover, in the UK the BBC will continue to provide a very clear, non commercial, yardstick against which audiences will compare commercial television programming.

Advertising revenue will continue to be the overwhelming revenue earner for commercial television for many years to come. Including inappropriate product placement which alienated audiences would be economically irrational for ITV – we would lose infinitely more than we gained. In other words, ITV's overwhelming incentive will continue to be to produce attractive programmes which attract audiences and therefore advertisers. In addition to this, for original content producers/broadcasters the secondary sale and exploitation of programming is an increasingly critical part of the return which those producers/broadcasters have to make on their investment in the content. Accordingly, the inherent attractiveness of the programme is more critical than ever given that the commercial life and usefulness of that programme has significantly extended in recent years.

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

ITV's starting position is that there should be a presumption against introducing any further restrictions on product placement in the UK beyond those already required by the Directive. The Directive itself represents a sensible compromise between legitimate public policy concerns about product placement balanced against the need to take steps to try to maximise investment in original European television content. In this context it is notable that almost all other European countries are both permitting the implementation of product placement and are not, in general, going further than the Directive in regulating that implementation.

It is worth noting that the Directive was agreed some time before the significant recent downturn in the advertising market was visible and it is arguable that if the debate were repeated again today there would be even greater concern about the future health of original European content investment when striking the balance between policy concerns and commercial opportunity. It is very important that in allowing product placement the commercial opportunity is not eliminated as a result of a very restrictive approach to implementation.

However, we recognise that the introduction of product placement in the UK is a significant change in longstanding rules governing programme content and therefore, at least for an initial period, we recognise that there may be a case for a differentiated approach to implementation in a few key areas. In particular (and as is set out in more detail in response to individual questions below):

- First, ITV recognises the issues raised by the possibility that the regime set out in the Directive could permit product placement in religious programmes, news programmes and current affairs content which deals with issues of political, economic/business or social controversy. ITV recognises that the policy and audience drawbacks of placement in such content might outweigh the (probably relatively limited) economic benefit that might arise as a result of such placement. However, this is subject to the caveat that there are some extended magazine programmes (for instance *This Morning*) which from time to time contains current affairs type content which may on occasion deal with issues of political, economic/business or social controversy in which product placement would not be appropriate. However, we do not believe that product placement should be prohibited entirely in such programmes given that they are not predominantly current affairs programmes.
- Secondly, we can also see a case for prohibition in content offering consumers comparative advice on different products or in content which performs a “watchdog” function on behalf of consumers where consumers would expect the advice to be uninfluenced by commercial considerations. However, we do not believe that a blanket prohibition in “consumer advice programmes” would be either precise enough or justifiable (given the broad range of content that might be covered) provided that content offering consumers comparative

advice on different products and watchdog type content was marked out as a prohibited type of content for product placement.

- Thirdly, whilst we believe that potential concerns in relation to product placement are different from those in relation to spot advertising (not least because there can be no active promotion of placed products) we recognise the concern around the placement of HFSS products as well as gambling offers and alcoholic drinks/brands in programmes of particular appeal to children. Whilst the Directive prohibits product placement in programmes for children, we can see some arguments, at least initially, in favour of ensuring consistency between a regime for product placement and the existing regime for spot advertising in relation to the inclusion of HFSS products, gambling and alcohol products and brands in adult programmes which are predicted to be of particular appeal to children using the established predictive 120 indexing system ultimately overseen by Ofcom
- Fourthly we believe there are also a very few other products where a strong policy case can be made not to permit placement – for instance cigarette accessories such as cigarette papers.
- Finally, we do not believe that, initially at least, either thematic placement or negative placement should be permitted.

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

We believe that it would be most appropriate and proportionate for the additional safeguards we have identified to be imposed by means of the Ofcom code as are the detailed rules around spot advertising. This approach would still result in binding obligations on all broadcasters but would build in more flexibility for changes over time to reflect an evolving understanding of product placement as the market develops.

Commercial advantages

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

The decline in television advertising revenue in recent years has been extensively documented in the Ofcom PSB Review and government's Digital Economy process. Clearly all commercial broadcasters reliant on advertising are looking at alternative, complementary sources of revenue in order to enable them to continue to invest in original UK content and make a sustainable commercial return.

In this context, product placement offers the opportunity to innovate in the offer to advertisers and, in particular, to offer something which is differentiated from the mature spot advertising product. Such an approach (which might, for instance, see product placement being marketed as a premium product) would potentially allow broadcasters to access different budgets of advertisers – for instance sales promotion

or PR budgets delivering brand enhancement rather than a simple selling opportunity. Although the business model for product placement is clearly still being developed, this approach could well result in the generation of incremental revenue for broadcasters rather than simply substituting advertising revenue. It is clear from approaches we have already had from clients that there is considerable interest in the opportunity.

However, the precise size of the opportunity both immediately and over time is very hard to predict precisely because part of the likely model for product placement will involve breaking new ground with advertisers. Accordingly, a broad range of potential value is probably the most appropriate approach to this issue and the range above seems to be a reasonable one. However, it is important to note that the extent of the opportunity will clearly depend on the outcome of this consultation and in particular whether any additional restrictions are imposed which materially limit the size of the opportunity. In this context, whilst ITV is proposing some additional restrictions in this response, we believe that the potential negative revenue impact of further restrictions will not be proportionate to the public policy benefit of such restrictions.

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

Given our comments above we do not believe that a narrowing of the estimates would result in an estimate that was any more accurate and that the current broad range approach is the most appropriate.

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

Clearly the recession of the past 18 months has had a serious impact on most if not all of the marketing and PR related budgets of major companies and therefore, in line with the general economy, it would be unrealistic to think that broader economic factors had not had some impact on the size of the likely short to medium term opportunity.

However, the fact that the potential benefit of product placement might in the short to medium term be smaller in absolute terms than might have been the case last year is of limited relevance since there is no reason to suppose that in **relative terms** (given the overall decline in revenues and content spending by the major PSBs in the past 18 months) the position has changed materially. In other words the product placement opportunity, provided that it is not unduly constrained with additional restrictions, is still an important potential source of incremental revenue albeit in a sector which is now smaller in absolute terms than it was.

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

Not so far as we are aware though recent economic conditions have made the case for implementation without significant further restrictions even more compelling.

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?**

In general no. Subject to the comments below on specific sub-genres, if product placement is to be allowed there would be no logic in restricting the opportunity for those investing in original UK content by excluding whole genres of programming which can contain product placement beyond the restrictions contained in the Directive itself which were agreed upon as part of the European legislative process and which will be the permitted genres in virtually all programming in Europe.

- 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?**

No – We agree with the consultation document that further attempts at guidance or definition could be counter productive and unduly complex imposing unnecessary and arbitrary restrictions in a market where the variety and speed with which TV show concepts and formats emerge and evolve is very significant.

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

In general no but to the extent that either news, religious programmes or current affairs programmes which deal with issues of political, economic or social controversy might be considered to constitute series, please see our comments below.

- 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?**

ITV agrees with the government’s view that the term sports programme clearly includes both broadcasts of sports events and programmes *about* sport. We can see no legitimate policy reason why there should be either a further definition of sports programme, still less some sort of restriction on product placement in such programmes, given the need to ensure that there remains a viable economic opportunity for those investing in original content (including sports programming) to generate some revenue from product placement. This is particularly important in the context of the escalating price of sports rights which impacts on the ability of Free to Air broadcasters to bring mainstream sports events for free to UK viewers.

- 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?**

As is the case for films and series further attempts at guidance or definition could be counter productive and unduly complex imposing unnecessary and arbitrary restrictions in a market where the variety and speed with which TV entertainment concepts and formats emerge and evolve is very significant. Again, we can see no legitimate policy reason why there should be either a further definition of light entertainment programme, still less some sort of restriction on product placement in such programmes, given the need to ensure that there remains a viable economic opportunity for those investing in original content to generate some revenue from product placement.

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?**

We believe that the government should consider very carefully the balance between the policy issues that would be raised by product placement in religious programmes, news programmes and current affairs content which deals with issues of political, economic/business or social controversy and the possible economic benefit that might arise from permitting such product placement. This is probably the only area where there are reasonable arguments that the Directive did not go far enough in seeking to properly regulate product placement in the broad interests of viewers.

Given the overriding importance of editorial relevance in assessing whether product placement is unduly prominent it is not clear to us that placement in such content in fact presents a significant commercial opportunity or that viewers would be particularly tolerant of product placement in such areas. Accordingly, on balance, we can see some merit in specific prohibition on placing products in such content. However, this is subject to the caveat that there are some programmes (for instance extended magazine programmes such as *This Morning*) which from time to time contain current affairs type content which may on occasion deal with issues of political, economic/business or social controversy in which product placement would not be appropriate. We do not believe that product placement should be prohibited entirely in such programmes given that they are not predominantly current affairs programmes.

In addition to this we can also see a case for prohibition in content offering consumers comparative advice on different products or in content which performs a “watchdog” function on behalf of consumers where consumers would expect the advice to be uninfluenced by commercial considerations. However, we do not believe that a blanket prohibition in “consumer advice programmes” would be either precise enough or justifiable (given the broad range of content that might be covered) provided that content offering consumers comparative advice on different products and watchdog type content was marked out as a prohibited type of content for product placement.

Other than in these areas we can see no case for restrictions in other specific types of television programme.

Children

- 15. Should any or all product placement be restricted or prohibited in programmes with a disproportionately high child audience?**
- 16. If so, how should that assessment be made in advance of a programme being broadcast?**
- 17. How could a ‘disproportionately high child audience’ be defined?**
- 18. Should there be restrictions on placing certain types of productions (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 the government’s consultation document points out, the Directive prohibits product placement in children’s programmes as well as the placement of certain products such as cigarettes. This prohibition is the result of a prolonged debate at European level as to the right balance between protecting children (particularly the very young) against potential exposure to commercial messaging whilst at the same time recognising that a broader restriction outside children’s programming would have a disproportionate impact on the ability of broadcasters to continue to invest in original UK content primarily aimed at adults or a family audience.

Further restrictions on product placement in categories of programming where such placement would otherwise be allowed under the Directive would substantially reduce the potential revenue which can be generated from some of the most popular adult programming on television. As the traditional economic models for investment in original UK produced television become more and more precarious such an approach will stifle an important opportunity to open up new and potentially incremental revenue streams. This will in turn risk exacerbating the decline in investment in original UK television content despite the views of the overwhelming majority of adults in the UK that such content is both important and attractive to them.

There are a few key points to make about the prospect of further restrictions in programmes not made for or specifically targeted at children:

- Non-children’s programmes which happen to have some children in the audience are not children’s programmes, they are programmes the vast majority of whose viewers are adults. By definition regulating in a way which affects the entire television audience in order to attempt to protect a relatively small proportion of that audience is disproportionate.

- Many of the products that might be placed in such programmes would include products of little interest to children – e.g. pasta sauces, cheese, ready meals etc. A blanket prohibition against such products would again seem wholly disproportionate.
- Adult programming which attracts children to view is in most cases watched by other family members too and therefore any product placement can (if necessary) be placed in context by adults viewing at the same time.
- The rules required by the Directive around product placement will ensure that any placed product is editorially relevant (in order not to be unduly prominent). Accordingly, if the characters in fiction or the presenters in real life would believably, as part of the programme, be consuming a particular product or be in a particular place the fact that such a product or location is potentially identifiable rather than being generic would seem to add little but realism to the situation. So, if a particular character would in the context of a piece of fiction drive a fast car or have breakfast cereal (in most cases an HFSS product) in the morning the precise identity of the car or cereal would at most seem to direct brand choice rather than stimulating demand for a particular type of product per se. There is no suggestion that breakfast cereals, alcoholic drinks, or fast food should not appear on television as part of normal programming so it seems inconsistent that where such things are editorially appropriate in programming it would not be permissible for particular brands of those products to be identifiable if product placement as a whole was permitted. What additional material harm is likely to be caused through the presence of an identifiable brand in a programme that is not already present as a result of the realistic portrayal by television of life in contemporary Britain?
- The point about brand presence is reinforced by the prohibition in the Directive (which must be reflected in the UK rules) on direct encouragement of the purchase or rental of goods or services in particular by making special promotional references' to them. In other words, product placement will be quite distinct from spot advertising where an overt sales message is permitted and designed to persuade the audience to purchase that product. In many ways product placement will be designed to flow with an existing and legitimate programme narrative and give presence to a particular brand in a particular circumstance rather than seeking to increase consumption of a particular product overall.

Against this backdrop we believe that the correct presumption should be that any restrictions introduced alongside the liberalisation of product placement should not go beyond those set out in the Directive. In general we believe that going beyond those restrictions would risk undermining the economic justification for the liberalisation of product placement without delivering a significant amount of additional protection to children.

However, at the same time we recognise that there are currently rules in place in relation to the advertising of HFSS products, alcohol and gambling which prohibit the advertising of those products around programmes that have a “particular appeal” to children (4 to 15 in the case of HFSS and up to 18 in the case of alcohol and

gambling). In this context, there is a well established approach for assessing whether a programme might be thought to have a particular appeal to children and that is if the broadcasters reasoned assessment of the likely audience shows that the number of children in the relevant age group indexed against all individuals that make up the relevant comparator audience (e.g. all homes) produces an index of 120 or more.

Accordingly, we appreciate the anomaly that would be created as a result of inconsistent regulatory approaches between advertising/sponsorship and product placement. As a result, we can see that some may make a case for aspects of the approach to advertising HFSS products, gambling and alcoholic drinks and brands being transferred into the rules for product placement. Accordingly, ITV would be prepared to accept the replication of the current scheduling restrictions (including the predictive 120 indexing approach as it is currently applied and ultimately overseen by Ofcom) for gambling, HFSS and alcohol products in the context of a new regime for product placement.

We believe that it would still be possible to adopt the current predictive 120 indexing approach to the inclusion of these products in programmes, though we recognise that the stakes are considerably higher given the inclusion of products within the actual programmes themselves rather than in an ad break surrounding them. In this context if the current 120 indexing approach was adopted there would need to be a clear continued recognition in the rules (as there is already in the rules) that the predictive approach requires a judgement by broadcasters based on the likely appeal of a programme as well as the historic audience for programming in the relevant slot in the schedule. Clearly this judgement will be more challenging (though not impossible) in relation to completely new programming. The latitude to exercise judgement does of course not rule out investigations by the regulator to assess whether that judgement was exercised reasonably in all the circumstances and given the available data.

Editorial independence; undue prominence

20. How could ‘undue prominence’ be avoided, given the commercial imperative for audiences to recognise the products and services that have been placed?

We do not believe that there is a contradiction per se between the requirement to avoid undue prominence and the commercial imperative for some recognition of products and services that have been placed. The key requirement for acceptable product placement in this context will be that the products, services or brands appear in a way which is justified by the editorial context in which they appear.

Accordingly, as a point of principle, there may well be a number of circumstances in which audiences recognise the products and services that have been placed without those products or services being unduly prominent.

The issue of undue prominence has been given significant thought in the context of the recent industry steering group discussions on product placement in VOD content (in which Ofcom has been involved and has now agreed in principle helpful guidance in this area with ATVOD). Those discussions have rightly concluded that in assessing whether a programme has given undue prominence to a product or service

for which payment has been made for placement the term “due” is critical. The manner in which a product or service (including company names, brand names, logos, trade marks etc) appears or is referred to in a programme should be judged against the editorial requirements of the programme and the editorial justification for the presence of the product or service in the programme. Clearly there may be circumstances in which a particular product is naturally a part of the narrative and therefore visibility of it may be entirely appropriate and justifiable. Conversely, there may be circumstances in which a particular product or service is only of marginal significance to the narrative and therefore it is possible in such circumstances that anything more than a passing shot (in which the product might well be hard to recognise) would be likely to be unduly prominent.

Ultimately, therefore ITV believes that this issue is, in the first instance, a matter of editorial judgement for production teams, broadcasters and their compliance advisors but clearly these judgements will be made against a backdrop of Ofcom supervision and, over time, “case law” decisions by Ofcom providing appropriate guidance. In this context, it seems likely that audience annoyance, distraction and complaint at placement will be a powerful indicator of inappropriate and potentially undue prominence in a programme.

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, ITV believes that the most effective approach to this issue is not in trying to create a hard line between legitimate placement and illegitimate “direct encouragement” to purchase or hire. Rather, a better approach would seem to involve a clear statement that direct encouragement to purchase or hire is prohibited but that each set of circumstances will be assessed on their own merits in the context in particular of the obligation to avoid undue prominence and as part of that the imperative of editorial relevance. Such an approach provides the necessary flexibility to enable a distinction to be made between different sets of circumstances.

So, for instance, in ITV’s view (and in the view of ATVOD in the context of discussions around the rules for product placement in VOD content) it should be possible for product placement to be used for prizes in programmes provided that the references to the products are editorially justified and are not promotional of the product. In particular, it is appropriate to recognise that prize descriptions help to create excitement around competitions and stimulate audience participation in programmes and as such references to the brand of a prize or its main features are likely to be justified. However, at the same time we recognise that competitions should not be used as advertising platforms for the prizes or brands and prize references should not sound or look like advertisements and the duration of any branded prize references would be subject to the prohibition on undue prominence.

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?

The European legislative process resulted in a Directive which sensitively balanced the need to enable the broadcast and production sector in Europe to continue to invest in original European content with the need to ensure that consumers were appropriately protected in the event that product placement was liberalised.

ITV believes that the requirement to identify programmes containing product placement, the undue prominence rule and the prohibition on promotion together comprise a coherent and strict regime governing the introduction of product placement. These must be the cornerstones in protecting the viewer experience and ensuring continuing editorial integrity.

However, the directive does also specify that the content and scheduling of programmes containing product placement should not be influenced in such a way as to affect the responsibility and editorial independence of the broadcaster. Whilst we do not believe that this principle should be elaborated on in law or in regulatory rules it does provide a backstop principle for regulators in circumstances where there is a legitimate suspicion that the editorial approach might have been unjustifiably influenced. In such circumstances it would be the responsibility of those involved – broadcaster and potentially producer too – to demonstrate an editorial process that had not been so influenced. This is one of the important principles of the ITV/PACT product placement code (attached at Annex 1).

Tobacco, alcohol, HFSS foods, gambling

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

Yes – consistent with the ban on the advertising of tobacco products we do not believe that such placement would be appropriate.

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?

No, we set out our view on the question of further restrictions in response to questions 15-19 above.

The key point for ITV (outside of children’s programmes and programmes which might be assessed as being of particular appeal to children which we deal with above) is that these products are all legal in the UK and can all now be advertised on television. We can see no case for an outright ban on placing such products in programming the vast majority of the audience for which will comprise adults perfectly capable of making life choices for themselves. Aside from the fact that such a ban will have a material impact on the potential revenue opportunity for broadcasters from product placement there are two key reasons for this:

- First, the editorial rules around product placement will have to ensure that any placed product is editorially relevant (in order not to be unduly prominent). Accordingly, if the characters in fiction or the presenters in real life would believably as part of the programme be consuming a

particular product or be in a particular place in the context of the programme the fact that such a product or situation is potentially identifiable rather than being generic would seem to add little but realism to the situation.

So, if a particular character would in the context of a piece of fiction drive a fast car or have breakfast cereal (in most cases an HFSS product) in the morning or a beer in the evening the precise identity of the car, cereal or beer would at most seem to direct brand choice rather than stimulating demand for a particular type of product. There is no suggestion that breakfast cereals, alcoholic drinks, or fast food should not appear on television as part of normal programming so it seems inconsistent that where such things are editorially appropriate in programming it would not be permissible for particular brands of those products to be identifiable if product placement as a whole was permitted. What additional material harm is likely to be caused through the presence of an identifiable brand that is not already present as a result of the realistic portrayal by television of life in contemporary Britain?

- Secondly, the point about brand presence is reinforced by the prohibition in the Directive (which will be reflected in the UK rules) on direct encouragement of the purchase or rental of goods or services in particular by making special promotional references' to them. In other words, product placement will be quite distinct from spot advertising where an overt sales message is permitted and designed to persuade the audience to purchase that product. In many ways product placement will be designed to flow with an existing and legitimate programme narrative and give presence to a particular brand in a particular circumstance rather than seeking to increase consumption of a particular product overall.

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?

ITV believes that it would indeed not be practicable to apply the BCAP Code rules on alcohol advertising to alcohol product placement. In particular, such an approach would fail to recognise the distinction between an overt selling opportunity (in spot advertising) where arguably the editorial itself should be strictly regulated given the overt intention compared to the combination of a product with a pre-existing and independently determined editorial (which would not and should not be influenced by an commercial considerations).

Rather than apply the web of BCAP advertising rules to a very different set of circumstances ITV believes that the government is right to suggest that the relatively simple but broad principles from the directive in relation to alcohol product placement are the most appropriate rules to put in place since they are both simple and relatively easy to understand.

These simple principles also go to the heart of the main policy concerns that such placement might be seen to raise. Of course, there will from time to time be a degree of judgement about the extent to which a placement might be thought to be aimed at persons under the age of eighteen and such judgements are likely to turn on both the content of the programme and also on the context in which the placement is presented. In addition, notions of encouragement and immoderation are also most appropriately judged in the context of the programme itself and in particular any editorial justification and the broader programme narrative. These are clearly matters on which broadcasters must take a view subject to the guidance and scrutiny of the regulator.

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

No.

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?

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

It is far from clear to ITV that there is a need for further assessment or monitoring around the introduction of product placement of particular products beyond a monitoring of the adherence of broadcasters to the rules. In particular, given our comments above about the limited additional role that the placement of real products or brands in pre-existing and editorially appropriate situations will play it is not clear to ITV how it would be possible to distinguish between the effect of the editorial of a programme and the product that was placed in that editorial content.

Furthermore, if the purpose of further research is to assess whether perceived societal problems (obesity, excessive drinking, problem gambling) are worsening it would be a mistake to attempt to zero in on a single factor either as the cause or the cure of such issues. Rather, the scale of such problems should be assessed in the round and any solutions need to be devised taking into account the role of a range of different factors in causing or aggravating problems. In this context, in order to try to isolate the particular contribution of product placement it would surely be necessary to have a parallel control group that was not exposed to product placement on television in order to assess the impact on the group that was so exposed. It is not clear how such a control group could be sensibly and reliably assembled.

This said, what is clearly important above all is that audiences are aware of when there is placement in programmes so that they are able both to choose whether to watch at all and/or whether to be particularly alert to the fact that the inclusion of products or services in the programme may be deliberate and the result of an economic transaction. In addition to this, we can see a case for a review by Ofcom of

the introduction of product placement after a reasonable period of time (taking into account the long lead time for a lot of the programming which might include product placement).

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?

No.

Terms of trade

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

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?

ITV believes that it will be an important part of the successful and reliable implementation of product placement in the UK that those entities with the legal and regulatory obligations in relation to compliance (the broadcasters) have full visibility of any commercial deals that are struck and are principals in such deals. This is important to the transparency of the operation of the product placement regime overall. In circumstances where products are being placed commercially under a carefully supervised regulatory regime where the regulatory jeopardy (and audience opprobrium) rests with the broadcaster it is clearly vital that the broadcaster has control over the placement of products in programmes it is transmitting.

In addition to this, control of the opportunity by broadcasters is almost certainly the most effective way of ensuring that the product placement opportunity remains a premium addition to advertising tapping into corporate budgets other than advertising rather than being marketed by producers as a cheaper alternative to the advertising opportunity offered by the broadcaster thus further imperilling the economics of advertising financed television.

Of course we would expect there to be a commercial negotiation with producers in relation to the product placement that the broadcaster is prepared to see included in the programmes that it broadcasts. As is the case with the supply of many programmes there will be a negotiation in relation to the licence fee, rights and revenues associated with programmes which might be acquired by the broadcaster and product placement revenue will clearly be part of this negotiation.

In this context and given the radically changing television broadcasting and production markets, ITV can see no case for the inclusion of the product placement opportunity within the terms of trade. There are compelling grounds now to dispense

altogether with the Terms of Trade framework which has now served its purpose in UK broadcasting.

In particular the current regulatory regime was designed for a world that has now past in which broadcasters could earn substantial profits potentially at the expense of independent producers, and in which the latter were small businesses in need of support from a statutory regime. But the world has now changed – the independent sector has grown and is now far stronger, while at the same time a combination of structural and cyclical pressures has created a crisis in free to air broadcasting.

Rather than adding to the terms of trade arrangements ITV is concerned that, if the current terms of trade/Code of practice arrangements are allowed to continue at all, they will have critical damaging effects:

- They will perpetuate and intensify an increasingly inequitable relationship in which the commissioning broadcaster bears the risk of a commission, while the independent producers gains a risk-free profit margin and most of the upside benefits if the commission is successful
- This inequitable relationship – in which the commissioning broadcaster cannot secure proper value from the programmes it funds – will severely curtail the commercial PSBs' ability to invest in original content. This would be to the detriment of UK viewers, and to the independent production sector.

In our view, new arrangements are needed in order to ensure a more market-based outcome:

- The negotiations between independent producers and broadcasters should be carried out on an open, commercial basis – rather than under the constraint of terms influenced by Government and Ofcom
- Broadcasters should be comfortable that they are negotiating with only the relevant independent producer(s) on a commission – rather than, at present, negotiating on the basis of collective arrangements put in place by PACT (an approach effectively endorsed by the regulatory regime and Ofcom)
- Enabling a market-based and open commercial negotiation of this kind should allow all parties to secure an equitable share in the value of commissions, in an environment in which the returns are inherently uncertain – this is in contrast to the current inequitable arrangements, where the risks of both programme development and commissions are borne disproportionately by the broadcaster.

To be clear, ITV believes that it is unrealistic to return to the historic arrangements in which all of the rights in a commission were automatically considered the property of the broadcaster. Rather, we are seeking a new business model that works for all parties. Specifically, we believe that there should be a true commercial negotiation on rights – not constrained by a presumption that broadcasters are only automatically entitled to purchase only a limited package of rights – in which the negotiating parties are able to work freely towards a mutually acceptable outcome. In our view, the best means of securing this outcome would be to abolish the current Codes of

Practice/terms of trade arrangements for all PSBs – thereby enabling a true commercial relationship.

Broadcasters do not enjoy market power in their dealings with independent producers, and our incentive is only to commission the best programmes that viewers – and, therefore, advertisers – would value. In the case of ITV, our reduced share of the commercial market further reduces our ability to make profits. We therefore believe that policy in this area needs to follow Ofcom’s conclusion that the existence of in-house production only creates a problem if it is coupled with market power – and that, in the case of vertically-integrated broadcasters without market power, only the best programmes would be commissioned.

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?

Clearly the advent of product placement may mean that there may well be fewer opportunities in future for businesses to provide products as free props for use in production. However, we do not believe that prop placement will disappear by any means. Clearly, the BBC will continue with prop placement activity and inclusion in BBC programmes may become more sought after. In addition to this clearly there may be circumstances in which businesses are prepared to provide products for inclusion as props in programmes (which could represent a significant production cost saving) in circumstances where they would not be prepared to pay for the inclusion of that product. In the end if there is no competing demand for paid inclusion the broadcaster would still have an incentive to continue with prop placement. In this context it is instructive that prop placement continues to co-exist with paid for product placement in the USA where there is a far less restrictive regime for product placement than is proposed in the EU.

Signalling product placement to viewers

- 34. How should television product placement be notified to viewers?**
- 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?**
- 36. Should notifications to viewers mention the product(s) which has or have been placed?**
- 37. Do you have any other views about alerting viewers to the presence of product placement in a television programme?**

ITV believes that there are two key (but potentially contradictory) principles which are relevant in this context:

- Audiences should be appropriately informed about the presence of product placement in programmes; but
- Audiences should not be faced with unnecessarily prominent or potentially irritating notification on a regular basis.

With this in mind we believe that the proposal in the directive for notification before and after the programme and after any ad break represents a sensible compromise between the numerous views that were expressed on the subject (particularly in the European Parliament) in the context of the AVMS process.

The major UK broadcasters have had preliminary discussions between themselves as what might constitute appropriate on screen information about product placement and whether there might be value (in terms of audience understanding) in a single approach to product placement by the main (or perhaps even all) UK broadcasters. The three principal conclusions of those discussions were:

- There is a strong case for a single, common approach across the main broadcasters in order to make audience notification as simple and coherent as possible.
- The most appropriate approach is probably a modestly sized “pp” logo in a corner of the screen before and after the programme and after any ad break.
- There is potentially a case for some form of introductory public information campaign run by the main broadcasters and/or Ofcom in the event that product placement is permitted to educate viewers about the pp logo and the protections around the introduction of product placement.

In general there is little enthusiasm for any obligation to mention the products that have been placed on air and to insist on this might start to bring product placement closer to spot advertising. However, there would seem to be no reason to prohibit broadcasters from narrative descriptions of the products placed in the closing credits.

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

ITV does not support, at least initially, thematic placement nor inclusion in programmes of references to the beliefs, policies, aims or objectives of the placer except in a programme. This would appear to be incompatible with the editorial freedom and judgement of the programme maker.

Negative and simulated placements

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

Negative placement should not be permitted (even assuming that such activity is itself lawful which is not beyond doubt).

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

ITV believes that simulated or virtual product placement should be permitted if product placement itself is liberalised if the opportunity is to be economically worthwhile. In particular, whilst much product placement activity will be carried out during the making of a programme itself, in which the product is incorporated into the film equally that might not always be possible and there may well be other circumstances in which insertion is only possible after filming.

In this context the regulatory regime which the Directive requires to be put in place should ensure that any ex post product insertion is (a) editorially justifiable and (b) not unduly prominent. On the first of these two points it would be incumbent on the broadcaster to ensure that it could make the case to the audience (and ultimately to the regulator) on the question of editorial relevance and fit with the programme. ITV, for instance, intends to require that any inclusion of products or branding after a programme is made must be approved, on editorial grounds only, by a senior commissioner of ITV itself.

ANNEX 1 – ITV/PACT Product Placement Code

PRODUCT PLACEMENT CODE

Guided by the AVMS Directive the aim of this document is to illustrate the approach broadcasters and producers would take to paid-for product placement (as opposed to prop placement) in UK originated content if its introduction in the UK is permitted. It is supported by:-

[List]

Transparency: as set out in the Directive, a visual indicator to signpost paid for product placement in UK originated programming will be displayed at the beginning, end and as programmes resume after a break. To ensure consistency and clarity for the viewer this should be an easily recognisable, industry-wide logo used by all commercial broadcasters .

Presence not promotion: our guiding principle for product placement is that it should constitute brand presence in a programme where this is editorially justified and not unduly prominent. There can be no question of promotional references to such brands.

Editorial independence: the separation of the commercial and creative in the process outlined below will ensure that there will be no programme distortion for commercial purposes.

Process

The following process would ensure that the principles of brand presence, editorial independence and editorial justification are adhered to. Creative and commercial activity are structurally separated. Product placement opportunities are identified by the production team and agreed by the broadcaster. These opportunities are not identified until the script/programme concept has been finalised ensuring that product placement is creatively, rather than commercially, led.

The process for all paid for product placement would be as follows:

1. Script/programme concept and production budget are finalised.
2. Opportunities for product placement are identified in the script/programme concept by the producer/executive producer.
3. Opportunities, as identified by the producer/executive producer are agreed by the broadcaster at an editorial level after which brands are approached and commercial terms agreed. This is a separate commercial process. Brands are not guaranteed prominence or hold.
4. Products are passed to the producers with no prescription as to the manner and/or length of their exposure. Guided by the finalised script/programme concept the producer decides how to incorporate products, ensuring the producer is the sole custodian of the creative process.

5. The broadcaster must have the final say on whether a product placement is compliant and appropriate.
6. There should be transparency in the price payable for product placement and the value only ascertained once the programme has been delivered to and agreed to be compliant by the broadcaster i.e. based on actual screen presence in terms of prominence and hold (measured in seconds).

Content that could contain product placement would include:

- Films
- Films and drama or other series made for television or on demand delivery
- Sports programmes
- Entertainment programmes

For the avoidance of doubt the following content will never contain paid for product placement of any sort:

- news bulletins and news desk presentations.
- news and current affairs programmes on television (programme containing explanation/analysis of current events/issues, political or industrial controversy or with current public policy).
- Consumer advice programmes
- Children's programming

We recognise that it would ultimately be for Ofcom and the co-regulator to decide the types of programming in which product placement should be prohibited.

Restricted product placement

- Where there are existing restrictions on advertising particular products around certain categories of programming, products falling into the same categories should not be placed in such programming. For instance, products classified as HFSS should not be placed into programmes which the broadcaster considers are of particular appeal to 4-15 year olds in line with the 120 index.

Other

- A product placing company must not influence the content and/or scheduling of a channel or programme such that the responsibility or editorial independence of the broadcaster is affected.
- There must be no promotional reference (a ref that encourages purchase or rental of the product/service in question) to the placed item. Non-promotional references are permitted only where they are editorially justified.