



**ITV plc response to the DCMS consultation on proposals for the Implementation of the Audio Visual Media Services Directive in the United Kingdom**

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## **Introduction and Executive Summary**

ITV plc welcomes this opportunity to respond to the UK government's proposals for the implementation of the Audio Visual Media Services Directive (the "Directive") in the UK.

The government is consulting on implementation at a moment when the future of commercial public service broadcasting ("PSB") and continued high levels of investment in original UK television production are in real question. Ofcom's recently published phase 2 PSB Review report sets out the stark challenge to the economics of commercial PSB in the UK against a backdrop of radically increasing competition both in linear television and online and given declining levels of implicit subsidy for commercial PSB. The facts are clear:

- 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.
- At the same time, Ofcom have found that around 90% of the investment in original UK television content is funded by the PSBs, notwithstanding the explosion in multichannel and online content offerings which has put commercial PSB revenues under acute pressure.
- Ofcom's audience research has found overwhelming public support for the continued provision of high quality UK content provided by the PSBs and this is the content which continues to attract the majority of the audience in the UK.

Against this backdrop, ITV believes that there are three basic principles which should inform the UK government's position in implementing the Directive.

The first, and we believe overriding, principle should be to ensure that everything is done to encourage and sustain continued investment in original, high quality, UK production by the commercial PSBs in particular.

The second principle is that service providers offering comparable services or programme offerings should be regulated in the same way. It is important that new online services provided by entities historically associated with linear television should not find themselves subject to regulation where newer entrants without such historical associations (but which provide comparable services to traditional broadcasters online) are not regulated. Specifically, companies such as YouTube or Bebo should not be able to deliver unregulated long form television like content on demand which competes for viewers and revenue with comparable on-demand content which is regulated because it is provided by broadcasters such as ITV.

The third principle is that the UK government should not seek to go any further than is strictly necessary in implementing the Directive in order to discharge the UK's obligations in European law. In particular, we believe that the UK should always choose a minimalist

regulatory position where potentially viable options present themselves so as not to impose unnecessary burdens on a successful UK creative industry.

On the basis of the consultation document ITV believes that there is a real risk that the government's approach to the implementation of the Directive may not meet any of these principles. We set out our concerns in the body of our detailed response below but by far our biggest difficulty relates to the government's proposed position on product placement.

## **Product Placement**

The government appears, from comments made by the Secretary of State prior to the launch of the consultation, to have already made up its mind that the UK should not permit product placement in television like content on linear services and should go further to ban (the currently permissible) product placement in television like content delivered on-demand. This apparent disregard for a consultation which had not even been launched was surprising and, in our view, in breach of basic principles of public law. Once the consultation document was published, we found it incredible that the key monetised benefit of the government's proposed position on product placement was that:

*"...broadcasters and video-on-demand providers who are more reliant on bought-in programming will not lose revenue from any diversion of revenues from spot advertising to product placement"<sup>1</sup>*

Is the government's basic policy position therefore to protect those who acquire and repeat content at the expense of those who are investing billions in the UK creative industries?

ITV believes that the government should reverse its position on product placement to allow carefully regulated product placement in television like content delivered on linear services and to continue to permit such product placement on-demand services. We take this position for the following reasons:

### *The continued health of commercial PSB in the UK*

Whilst ITV is investing in a new business model to help sustain a high level of investment in original UK produced content 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.

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 and to offer a "full service" proposition in competition with online providers who, in any scenario, will be able to offer multiple unregulated product placement opportunities.

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<sup>1</sup> DCMS Consultation document on AVMS Implementation (Impact Assessment) p58

### *The views of audiences*

The government presents no evidence of viewer opinion to underwrite its position that product placement should continue to be prohibited on television and should now be banned in television programming delivered on-demand. In fact, the available evidence (for instance that commissioned by Ofcom in 2005/6 and more recent Ipsos Mori research for Clearcast) 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*

The government is not proposing to ban product placement in acquired programming from outside the UK which audiences already see, to no obvious ill effect, every night of the week on most mainstream television channels in the UK. This position is simply illogical and would appear to be based on the unpopularity which would result if some of the most popular imported television content currently shown in the UK was banned. Either the government believes that there are sound policy reasons to ban product placement or there are not. To ban it 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 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. 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.

It is clearly perfectly possible to require, via explicit licence conditions backed by regulatory sanctions, that the content and scheduling of a programme should in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider. To the extent that in future there was ever a suspicion that this principle had not been complied with it would clearly be open to the relevant regulator to investigate the circumstances and for the broadcaster to prove that the rules had been followed.

In this context, 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 includes a clear process which would permit the identification and marketing of product placement opportunities only once the script/programme concept has been finalised to ensure that product placement is creatively rather than commercially led. We set out more detail on the draft ITV/PACT Code in the detail of our response below.

Finally, the recent issues around compliance in the context of PRS services make it more and not less likely that the introduction of product placement would be handled extremely

carefully by broadcasters with an overwhelming emphasis on the need for effective compliance with very serious regulatory consequences for breaches.

*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, contrary to suggestions in the consultation document, 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.

## Part 2 – Scope: The Definition of Audio Visual Media Services

1. Does the Communications Act 2003 need to be amended in order to ensure that it covers all scheduled television services within UK jurisdiction regardless of the platform over which they are provided? If so, how?

It is not completely clear that any amendment to the current regulatory regime is required and as the consultation paper notes Ofcom has consistently applied the current regime in a platform neutral manner. However, consistent with the ITV plc principles set out above, we believe that it is important that there is equality of treatment between all comparable services and therefore we would support any necessary clarification of the current regime for the avoidance of doubt.

2. Do the proposed definitions to be included in the Communications Act capture all the relevant elements of the definition of an on-demand audiovisual media service in the AVMS Directive?

Yes

3. Are there any services which you think should fall within the scope of the regulation according to the Directive, but which the proposed definitions to be included in the Communications Act might exclude?
4. Are there any services which you think should fall outside the scope of the regulation according to the Directive, but which the proposed definitions to be included in the Communications Act might include?

ITV is concerned that there is a risk that the Directive is implemented in such a way that only those on demand services offered essentially by television providers (given the definition of programme and the television like requirement) will be subject to regulatory oversight. We acknowledge that the government's obligation is to implement the Directive but we believe that serious thought needs to be given to how online offerings which provide access to a variety of different services, only some of which might satisfy the definition of an on demand audio visual media service pursuant to the terms of the Directive, might be appropriately regulated.

There are two dimensions to this. First, we are very concerned to avoid a situation in which anything other than the on demand provision of programmes (in accordance with the Directive definition thereof set out on page 11 of the DCMS consultation document) is regulated. So, for instance, it is possible to access a variety of different services via an offering such as ITV.com many of which (ITV Local, video clips, etc) will not and should not be regulated pursuant to the Directive, though we recognise that the element of the ITV.com service which does provide access to programmes on demand may be regulated. We would urge the government to ensure that there are clear exclusions in the definitions used to ensure that services offered via the same access point as a regulated on-demand service are unequivocally not subject to regulation. This is a particular issue in relation to the scope of the regulation of advertising pursuant to the Directive which we deal with in more detail below.

Secondly and conversely, in paragraphs 19-22 of the consultation document the government describes those services which will not be covered by the Directive. We are concerned that,

rather than apply the definition of the regulated service in the Directive on a granular case by case basis, the government is excluding types of service without acknowledging that parts of those services should be caught if they offer on-demand programmes meeting the definition on paragraph 18 which is taken from the Directive. In particular, we note that providers such as Bebo or YouTube would appear from paragraph 22 of the consultation document (and from statements made by DCMS officials) to be excluded from the scope of the Directive. However, Bebo (like YouTube) offers identifiable on demand television like programme services (for instance, the Bebo Originals microsite offers television like programming including Kate Modern, Sofia's diary, The Secret World of Sam King, The Gap Year with other commissions to follow) made by television production companies, often funded using product placement and with advertising associated with the content.

We are unclear why clearly identifiable on demand programme service offered by providers such as Bebo or YouTube might not be subject to the regulatory regime for on demand programming? In particular, it would appear to be heavily promoted and pitched to compete directly against other television like programming delivered on demand (competing both for advertising and audience), and it is delivered to a mass audience. This issue becomes even more problematic in the context of the government's proposals for product placement which we discuss below and which would result in Bebo or YouTube being allowed to continue to fund its programme content through product placement but a regulated ITV.com or 4OD on-demand programme service not being able to do something similar.

It is hard to avoid the conclusion on the basis of the consultation document that if ITV.com for instance provided Kate Modern or other Bebo programming from any part of its site (even if separately from the core on-demand programme offer) it would be regulated under the UK implementation of the AVMS regime whereas if Bebo continues to provide such content from any part of its site it will be unregulated. Such a distinction would appear to rest on an all or nothing judgement about the "principal purpose" of a site or the "incidental" nature of content on a site (pursuant to recital 18 of the Directive). However, the reality is more complex - in the online world many sites and online businesses accessed through the same home page (including ITV.com) have a number of different principal purposes – it is impossible to say that such portals have a single principal purpose.

We are extremely concerned that if this is the UK's approach to the application of the Directive it will amount to little more than the identification of (mainly UK) broadcasters who are offering on-demand access to television programmes (irrespective of all of the other offerings provided by their online sites) subjecting them to expensive and time consuming regulation but ignoring and effectively favouring the online delivery of competing programmes which are offered by other providers who have brands which are not identified with traditional television broadcasting. It would be hard to think of an approach better designed to discriminate against the efforts of UK broadcasters to continue to invest in original UK content by developing online businesses to generate revenue to pay for that content in competition with new entrants who are capturing increasing amounts of advertising and other revenue.

In ITV's view the principal purpose test in particular needs to be applied at a granular level to particular services and online offerings in order to identify whether online providers are as a matter of fact offering television like content services meeting the relevant definitions in the Directive notwithstanding the fact that such programmes may be provided via sites which offer a variety of other unregulated services and which may have brands which are also predominantly associated with other (unregulated) activities.

5. Is the concept of general control appropriate for determining the person or organisation subject to regulation in respect of a particular video-on-demand service?

Yes – this test appears to us to be an effective, familiar and flexible test of assessing control.

6. If the provider of an “aggregated” video-on-demand service has control over some elements of another video on demand service to which it provides access, to what extent and in what circumstances should the regulatory responsibility for that other service remain with its original provider and to what extent and in what circumstances should it transfer to the provider of the aggregated service?

As paragraph 36 of the consultation document implies, the starting point in assessing this question should be the contractual position as between original provider and aggregator. If (as this question seems to imply) the contractual position as to general control over selection, organisation, access etc is either unclear or each party has control over different elements which can only collectively ensure that a service is compliant clearly the position is more complex. As a basic principle we do not believe that entities should be liable or responsible for regulatory failures over which they clearly do not have control. Accordingly, we believe that the most appropriate solution in the circumstances implied by this question would be for both the original provider and the aggregator to be responsible for compliance in each particular area only to the extent that they have (or perhaps share) general control of those elements. It is hard to see an alternative to such a flexible approach in such circumstances unless the regulatory regime is to become excessively rigid and prescriptive (potentially resulting in a narrowing of the range of possible services and innovations) or result in entities being held responsible for things over which they have no control. We believe that such a pragmatic approach would mean that each party would be incentivised to ensure that they discharged their respective responsibilities.

7. If an “aggregated” video on demand service provides access to a video-on-demand service from outside the EU, should the provider of the “aggregated” service have regulatory responsibility for the non-EU service? If not, what other options are there for ensuring that the UK can meet its obligations under the Directive in respect of the non-EU service?

Clearly there is an issue where an aggregated service provider offers access to a VOD service from outside the EU where the aggregator does not have general control over the VOD service which is being offered. In such circumstances, assuming that the VOD provider is outside the EU jurisdiction, the only way in which the regulatory regime could be enforced (as an exception to the general approach) would be via the aggregator which was offering access to the service. In such circumstances if the content in the VOD service did not satisfy the terms of the regulatory regime it would be appropriate for the regulatory action to be taken against the aggregator. In such circumstances the aggregator would have an incentive to work with the VOD provider to ensure compliance and ultimately if no action was taken then the aggregator might be required, at the end of an escalation process, to remove access to the foreign VOD service.

8. What other types of additional content might video-on-demand services offer or provide access to? Do you envisage any difficulties in determining whether a service provider has general control over such content?

Following on from our responses to questions 3 and 4 above we are very concerned by the implication in this question that other content (apart from that which satisfies the definition of

a programme for the purposes of the Directive) might nonetheless be caught by the provisions of the regulatory regime simply because it happens to be provided via a site which, as part of its offer, provides access to a regulated service. If this “additional” content does not satisfy the relevant Directive definition of the type of content which must be regulated – for instance because the content amounts to clips as opposed to full form programmes -- then the question of general control has no relevance to it.

9. Is it appropriate to treat scheduled and on-demand parts of the same overall service differently for regulatory purposes? Do you envisage any difficulties in identifying the boundaries between the scheduled and on-demand parts of the same overall service and/or making different parts of the same overall service subject to different regulatory requirements and different regulatory bodies?

Yes. We do not believe it would be difficult to identify boundaries between services – provided that the tests in the Directive for scheduled and on-demand services (which already build on ECJ precedent under TVWF where the concept of a scheduled service has been extensively explored) are properly applied. In addition, and given the point we set out in response to questions 3 and 4 above about the numerous different regulated and unregulated services offered by many sites, we do not believe that applying different regulatory regimes to parts of the overall service need be particularly problematic. This is subject to the proviso that the each service is defined narrowly and only that part of any overall set of services which constitutes a scheduled or on-demand service programme service within the relevant definitions in the Directive is regulated.

### **Part 3 -- Regulation of On-Demand Audio Visual Media Services**

10. Do you agree that the criteria at paragraph 9 are the right ones for determining the best regulatory option? Are there any other important criteria?

Yes – but we believe that there should be a degree of weighting attached to each criteria to reflect its relative importance as well as an overall sense of what the guiding priorities in designing and establishing the new regime should be. In particular, ITV believes that, above all, the new on demand regulatory regime should be a light touch one which is as simple and cost effective as possible, reflecting the significant additional consumer autonomy which is involved in the selection of programming on demand compared to on linear television. We believe that any proposals for the new structure and operation of an on-demand regulatory regime should be considered with this overriding objective in mind.

11. Are there any other possible co-regulatory or statutory models that you think we should consider? If so, please describe them and say why they meet the criteria?

No

12. Should service providers be subject to a membership, prior approval, notification or general conditions regime?

ITV believes that, appropriately structured, a system whereby each VOD provider is required to be a member of an industry body designated as a co-regulator probably offers the most effective method of implementing the requirement to regulate on-demand services. In particular, such an approach will ensure that the minimum amount of time and effort is expended in gathering revenue and dealing with jurisdictional questions (though as we mention below the question of whether membership is required or not in any particular

instance could be a significant issue for the regulator). In addition, such an approach will ensure that the industry body has some legitimacy.

13. Who should be responsible for interpreting the legislative definitions and determining which services are subject to the industry framework – Government, Ofcom or an industry appointed co-regulator?

Although ITV favours Model 2 as the method for implementing the requirements in the Directive to regulate on-demand services, we have some concerns about the industry co-regulatory body being solely responsible for determining the issues set out in this question. In particular, given the issues of scope raised above and the potentially contentious nature of determining scope we are concerned that a small industry funded entity with a budget which the consultation document assumes will be only a few hundred thousand pounds will not be set up to be able to cope with well resourced legal challenges to determinations on scope (and hence the requirement to join the industry body or not).

Accordingly, we believe that although the industry appointed co-regulator should have a first instance role in determining questions of jurisdiction (which in many cases should not be controversial assuming that appropriate guidance is in place) there should be a direct appeal to Ofcom to give binding decisions on questions of scope in cases of disagreement. ITV believes that such an approach would mean that particularly contentious issues would be dealt with by Ofcom which is better equipped (both in terms of staff and resources) to handle well resourced litigants in a way in which the industry co-regulator is unlikely to be.

This issue has real implications for the suggested cost of a co-regulatory scheme. In particular, the government's suggestion that the incremental cost of the scheme will be only £200,000 on top of the current assumed cost base of £200,000 appears to us to be at the bottom end of the likely cost given the far more formal responsibilities which will rest on the co-regulator. However, this amount will be manifestly insufficient if the co-regulator finds itself embroiled in more or less any form of litigation over the scope of regulation. Moreover, potential challengers may be more likely to pursue aggressively litigation against an organisation which is far less able to defend itself effectively than against Ofcom.

14. Who should be responsible for developing and maintaining a standards code and any additional guidance?

ITV believes that the industry co-regulatory entity should be responsible for this with formal sign off from Ofcom – broadly the approach currently adopted for advertising regulation.

15. Who should be responsible for monitoring compliance, investigating complaints and reviewing any breaches of the code?

ITV believes that, for the most part, these responsibilities should rest with the industry co-regulator. However, as we set out in more detail below, we believe that Ofcom should have appropriate powers in relation to the most serious sanctions which it might be difficult for an industry co-regulator to impose and/or to defend successfully against challenge from far better resourced opponents.

16. What sort of sanctions should apply and who should apply them?

As for broadcast advertising regulation at present there is a clear case for graduated sanctions in the event that providers do not comply with the rules of the industry co-regulator. In particular, we believe that the industry co-regulators greatest weapon might well be naming

and shaming with the result of adverse publicity from negative findings of the co-regulator. We believe that there is also a real opportunity to use a co-regulatory industry standard mark which would denote services which adhere to the rules of the scheme and which service providers would have an interest in being seen to adhere to. In such circumstances most operators would think seriously about incurring the publicity from a negative ruling of the co-regulatory body comprising industry peers but acting on behalf of the public.

However, we recognise that not everyone will be motivated by the desire to avoid such publicity and therefore it will be necessary to have a further, graduated, set of sanctions. These are likely to range from on service apologies for transgressions to restrictions on the provision of particular programmes (either absolutely or with requirements as to appropriate labelling/protection), with the most serious sanctions being fines, temporary membership suspensions and, ultimately, in the case of a service provider which wilfully ignored the regulatory regime altogether, some form of prohibition from providing services.

ITV believes that the imposition of most sanctions should be the responsibility of the industry co-regulatory body. However, should it ever be necessary, we believe that the imposition of fines, membership suspensions and ultimately prohibitions ought to be the responsibility of Ofcom on the recommendation of the industry co-regulator. We believe that such sanctions would be likely to be more theoretical backstop provisions but their presence in the regime is likely to ensure compliance at a far lower level. Again, if the co-regulatory entity found itself responsible for imposing these sorts of sanctions we are concerned that it might well become subject to litigation which it is unlikely to be funded or structured to be able to cope with effectively.

17. If we opt for a co-regulatory structure we would need to introduce legislative backstop powers. What should be the second tier level of enforcement to address cases of repeated breaches or system failure?

We deal above with the question of the second tier level of enforcement in the case of repeated breaches. We believe that the sensible approach in relation to systemic failure would be for Ofcom to have reserve powers to step in to oversee the regulatory system for a temporary period prior to redesigning/relaunching an alternative co-regulatory approach.

18 In the light of all these considerations, which option do you prefer and why?

We believe that Option 2 (with the modifications/refinements described above) combines the right degree of co-regulatory flexibility with the assurance that Ofcom, with ultimate backstop legal powers and regulatory capability, can support the co-regulatory system. It is likely that the mere presence of Ofcom in such a role will play a significant part in helping a co-regulatory system to work effectively.

### **Part 3B – Advertising in On-demand Audiovisual media services**

19 Should the controls on advertising in video-on-demand services cover:

- a. Advertisements which appear onscreen as a result of the user accessing a particular video-on-demand programme?
- b. Advertisements which appear onscreen as a result of the user accessing a particular video-on-demand service?

The definition of “Audio Visual Commercial Communication” in the Directive specifies that these are images which “*accompany or are included in a programme in return for payment or for similar consideration*”. (emphasis added). Accordingly, it is clear that the baseline provision of the Directive requires the UK government only to regulate those commercial communications which accompany or are included in a programme rather than those which appear as part of the broader VOD service. In addition to this, the Directive specifically states that it does not apply to services which may be deemed to be Information Society Services.

ITV strongly believes that only advertisements which appear onscreen as a result of the user choosing to access a particular video-on-demand programme (i.e. embedded within a VOD programme at the beginning, during or at the end of the programme) should be regulated pursuant to the AVMS directive. We take this view for the following reasons:

- The government suggests in the consultation document that there are two possible (i.e. permissible) methods of interpreting the Directive in this context though the government appears to favour the more expansive service based interpretation which goes beyond the strict requirement of the Directive. In other words the government is proposing to subject something which is not currently regulated on a statutory basis to such regulation in circumstances where there is no European law obligation to do so, apparently in the interest of “a more consistent scheme of regulation”. We do not believe, as a matter of principle and good regulation, that the government should go beyond a strict interpretation of the European requirements without compelling justification. Such a restrictive approach would seem far more consistent with the approach the government took in the passage of the Directive which was to limit the scope of the Directive to the greatest possible extent.
- In going beyond the strict European requirements, the government is seeking to impose statutory regulation on some (but not all) online display advertising in place of the existing self-regulatory regime (the ASA/CAP arrangements) which are functioning effectively and which the government does not question. In other words, the government is proposing statutory regulation of some (but not all) online display advertising in circumstances where there is an adequate regulatory regime already in place. This is both unnecessary and potentially a source of confusion to the regulated and to consumers alike.
- Finally, ITV believes that, rather than result in a more consistent scheme of regulation, the proposed service based approach to advertising regulation will accentuate the potentially challenging definitional question of where an on-demand service begins and ends. As we set out in response to questions 3 and 4 above, where an on-demand programme service is part of a broader online offering, we are concerned that identifying the precise contours of the regulated service may not always be straightforward. The potential difficulty of delineating the on demand service will be compounded if the regulatory regime itself extends beyond the delivery of television programmes on demand and into other online material as would be the consequence of a service based approach to advertising regulation. So, for instance, in a multiservice online offering it is perfectly possible that some video content might be hotlinked from a home page or portal which offers access to all sorts of other services as well as a VOD service. Under the government’s expansive interpretation it would appear that in those circumstances all advertising on the home page would be regulated even if the majority of services offered via that page were

not VOD services. Similarly, access to VOD content may be hotlinked from editorially appropriate pages on a site with the result again that that particular page would be subject to statutory rules on advertising. As these examples highlight the government's proposed approach would be likely to result in a less consistent scheme of regulation than the narrower programme based approach which would ensure regulation on a consistent basis irrespective of the precise ways in which different services offer access to on demand content.

20 Should there be only one co-regulatory body for advertising on video-on-demand services?

Yes – ITV believes that Option A (the regulation of VOD advertising by the ASA) is the most appropriate solution. The ASA should remain the body responsible for advertising standards since there is very clear industry and consumer understanding of the current position which has proved itself to be effective over many years.

21 Should such a body have its powers assigned to it by the Government, by Ofcom or by the body or bodies responsible for regulating programme and other content?

ITV believes that the ASA should have its powers delegated to it directly by Ofcom in a manner analogous the contracted out arrangements for regulating broadcast advertising.

22 Should the Advertising Standards Authority be the body, or one of the bodies, which regulate advertising on video-on-demand services?

Yes – as per our answer to question 20 it should be the body (and the only body) responsible for regulating advertising on video-on-demand services pursuant to powers delegated by Ofcom.

23 Should regulation of advertising in video-on-demand services be handled by the body or bodies responsible for regulation of the programme or other content?

No --- the ASA should remain as the one stop shop for advertising regulation.

24 Should product placement in video-on-demand services, if allowed, be regulated by:

- a. The body or bodies that regulate advertising on these services? Or
- b. The body or bodies that regulate programme content on these services?

As we set out in more detail below, ITV believes that Product Placement should be liberalised in the UK as the AVMS Directive now allows. For reasons of logic and practicality we agree with the government's suggestion that the body that regulates programme content in on demand services should also regulate product and prop placement too for the reasons set out in the consultation document.

Should sponsorship of video-on-demand programmes and services be regulated by:

- a. The body or bodies that regulate advertising on these services? Or
- b. The body or bodies that regulate programme content on these services?

Similarly, ITV supports the government's preferred option that sponsorship in on-demand services should be regulated by the body responsible for regulating programme content in video-on-demand services.

#### **Part 4 – Product Placement**

- 25 Should product placement be prohibited by law? Please explain the reasoning behind your preference.
- 26 Should any such legal prohibition allow for Ofcom and the co-regulator of video-on-demand services to permit product placement in some or all of the programme genres specified by the AVMS Directive (feature films, television films and series, sports and light entertainment programmes)?
- 27 What advantage would there be in permitting product placement in any or all of the specified genres? If so, which genre(s), when and why?

ITV believes that it is in the interests of the health of commercial public service broadcasting in the UK, and the continued investment in original high quality UK produced content, that carefully regulated product placement should be permitted in linear and non-linear content services in the UK in all the genres permitted in EC law as the Directive now explicitly allows.

There are two dimensions to the issues addressed by these questions:

The first dimension concerns the nature of the enabling regime that is put in place either via legislation or via industry codes/licensing arrangements. We believe that, irrespective of the government's ultimate substantive decision on liberalisation, it would be a mistake not to use the current process to put in place an enabling regime for product placement consistent with the provisions of the Directive. In other words, the government should use the current opportunity to establish a regulatory regime for product placement even if, ultimately, it decides not to liberalise or to liberalise only to a limited extent. This is an approach which has been applied in other areas (such as must offer and must carry) and represents good administrative practice allowing greater flexibility should circumstances change. This would strongly suggest adopting option 2 set out on page 50 of the consultation document.

Notwithstanding the need for flexibility, we are not convinced that the implementation of the provisions on product placement requires primary legislation provided that there is an effective regulatory regime for all linear and non-linear programme services which must be regulated pursuant to the Directive. If all such services are subject to effective regulation then detailed provisions relating to product placement (as is the case in relation to other provisions in the TVWF and AVMS Directives governing television advertising regulation or sponsorship for instance) can be implemented by binding codes for such regulated services breach of which bring clear regulatory consequences. Accordingly, we are not clear why the government believes that a ban on product placement must be implemented by primary legislation in the current circumstances when such an approach is not required (and has not been implemented) in other areas where the provisions of the AVMS Directive and indeed the TVWF Directive before it are equally unequivocal.

Having put in place the enabling regime mentioned above, the second dimension to this question concerns the substantive issue of whether to activate/bring into effect the full product placement regime which is now permitted by the Directive. ITV believes very strongly that the government should bring all of the product placement provisions into effect

(i.e. it should liberalise) in all the genres which are permitted as soon as possible in both linear and non-linear services. We set out below the advantages we believe would follow from such a liberalisation and the difficulties we have with the government's current position and the justification it puts forwards for that position.

### **The future funding of original UK television content in the UK**

The one thing which should now be in little doubt in the UK (as the latest PSB Phase 2 report from Ofcom confirms unequivocally) we are close to the end of a seismic shift in UK broadcasting as the whole country moves from accessing a handful of television channels to a world in which everyone has multichannel digital TV.

ITV and the other commercial PSBs now faces intense competition from multiple television and online service providers with new entrants assembling powerful, innovative offers to advertisers to which ITV must respond if it is to survive. The handful of analogue commercial channels competing for revenue 20 years ago are a distant memory with over 250 channels currently registered with Barb and hundreds more listed on the Sky EPG. In less than fifteen years, the internet has also become a substantial market for advertisers: in the first half of this year Google took more nearly £50m more in advertising revenue in the UK than ITV's income from advertising and sponsorship – without making any significant investment in UK production or journalism. More generally, the competition ITV faces for revenue is increasingly from channels and businesses with very low budgets and little interest or ability in investing in original high quality UK content.

The quasi monopoly revenue which historically enabled the commercial PSBs to pay for the original content which UK audiences enjoy is rapidly disappearing. In its phase 2 report Ofcom shows that direct and indirect funding available for investment in PSB content declined from £520m in 2003/4 to £390m in 2007/8. It will reduce further to £185m in 2012/13. The Oliver and Ohlbaum analysis for Ofcom suggests that levels of investment in UK originated content are likely to decline in all plausible future scenarios.

At the same time, however, almost all respondents to Ofcom's consultation continue to believe that UK-originated content is fundamental to the delivery of PSB purposes. Almost all respondents to Ofcom's phase 1 PSB consultation agreed that UK-originated content is fundamental to the delivery of PSB purposes. 83% of respondents felt that it was very important – or quite important – that programmes made in the UK and reflecting life in the UK, are shown on the main television channels and this is still the content that audiences watch most of. Moreover it is still the PSB broadcasters who – as Ofcom's data make clear - remain the only substantial sources of new investment in UK production, still providing over 90% of the spend on original UK programming.

As DCMS is aware from our submissions to the Ofcom PSB Review, ITV already has a depressed operating margin on ITV1 compared to the margins enjoyed by commercial broadcasters in the rest of Europe. It is unlikely, absent a significant growth in other revenue streams for instance in content production, secondary sales and online exploitation as well as developing new opportunities such as product placement, that ITV's shareholders will continue to accept such a margin on the currently very high level of investment in original UK content.

As we have made clear in a number of public announcements and again in our submissions to Ofcom's PSB Review, ITV is doing everything it can to help maintain its investment in original UK programming. In particular, we are a year into a Turnaround Plan for ITV plc which is making real progress. Whilst we are clear that our future is in our hands, at least part of the solution to help us sustain our investment in content must involve an imaginative and radical approach to regulatory reform to reflect the passing of the analogue era.

In ITV's view, without a systematic elimination of the regulatory restrictions on ITV which prevent us from maximising primary and secondary revenue from high value UK originated content (and this includes the current prohibition on product placement), there is a real danger that the current high levels of investment in original UK programming by commercial PSBs will not be economically sustainable.

In this context, if product placement both on television and online isn't at least part of the solution to help sustain high levels of investment on ITV1 then we need to have a very urgent discussion with government about the sort of measures that it believes can help to preserve original television content which is so popular with British audiences. In particular, it seems clear from Ofcom's recently published consultation document on RADA that the liberalisation of the advertising rules could at best deliver only a modest increase in revenue for PSB broadcasters (in ITV's view the benefit is far more modest than Ofcom itself suggests).

In the hyper competitive media world in which we now operate only a radical approach to sustaining original UK television will work whether this is in relation to liberalising product placement, re-assessing the historic balance between those who fund and those who make content, or even at the possibility of further public support including looking at the long held principle that the BBC is the sole beneficiary of the licence fee/licence fee funded assets.

No one can be certain about the size of the economic opportunity which product placement represents in the UK, just as no one could be sure about the size of the commercial opportunity represented by sponsorship when it was first liberalised. Initially sponsorship revenue was relatively small but it has grown very significantly to the point where it forms an vital part of the financing of commercial television. We certainly would not rule out the possibility of product placement reaching the £120m mark which is mentioned in the consultation document, though of course it would take time for the market to develop.

Product placement is not the only way in which we can try to sustain the funding of original UK television content but we believe it may be part of a broader answer. The particular beauty of PP is that the revenue is effectively hypothecated to people who are making and/or investing in original content - it is one of the most direct forms of commercial funding for original UK television content.

Product placement also represents a rare opportunity for innovation in the commercial offering of a mature product (commercial television) in competition with new entrant service providers who trade to a very significant extent on the innovative nature of an online advertising offer. Permitting product placement in television content (however delivered) also enables television broadcasters to offer a "full service" offer in competition to online service providers who will always be able to offer far more pervasive product placement opportunities in content which does not fall to be regulated pursuant to the definition of on demand content in the Directive.

In this context, it seems particularly perverse that the government is proposing to transfer the current prohibition on product placement in linear television onto television providers when they provide their television content on demand. What is more, that prohibition would not appear to apply to some providers of television like content such as Bebo because (it appears) they provide such programming via a website which is also used and has a brand which is mainly associated with the provision of social networking services. It appears to ITV that the government's proposed approach to implementing the Directive's provisions on product placement will systematically discriminate against UK original television providers disadvantaging them against their competitors for revenue in circumstances where the original UK content offered by those television providers is under real threat. Does the government really consider that this policy position is a coherent part of its broader policy for UK television and the creative industries?

In this context, we found it incredible that the key monetised benefit of the highly restrictive position on product placement set out by the government in the consultation document was as follows:

*“If the prohibition on product placement is maintained, broadcasters and video-on-demand providers who are more reliant on bought-in programming will not lose revenue from any diversion of revenues from spot advertising to product placement”<sup>2</sup>*

This benefit to competitors of the UK commercial PSBs is on top of the fact that advertisers interested in reaching UK viewers could be incentivised to direct some of their spend into high budget original US content which can contain product placement and still be shown to UK audiences entirely legitimately.

### **The views of the UK television audience**

In a consultation of this sort in which the government is proposing not simply to maintain an existing restriction where it is no longer under an obligation to do so but also to extend regulation into an area which is not currently regulated we would expect to see either a compelling economic case and/or a case clearly supported by evidence of significant public concern. As far as ITV can see, however, the government has produced neither of these. As we set out above, the economic justification appears to run counter to the basic policy stance of Ofcom and government to encourage investment in original UK content and the UK's creative industries and there is seemingly no evidence that the government's position commands public support or meets a clearly expressed public concern.

In particular, it appears to ITV that the evidence about public attitudes points clearly against the position the government is taking. In particular:

- The government states that its central intention is to ensure “*continued viewer and consumer confidence in the integrity of television and video-on-demand programming*”. However, in the case of video-on-demand programming product placement is currently allowed and the government can point to no expressions of public concern about product placement online or any demand for such product placement to be banned.

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<sup>2</sup> DCMS Consultation document on AVMS Implementation (Impact Assessment) p58

- The government has also not suggested that audiences are complaining about the product placement which they see every night of the week on all UK television channels in US and other acquired content. If the government believes that there is a genuine concern about protecting the public from product placement then the logic of the government's case for a ban would lead to the conclusion that these acquired programmes are as compromised as any UK produced programme containing product placement would be and should therefore be banned from UK television screens. We assume the government is not suggesting this because it would be universally unpopular with audiences and this in turn suggests that the government is proposing regulation in relation to UK content because it can rather than because it is necessary.
- The available evidence about audience opinion in relation to product placement in UK content suggests that audiences would not be opposed in principle to the carefully regulated implementation of product placement. In particular:
  - - It is clear from research which Ofcom commissioned on viewer attitudes to product placement for the purposes of its consultation in 2005/6<sup>3</sup> that viewers accepted controlled product placement as a way of continuing to fund television indeed, they would prefer it to more advertising. Although the sample size for the research was small it was both independently conducted and was deliberative – in other words the participants were educated about the choices, trade offs and consequences of their expressed preferences.
    - More recently, there has been instructive quantitative research carried out as part of the Television Opinion Monitor a continuous tracking study carried out by Ipsos Mori for Clearcast since 1980<sup>4</sup>. The relevant results of this research are set out at Annex 1 but the following headline findings are significant:
      - - Of those respondents (the majority) who had ever seen branded products/services in the background of a programme set, more than half thought that the company providing the product had paid to have it shown.
        - The vast majority of respondents were either not concerned at all or not very concerned about companies paying to have their products in TV programmes and only a small percentage felt that the implication of companies paying to have their products or services used or shown in television programmes such as soap operas, dramas and reality programmes was that the company in question might influence the programme and this was without any suggestion that the interests of viewers might be protected via a carefully designed regulatory framework.

## **The health of the UK creative industries**

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<sup>3</sup> The Future of Television Funding: Findings of a research study looking at attitudes towards existing and potential new funding mechanisms. Research conducted by Human Capital on behalf of Ofcom, September 2005.

<sup>4</sup> The survey is carried out using face to face in home computer assisted personal interviewing and a nationally representative quota sample of over 2,400 adults (aged 16 and over) who are interviewed across the year. The Data is then weighted back to the nationally representative profile to correct for any imbalances in the quota process. In 2008 to date the January-June data (consisting of roughly 1200 responses) has recently been collected and analysed.

Our final concern relates to the continued health of the UK's creative industries. The UK is an acknowledged world leader in the production of original television programming and formats. We are concerned that a combination of the liberal approach to product placement in the US and the clear likelihood of liberalisation in continental Europe may put UK producers at a disadvantage, particularly in attracting co-production financing/partners, given that the UK regulatory regime for product placement would then be out of step with the major secondary markets for programming.

Our particular concern is that it might well prove easier to exclude UK producers altogether and then sell finished programmes to UK broadcasters as acquisitions rather than to co-produce with a UK producer and not be able to sell/screen the programme in the UK (or to have to make very significant cuts which might undermine the programme) or to have to shoot two versions of the programme. This is already an increasing problem with UK/US co-productions – for instance ITV is currently involved in filming a high budget co-production and is incurring six figure additional filming costs in order to reshoot scenes which in one version of the programme will contain product placement.

In addition, we also have concerns that for multinational advertisers it is already advantageous to back and fund US (and potentially in future continental productions) rather than UK produced material since such ex-UK productions can include product placement and could continue to be acquired by UK broadcasters and broadcast legitimately in the UK under the rules being proposed by the government.

28 If product placement were permitted, how could audiences and regulators be assured that editorial integrity had been preserved as required by the Directive?

29 How could undue prominence be avoided, given the commercial imperatives for audiences to recognise the products placed?

In ITV's view maintaining viewer trust in television is vital, more so than ever following the issues which arose in relation to premium rate telephone charging. This is a fundamental principle for ITV but also one which has real commercial logic and we would seek to apply a set of principles and an approach to product placement with the specific aim of maintaining trust. In the specific context of product placement ITV believes that:

- The regulatory framework set out in the Directive which was debated at length by the EU institutions, if implemented effectively in the UK, would provide a rigorous framework for UK viewers which will (a) protect the interests of viewers by safeguarding editorial integrity, (b) ensure that viewers are informed about the presence of product placement and (c) ensure that there is no undue prominence on screen.
- The recent PRS issues make it more and not less likely that the introduction of product placement would be handled extremely carefully by broadcasters with an overwhelming emphasis on the need for effective compliance with very serious regulatory consequences for breaches.

In the context of these two questions the consultation document suggests three main concerns which militate against the introduction of product placement:

- The increasing level of concern in the US about levels of product placement which is leading to the FCC examining the introduction of a requirement for better information for viewers about who has paid for their products to be featured.
- More general concern about the impact of commercialisation on children and young people, who would be likely to see many programmes not specifically defined as “childrens”.
- The risk that the principal incentive for broadcasters will no longer be the production of attractive programmes but rather making editorial decisions on the basis of an advertiser’s wish to include their products.

In ITV’s view the consultation document itself undermines the first two of these arguments. In the case of the US example, the regulatory regime which the UK would be obliged to implement would contain numerous protections for viewers including clear information requirements which mean that the regime in Europe will, ab initio, be entirely different to the unregulated US market. As to the argument about what children see on television, aside from questions of parental responsibility, the consultation document recognises (para 29) that the Ofcom Code allows the inclusion of branded products on television if justified by the editorial context and product placement would not change the current position. This is the case because editorial justification would always be central to the application of the prohibition on undue prominence which is a requirement of the AVMS directive if product placement is permitted.

The third point about the incentives of broadcasters might have had some resonance in a world where the only competition was between a few analogue channels but in a multichannel world the point is wrong for three main reasons:

- UK television audiences now have more choice of television and other content than would have been imaginable even 15 years ago. Put simply, if they do not like a programme they will not watch it and if audiences 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, contrary to the suggestion on page 48 of the consultation document, 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.

However, even ignoring broadcast and secondary market incentives, the Directive sets out a clear regulatory framework for product placement which Member States would have to

implement if they decided to liberalise. The Directive itself prohibits undue prominence which is a concept which UK broadcasters are already well used to applying. In other words, product placement in UK programmes would have to be editorially relevant and not given undue attention in ways which could not be justified editorially. We do not see that the current rules on undue prominence could or would need to change materially if product placement was allowed.

In addition, the Directive also requires that the content and scheduling of a programme should in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider. In ITV's view such an obligation could easily be written into the Broadcasting Code (and the relevant code for on-demand services) as an obligation with which all broadcasters had to comply. To the extent that there was ever a suspicion that this principle had not been complied with it would clearly be open to the relevant regulator to investigate the circumstances surrounding a particular placement. In such circumstances the regulator could call for evidence and require the broadcaster to explain its procedures and approach in the particular instance to demonstrate that there was no interference in the editorial decision making such as affected the responsibility and editorial independence of ITV.

In this context, ITV has developed a set of principles and a possible approach to product placement on television in the UK in conjunction with PACT. The purpose of the draft code (enclosed at Annex 2) is to ensure adherence by all parties to the regulatory obligations in the Directive and to go further to ensure, for instance, that certain products (such as HFSS products) are not placed in content where advertising around that content would not currently be permitted. Our joint aim is to protect the audiences and ensure that the product placement process is editorially and creatively led rather than being influenced by commercial considerations.

On this point, ITV believes that there are a number of possible structures/approaches which could be adopted by broadcasters to ensure compliance and provide reassurance that editorial independence had not been compromised. For instance, the draft code agreed with PACT would permit the identification and marketing of product placement opportunities only once the script/programme concept has been finalised to ensure that product placement is creatively rather than commercially led. In those circumstances, companies would demonstrably be offered opportunities which already exist rather than having any opportunity to influence the script or appearance of a product.

30 Should the same rules apply to both television broadcasting and on-demand audio visual media services? If not, how should they differ and why?

As we have set out above, ITV believes that there should be carefully regulated liberalisation of product placement in the UK. We do not believe that any distinction should be made between television broadcasting and on-demand – as we set out above, television revenues are increasingly being affected by competition for advertising from online businesses.

Moreover, given the concern we expressed above about only the “traditional” television providers being caught as on-demand content providers under the implementation of the directive in the UK, for those providers to be put at a further competitive disadvantage to providers such as YouTube or Bebo which it appears from the government's position on the scope of the directive could continue to take revenue from product placement to fund programmes such as Kate Modern would be the most extraordinary and unjustifiable double standard.

As we set out above, we do not believe that the government has to date set out a defensible rationale, grounded in evidence, for continuing to ban product placement either on television or on demand. The government suggests that a ban would ensure “continued viewer and consumer confidence in the integrity of television and video-on-demand programming” and yet in the case of product placement in on-demand content (which is currently allowed) presents no evidence to suggest that viewer confidence in the integrity of video on demand content is currently in question. In the case of on-demand content surely the evidential hurdle should be even higher given that in this area the government is proposing to ban an activity which is currently allowed?

31 Should prop placement continue to be permitted?

Yes – it is very important that it should continue to be permitted. Prop placement is a vital component of programme making, in effect enabling production budgets to go far further than they otherwise would do. If prop placement were not permitted ITV is very clear that there would be a reduction in the amount and quality of UK produced television. In particular, long running drama series and soaps in particular, whilst expensive, have very small amounts of “discretionary” expenditure on props, vehicles, animals etc per episode (most of the cost is fixed – on and off screen staff and sets primarily) such that the provision of props for free is critical.

Taking the example of Emmerdale<sup>5</sup>, the setting and storylines frequently require characters (and extras such as postmen) in central shots to drive cars in keeping with their characters or roles. Moreover, there is a frequent need for cars to drive past to add realism. Clearly it would be highly artificial and detract from the drama if there were only a handful of cars available for use – the audience would notice quickly and actors might well have to drive cars on screen which were incompatible with their fictional characters. Accordingly, we take on loan a variety of cars from a wide variety of manufacturers (and the occasional commercial vehicle such as vans) as props and use them intensively in filming. The provision of these props represents a very significant saving to a drama such as Emmerdale.

Similarly, though on a lesser scale, characters in Emmerdale also use mobile telephones on short or long term loan from manufacturers and it is estimated that to buy such telephones would be material in the context of the discretionary spend available for each episode. In the case of Emmerdale in particular the amounts of money saved through car prop placement are such that to pay for such availability would seriously affect the economics of the programme and quite possibly, as a result, force cuts which would reduce its attractiveness to viewers. More generally, if money had to be found for props across ITV’s original productions as a whole, it would have very serious consequences for the realism of productions and/or the viability of considerable amounts of original (particularly fiction) production.

32 Should there be a specific set value above which prop placement is subject to the Directive’s rules on product placement? If so, what should it be?

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<sup>5</sup> We use Emmerdale as an example but most fiction productions make use of free props, though the precise nature of the props varies. So, for instance, Emmerdale (set in the countryside) is a heavy user of cars compared to Coronation Street where props for shops and pub are important. Props are not just used in soap operas. For instance the drama Frost has saved significant sums by using loaned prop vehicles as well as mobile telephones.

- 33 What other ways are there of ensuring that the UK meets the Directive's requirement that prop placement above a "significant value" must be treated as product placement? What is the best test and why?
- 34 If there is to be a set value for this purpose, should it be set by the Government in legislation or by Ofcom (for television broadcasting) and the video-on-demand co-regulator?

We do not believe there should be a specific set value above which prop placement would be subject to rules on product placement: the two things are essentially different things. We also believe that circumstances are very varied and to have a one size fits all rule would be too indiscriminate. We believe that a better approach might be to have an indicative percentage of total production budget approach which might perhaps catch prop placement which was above a certain proportion of a total programmes budget. In our view, "significance" can only be a relative concept and the most obviously relevant element against which it might be significant is as a proportion of the total production budget. We believe that in this context "significant" should not be less than 10% of the total production budget for a programme (if a one off) or a series and this should apply for each separate manufacturer/supplier.

We do not believe that there should be a set value in the first place but if such an approach was adopted we think it would be far more appropriate and build in far more flexibility if the VOD regulator (as the entity closest to the enforcement of the relevant rules) reviews the value rather than risk the figure becoming hopelessly out of date if included in legislation.

Because this submission is a public one we have not included commercially confidential information about our productions. However, because of the importance of prop placement to ITV's production activities we would be keen to have a further discussion with government about this issue to ensure that the regulatory regime which is introduced does not inadvertently have an adverse impact on the economics of UK production.

- 35 Should product placement continue to be permitted in programmes acquired from outside the UK and in films made for the cinema? If not, why not and how could such a ban be made effective in practice?

The fact that it is very hard to make a case (still less to get any public support) for a policy which would result in a ban in showing acquired content from outside the UK (including films made for television) on UK television makes it hard to see how the case to ban product placement in UK content can be sustained. Clearly significant amounts of acquired content from outside the UK content already contains product placement and large audiences see it every day of the year on every UK channel (including the BBC) to no obvious ill effect and with no serious complaints.

However, logic and consistency would suggest that if the government is right that there is a public policy case against product placement in UK produced content then surely such a case must also exist in relation to all content and indeed more so in relation to content produced in the absence of any regulatory framework governing product placement at all (as is the case with US content and films made for cinema). The fact that the acquiring broadcaster does not share in the benefit of the product placement doesn't detract from the risk that the original broadcaster/producer did get that benefit and if the government is right about the effect of product placement on editorial content then the harm will already have occurred before the point of acquisition.

Clearly to ban such acquired programmes would take considerable regulatory resources and would be extremely unpopular but if it is the right basic policy approach then this should surely be the approach adopted?

However, if the government continues with the unsupported approach to product placement proposed in the consultation document then product placement in UK produced content will be prohibited and yet it will be entirely legitimate for acquired content to contain such product placement. In such circumstances there would, as a minimum, need to be extensive anti-avoidance provision on affiliates to prevent circumvention of the rules.

36 How should product placement be signalled to viewers?

37 Should the rules on signalling be set by the Government in legislation or by Ofcom (for television broadcasting) and the video on demand co-regulator?

ITV believes that any signalling of product placement should, in the interests of viewers, be clear but not excessive and that broadcasters should be afforded a significant measure of discretion to decide how best to ensure that product placement is appropriately identified to avoid any confusion. We do not believe that it would be appropriate for government or the regulator(s) to prescribe a single method of identification but rather to leave the method and application to the broadcaster within an overall regulatory framework. In ITV's view it may be that different methods of identification are more effective and more appropriate in different circumstances – this should be a matter of editorial and compliance judgement for each broadcaster. In addition, ITV would want to understand the opinions of viewers as to how signalling could be both effective whilst not unduly interrupting the viewer experience. It might also be, ultimately, that a single industry approach/logo might be developed to alert viewers to the presence of product placement in all programming.

Given our preference for flexibility, we do not believe that the rules on signalling should be set by government in legislation. Accordingly, we agree with the government that the relevant regulators who are closest to the issue should determine the regulatory framework and any appropriate rules. This approach will ensure that the arrangements are capable of changing over time to reflect changes in audience preference and behaviour as well the changing practice of broadcasters.

## **Annex 1**

### **Product Placement on the Television Opinion Monitor**

The Television Opinion Monitor (TOM) is a continuous tracking study carried out by Ipsos MORI for Clearcast, which represents a consortium of media owners. The survey has been running since 1980 and provides a comprehensive, prime quality data source on public perceptions towards television advertising. The survey is versioned, with data from version 1 of the January-June 2008 wave of TOM among 658 respondents including questions on product placement.

In general, TV advertising is viewed more favourably than that of other media. 39% say they like TV advertising a lot or little, compared to 32% who dislike them a lot or little. The most popular characteristics of TV advertising – among the 8 statements tested – are that they are a good way to find out about new products (51% say they do so very or fairly often) but that they interfere with enjoyment of TV (66% say this happens very or fairly often).

With specific regard to product placement, 51% say that they always or sometimes see branded products or services in TV programmes such as soap operas, dramas and reality programmes. When all who had seen branded products or services in such programmes were asked how they thought the brands appeared in the TV programme, 52% said the company that makes the product or service has paid for its placement, while 32% believe the company provided it for free. 20% believe the brand was placed by the programme designer, while 9% didn't know.

Despite this confusion, there is no overwhelming opposition to product placement. Among all respondents, 26% are not at all concerned and 42% are not very concerned about product placement. Even among those that believe companies pay for their brands to appear, the figures are 21% and 46% respectively. 8% of those that believe companies pay for their brands to appear are very concerned and 24% are fairly concerned about product placement – this compares to 5% and 22% of the public as a whole.

Regarding the implications of product placement, the most common answers are that respondents have no opinion (38% said they didn't know) and that there is too much advertising on TV (22%). The joint-third most popular answers (with 8% of respondents) were concern that the company had influenced the programme but also that it made the programme more realistic. Just 7% think it results in a poorer quality programme, 6% believe it detracts from the storyline and 3% would trust the programme less. Among those that believe companies are already paying for their brands to appear, 10% think it makes the programme more realistic and 9% have concern that the company has influenced the programme.

## Annex 2

### ITV/PACT Product Placement Code

Guided by the AVMS Directive but in the absence of detailed regulations, the aim of this document is to illustrate the approach broadcasters and producers would take to paid for product placement (as opposed to free provision of props) 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. 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.

#### Content that can contain product placement:

- 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 on radio
- 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

#### 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 children's programmes or programmes which the broadcaster considers are likely to index over 120.

## **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.

## **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 producer 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
3. Opportunities, as identified by the producer, are agreed by the broadcaster 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 deploy products, ensuring they are sole custodians of the creative process.
5. The broadcaster must have the final say on whether a product placement is compliant.
6. The price payable for product placement will be calculated according to a transparent and independent formula, 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).