CONSULTATION ON PROPOSALS FOR IMPLEMENTATION OF THE AUDIOVISUAL MEDIA SERVICES DIRECTIVE IN THE UNITED KINGDOM

Submission by the Campaign for Press and Broadcasting Freedom (CPBF)

Introduction

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

General comments on implementation of the Audiovisual Media Services Directive

We welcome the extension of regulation to cover all scheduled television services, regardless of the means of delivery, and the inclusion of on-demand content and services within the scope of the Directive. However do not support the liberalisation of regulation that accompanies this extension. We argue that the UK should retain effective regulation across all television and audiovisual services. The UK should not adopt minimum standards set out in the Directive but should maintain existing UK rules where these are stronger, subject to democratic oversight.

We share the concerns of the European Alliance of Listeners' and Viewers' Associations (Euralva), and others, that Member States will lack sufficient powers to protect their own citizens when the standards adopted by another Member State falls below those which it demands from its own broadcasters and providers of audiovisual media services.

We believe that policymaking at both EU and UK level has been unduly shaped by the interests and perspectives of commercial organisations and insufficiently engaged with, and accessible to, the concerns and interests of citizens. We believe that communications policy making should be guided by principles of transparency, openness, and efforts to ensure the maximum democratic input. We believe this requires canvassing public opinion, conducting deliberative research, commissioning research from a greater range of perspectives and interests that at present, including non-commercial and academic research, and ensuring that the voices and views of trade unions and civil society organizations have structured input to the policymaking process.

We welcome this consultation on the AVMSD. We also welcome the Government's indicated preferences on a number of issues, in particular the prohibition on product placement.

We note that the Government favours drawing in a narrow range of video on-demand services falling within the scope of the directive (p9). We share concerns that

interpersonal or intergroup audiovisual publication should not automatically be incorporated into content regulation and that private communication should be excluded altogether. We believe that the definition of an audiovisual media service in article 1 (a) of the Directive is appropriate. This states:

> the definition of an audiovisual media service should cover mass media in their function to inform, entertain and educate the general public, and should include audiovisual commercial communication but should exclude any form of private correspondence, such as e-mails sent to a limited number of recipients.

However, it goes on 'That definition should exclude all services whose principal purpose is not the provision of programmes, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose'. We note that the definition excludes 'games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services, as well as on-line games and search engines, but not broadcasts devoted to gambling or games of chance'.

We think that product placement in games need to be restricted and should only be permitted where there is no substantial risk of undermining regulations prohibiting product placement in television programmes and services covered by the Directive.

The Directive excludes from its scope electronic versions of newspapers and magazines. We think that this exclusion is increasingly anomalous and is serving to undermine rules for broadcasting regulation, in particular impartiality rules and rules on election coverage.

Regulatory System for on-demand audiovisual media services

We do not belief that the expansion of new media services provides justification for weakening public service obligations and other content regulation for linear television services. On the contrary, we believe that both linear and non-linear AV services should be regulated to serve the needs of citizens and consumers. We believe the minimum standards for VOD set out in the Directive are too weak.

The government strongly supports an industry-led co-regulatory solution (Part 2, para 43). We think it is essential that any regulatory system proves its effectiveness first before public control and oversight is relaxed. In order to be granted greater autonomy an industry co-regulator should be able to demonstrate that it can maintain a high level of public trust and ensure that it is responsive to the breadth of concerns in society not merely the interests of the industry. We think there needs to be strong oversight and statutory powers to ensure the system established is effective. We therefore favour an evolutionary regulatory structure based on public accountability and measures of effectiveness, rather than a transfer of regulatory power and oversight from the public to private industry. We also want to see Ofcom maintain key responsibilities, such as advertising regulation. The market for on-demand services is likely to grow exponentially and these will become major means by which people

access AV material. Any system of co-regulation must ensure effective mechanisms for public input, public accountability and oversight.

Q13. Who should be responsible for interpreting the legislative definitions and determining which services are subject to the regulatory framework - Government, Ofcom or an appointed industry co-regulator?

We think that the Government should retain responsibility for interpreting the legislative definitions and determining which services are subject to the regulatory framework, subject to parliamentary oversight. Ofcom should work with the framework set by Government and should also be subject to parliamentary and public oversight. We do not consider there to be sufficient safeguards in leaving such matters to an industry co-regulator, although it is appropriate for the industry co-regulator to have a consultative role.

Q14. Who should be responsible for developing and maintaining a standards code and any additional guidance?

We believe that Ofcom should be responsible for developing and maintaining a standards code. However, this should be carried out in accordance with key standards and requirements laid down by parliament. Ofcom should continue to be required to undertake public consultation on any revisions to the standards code.

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

We do not believe that a newly created industry co-regulatory body should handle complaints. Any such new body needs to prove its competence and effectiveness first before it is granted the key role of handling complaints. It has taken over forty years for the ASA to become a more effective and independent self-regulatory organisation. The Press Complaints Commission continues to provide an unsuitable and quite inadequate means of complaint handling and redress in our view. It is vital that the public, as well as market players, is served by a complaints system that is effective, independent and transparent. The complaints system needs to be made fully open and accessible through effective promotion and in terms of its processes for handling complaints.

We believe that the responsibilities for monitoring compliance, investigating complaints and reviewing any breaches of the code should therefore remain with Ofcom, at least until the new regulatory body has demonstrated the ability to maintain appropriate standards across the industry as a whole. We do not believe that Ofcom, as it currently operates, is suitably equipped and oriented to take on the role we recommend. However, suitably restructured with such powers as the ITC enjoyed, Ofcom would be the appropriate body to monitor compliance and investigate complaints.

Q16. What sort of sanctions should apply and who should apply them?
We oppose the issuing of fines by Ofcom against the BBC. We believe it is right for the BBC to be required to comply with either the same or similar provisions as those of the programme code. However, we believe that the BBC Board, not Ofcom, should

govern the BBC and should be responsible for taking action in respect of code breaches. On 30 July 2008 Ofcom fined the BBC £400,000, in total, for breaches of Ofcom's Broadcasting Code relating to unfair conduct of viewer and listener competitions. This fine was the highest financial penalty so far to be imposed by Ofcom against the BBC. We believe it is damaging for the public service system for there to be any perception of licence fee income being used to pay fines imposed by Ofcom. There needs to be a more appropriate means of ensuring accountability and sanctions than Ofcom issuing fines to the BBC.

Advertising in on-demand audiovisual media services

Introductory comments

Self-Regulatory Organisations (SROs) like the ASA cannot exercise authority over non-national traders. There is no pre-clearance for Internet advertising. With the growth of 'rich' audiovisual advertising online, there are mounting temptations for some advertisers to break out of the constraints imposed by the Committee on Advertising Practice's codes. An even greater challenge is that advertisers can easily create 'editorial' content, which is outside the ASA's remit. According to *Campaign*'s Claire Beale 'Any advertiser that really wants to shock or surprise us can do a fine job of bypassing regulated media at the moment by going straight to a website, where they have free rein'[1].

Marketing communications online, as offline, must be recognisable as such. The ASA upheld its first complaint against a banner advertisement in May 2000, for an ISP advert on a financial webpage that was not clearly distinguished from the editorial content. The Cap code applies to online advertisements in 'paid for' space, such as banner, pop-up ads, ads in commercial e-mails, and sales promotions wherever they appear online (including in organisation's websites or in e-mails) but not companies' 'editorial' content, for instance McDonalds' *Kids Zone*. This means that regulation fails to grapple with one of the Internet's key features, the ability to seamlessly integrate editorial and advertising, telling and selling. It means too that the ASA rejects the majority of complaints it receives which relate to claims made on companies own websites. This failure challenges the self-regulatory system. As one government source put it: 'It cannot be right that 90 per cent of the complaints to the Advertising Standards Authority about online ads were outside its remit'. [2]

We welcome the Government's renewed call in 2008 for the advertising industry to bring online ads fully under the remit of its voluntary code or face the threat of legislation. Online marketing communications aimed at children remains a particular concern, with a government-commissioned report by psychologist Dr Tanya Byron calling for 'future-proofing' of the self-regulatory system in order to prevent 'harmful and offensive advertising to children' (Byron Review 2008). Under pressure, the ASA has sought agreement with the Advertising Association about ways of ensuring web content is as 'responsible' as the advertising around it, but this has not yet resulted in any binding agreement.

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[1] Beale, C. (2008) 'Will web content undermine ASA's effectiveness?' *Campaign* (2 May).

[2] *Campaign* (2008) 'Govt threatens to regulate online advertising' (4 April)

Regulating audiovisual commercial communications

The ASA maintains that it regulates advertising but does not 'interfere' with editorial content. In contrast, the regulation of UK broadcasting was established on the basis of dealing in an integrated way with all broadcast output. Ofcom has driven forward an agenda of disaggregating such regulation, with Ofcom regulating programme content and the ASA broadcast advertisements. However, product placement is one of many anomalies that this new system is ill equipped to address since it requires a coherent regulatory approach to promotional opportunities across audiovisual output. The result has been, all too often, to allow a commercial agenda to be pursued without the necessary countervailing force of regulation in the wider public interest and with, instead, a dislocated, deregulatory response.

It is essential that the regulatory system is capable of addressing not only programme content and designated advertising but also the integration of content and advertising. The blurring of divisions between content and advertising is occurring in a variety of ways across media. The pressures to integrate media and advertising can be expected to continue and even intensify so it is essential that the regulatory framework is suitably broad and adaptable to ensure consistency and the maintenance of appropriate safeguards across existing and evolving media forms.

We think that the ASA should continue to regulate advertising content, including VOD. In regard to programme content, and indeed all output with the exception of designated advertising, Ofcom should regulate as it does in the case of (linear) scheduled broadcasting. We favour Ofcom retaining strong powers here and being responsible for sanctions, as it is in respect of the existing broadcasting code. Above all, we believe it is vital that the advertising/editorial boundary is adequately addressed in regulation to remove, or at least reduce, the risks of anomalies, regulatory bypass etc.

Q19. Should the controls on advertising in video-on-demand services cover

- *advertisements which appear onscreen as a result of the user accessing a particular video-on-demand programme?*

Yes

- *advertisements which appear on-screen as a result of the user accessing a particular video-on-demand service?*

Yes.

Q20. Should there be only one co-regulatory body for advertising on video-on demand services?

We understand co-regulation to involve a combination of self-regulation and statutory powers. The reference to 'one body' is confusing. We favour an extension of the existing co-regulatory arrangements for broadcast advertising to advertising on video on-demand services. We recommend that the current system of regulating VOD advertising content by BCAP/ASA be maintained. The advertising industry must

undertake to operate a co-regulatory framework that covers all marketing communications. Ofcom should have legal responsibility for advertising across all broadcasting and on-demand audiovisual programmes and services. If the industry is unwilling to comply or fails to comply, Ofcom needs to exercise its statutory powers.

Q21. 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?

Ofcom should have statutory powers which it devolves to the ASA, as it does in the case of broadcast advertising content regulation. Ofcom should retain statutory responsibility.

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

YES. See above.

Q23. Should regulation of advertising in video-on-demand services be handled by the body or bodies responsible for regulation of the programme and other content?

Ofcom should regulate all programme content while the ASA regulates designated advertising. This means that Ofcom should continue to regulate 'in programme' advertising or marketing communications, programme sponsorship, self-promotion by service providers, promos and trailers as well as telesphopping, games, quiz services and any other content that includes marketing communications.

Q24. Should product placement in video-on-demand services, if allowed, be regulated by

- *the body or bodies that regulate advertising on these services? or*
- *the body or bodies that regulate programme content on these services?*

The Directive establishes different sets of rules for product placement in each main type of service. In the absence of consistent prohibition across all services under UK jurisdiction, there is likelihood that product placement and surreptitious audiovisual communication would be more prevalent in on-demand services. The rules on exceptions to the prohibition on product placement mostly refer to programmes but not to services.

Product placement should not be permitted in any VOD service. For acquired programmes that contain product placement there should be a mandatory notification given to viewers. In addition, there should be a prohibition on any product placement being added to acquired VOD.

All VOD material, including acquired material should be subject to undue prominence rules. The regulator should be Ofcom. As stated, it would be entirely inappropriate for a new, untested industry established body to be responsible for regulating product placement or sponsorship.

Q 25 Should sponsorship of video-on-demand programmes and services be regulated by

- *the body or bodies that regulate advertising on these services? or*
- *the body or bodies that regulate programme content on these services?*

See above.

PRODUCT PLACEMENT

Q 26. Should product placement be prohibited by law? Please explain the reasoning behind your preference.

Yes, product placement should be prohibited by law. We applaud the stated preference of the government to maintain the prohibition of product placement and we concur with the reasons put forward in the consultation paper. The principal reason for prohibition is that product placement would allow programme agendas being distorted for commercial purposes.

We have given our views at greater length elsewhere in our response to Ofcom's consultation in 2006 on product placement available at http://www.ofcom.org.uk/consult/condocs/product_placement/responses/.

We believe that product placement would represent a serious erosion of the separation of content and advertising and would lead to a deepening commercialisation of broadcasting. Permitting product placement would also undermine the existing capacity for effective regulation of programme content, advertising content, and rules governing marketing communications.

In the United States product placement has become more intensive and more intrusive – driven by powerful commercial dynamics and weak or non-existent regulation. This has been accompanied by growing levels of public discontent and pressure on the regulators to take action. According to Nielsen Media Research, product placement occurrences on network TV prime time rose to 22,046 in the first three quarters of 2007. On cable TV, for the same period Nielson found 136,078 occurrences. Product placements with a combined visual and audio reference on US network television went up by 17% in 2006 to 4,608, and by 13% to 5,190 in 2007. There were 118,000 individual product placements across 11 top US channels in first three months of 2008 alone.

According to David Young, Director of the Writers Guild of America *West*, 'Product integration goes far beyond the long-standing practice of using real commercial products as props. It forces professional television writers to disguise commercials as story lines and destroys the line between advertising and editorial content'.[3] In the first quarter of 2008, TNS Media Intelligence found that brand appearances, in the form of product placement and integration, averaged 12 minutes and eight seconds per hour in primetime network television, all in addition to 14 minutes of regular

[3] David Young, Executive Director Writers Guild of America, West, letter to CPBF, 22 October 2008.

commercial breaks. In 2007, *American Idol* featured 4,349 product placements, topping the list of network TV programmes with product integration. Coca-Cola's deal with *American Idol* has involved logo-ed cups in front of the three judges, the traditional green room renamed "Coca-Cola Red Room', specially taped segments labelled 'Coca-Cola Moments', as well as plugs by the show's hosts.[4] Fox's talent show *American Idol* is produced by FreemantleMedia North America, a subsidiary of Freemantle Media Ltd UK which produced more than 500 hours of programming in the UK last year. Ofcom has already stated that episodes of *American Idol* that aired on ITV 2 breached UK rules on undue prominence despite having been re-edited for transmission in the UK.

The levels of product placement in the US have led to pressure on regulators to rethink current rules. Product placement is unregulated in movies. For television, the Federal Communications Commission (FCC) rules require that all commercial messages must be clearly disclosed to viewers. In practice, however, this means that corporate sponsors are mentioned in small type during fast moving end credits. Recently, though, FCC commissioner, Jonathan Adelstein has called for tighter rules and more prominent on-air disclosure. As FCC Chairman Kevin Martin put it: 'there is a growing concern that our sponsorship identification rules fall short of their ultimate goal: to ensure that the public is able to identify both the commercial nature of the programming as well as its source. I believe it is important for consumers to know when someone is trying to sell them something'. [5]

British television regulation has been largely successful in restricting in-programme promotion. The separation of advertising and content was a triumph of the 1954 Television Act. Maintaining the separation of advertising and content not only protects against stealth advertising – it also provides viewers - and creative workers - with important assurances about the editorial independence and the artistic and creative integrity of programmes. So we believe the Government is right: allowing product placement in the UK would undermine standards, quality and trust. It would drive a further wedge between the BBC and other broadcasters and would undermine public service values in commercial television.

Permitting product placement would also undermine broadcast advertising rules. All the efforts in the BCAP advertising code to prevent brand associations which may be damaging in various ways (cars and speed, alcohol or cigarette and sexual allure, 'junk' food promotion to children) are much less enforceable in programme content. As Ofcom itself noted in its 2006 consultation on product placement: 'anomalies… could arise were consistency with the advertising code principles to be insisted upon' (6.34). In fact, promoters would have incentives to evade advertising restrictions, broadcasters and producers would have incentives to attract product placement, and advertising rules would be inconsistently applied and so undermined. Recent research by the US Institute of Medicine, for instance, found that companies promoting unhealthy food and drink were increasingly targeting children through product placement, as well as other means.

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[4] Friedman, W. and Halliday, J. (2002) 'Product Integrators tackle learning curve', *Advertising Age*, vol 73 (42): 18-20.

[5] Statement of FCC Chairman Kevin J Martin on Sponsorship Identification Rules and Embedded Advertising, MB Docket No. 08-90 (26 June 2008)

We agree that product placement should be explicitly prohibited in new legislation. However, product placement would arguably contravene various sections of the Communications Act 2003. Ofcom's Broadcasting Code 'pays due regard to the need to maintain independent editorial control of programme content, as required by Section 319(4) of the Communications Act 2003'. Product placement would contravene – 319 (2) (h) 'that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented'. Product placement would also contravene 319 (2) (l) 'that there is no use of techniques which exploit the possibility of conveying a message to viewers or listeners, or of otherwise influencing their minds, without their being aware, or fully aware, of what has occurred'. Although this maintains the longstanding ban on subliminal advertising, we would argue that much, if not all, product placement and brand integration activity would breach this section of the Act.

As we have stated in previous consultation we believe that the following key principles need to be upheld:

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

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

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

The case *for* product placement is principally economic. We recognise the changes in the broadcasting sector and allied media markets raise considerable uncertainties and challenges for future revenue models. However, the income to be derived from product placement is not sufficient to outweigh the irreversible damage to British broadcasting arising from the abandonment of the separation principle. Even in the United States revenues from product placement represent only around 3.3% of the total revenue from spot advertising.

The commercial pressures on media and advertisers alike to increase product placement are too great for it to be appropriate to rely on self-regulation instead of a statutory ban.

The argument that viewers can rein in producers by exercising their market power to switch over or switch off is also seriously flawed. The influence of consumers in advertiser-financed markets is not straightforward and direct, and the level of substitutability of AV programmes and cultural goods also varies considerably. The market is a poor mechanism for registering opposition to or dissatisfaction with product placement. Complaints mechanisms can play an important role but on their own they do not offer either a sufficient means of regulating the industry or a reliable gauge to public attitudes and concerns. There is much that can be said about the available research on public attitudes to product placement. The principal issue, however, is not whether or not viewers are deceived. Some are and some aren't – to varying degrees. The issue is that the practice itself is deceptive– buying the capacity to be promotional without making this clear and transparent for viewers.

The AVMSD would allow Member States to opt out of the general prohibition and allow product placement, subject to restrictions, in a variety of programme genres. However, we do not consider that the supposed safeguards exist in drawing up such a list of permitted (and excluded) programme types as there are considerable, and growing, problems defining programmes by genre. We agree with the observation of EURALVA that:

> '[i]t is possible, even likely, that television companies may well develop hybrid programme genres which straddle those genres in which product placement is allowed and those in which it is not. Consider, for instance, a family game show which was designed to be watched by both adults and children. One Member State might consider it to be "a programme for children", and therefore forbid product placement, whereas another might consider it to be "a programme for adults", and therefore allow it. There would therefore be no EU-wide standard for a given programme format.

So, we call for:

- No paid product placement
- Strict separation between programmes and advertising
- Maintenance of the undue prominence rules

All other safeguards are elastic and erodible. These safeguards remain clear and effective. The ban on product placement does not just protect against how brands are featured in particular programmes – it protects how decisions are made across broadcasting as a whole - about how stories are told and even what stories are told. If editorial space is bought or is constrained by commercial considerations then that is a serious loss across any genre of television.

Q27 Should any such legal prohibition allow for Ofcom and the co-regulator(s) 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)?

No. As we have argued above there is a real risk of inconsistency and erosion of the principles of separation, transparency and editorial integrity if product placement were permitted in VOD services. If product placement were permitted, how could

audiences and regulators be assured that editorial integrity had been preserved, as required by the Directive?

Q30 How could "undue prominence" be avoided, given the commercial imperatives for audiences to recognise the products placed?

If product placement were permitted, the 'undue prominence' rules would be undermined and eroded. We do not believe that a form of intentional commercial communications organised through a transactional relationship to realise value for the advertiser can be made compatible with rules on undue prominence or rules on programme/editorial integrity.

Q31 Should the same rules apply to both television broadcasting and on-demand audiovisual media services? If not, how should they differ and why?

The same rules should apply. See above.

Q32 Should prop placement continue to be permitted?

Yes.

Q33. 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?
Q34. 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? Which test is best and why?

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

Q35. 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(s)?

Ofcom should set the level and administer and report on all declarations made by parties concerned. This should be subject to greater public oversight and periodic oversight by parliament, at least annually.

Q36. 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?

We oppose product placement and wish to see it removed from all programme. However, for existing programmes or material produced under jurisdictions where PP is permitted there should be appropriate notification and identification, and PP should be subject to undue prominence rules.

There should be a requirement concerning the transmission or retransmission of any programme that has not otherwise been subject to rules prohibiting product placement and in which this occurs. In such instances, there should be oral and written identification at the beginning of the programme and in end credits providing clear identification that the programme contains product placement, In each case a statement should be included that product placement is prohibited in UK sourced programmes. This would aid media awareness and media literacy. Such clear recognition would also assist in encouraging wider public debate favouring either a more stringent or relaxed regulatory approach when regulation is reviewed in future.

Q37. How should product placement be signalled to viewers?

We reject the view that notification provides an adequate safeguard for product placement/integration in programmes. This frames the issue far too narrowly in terms of viewer identification, and displaces a broader set of concerns about editorial integrity, artistic integrity and the risks of ongoing distortion of programme agendas and editorial content for commercial purposes. In addition, there are considerable difficulties in establishing a suitable system for signalling product placement to viewers that would be effective in notifying viewers, including those watching only parts of programmes, while not damaging the viewing experience, or serving as a promotional message itself.

We do not believe that the presence of a 'neutral logo' to alert viewers to product placement, as suggested in the AVMSD is an adequate or satisfactory means of identification. More importantly, we reject the assumption that this removes the surreptitious nature of the commercial communication.

Q38. 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(s)?

In the case of any rules on signalling being required, the principles and parameters should be set out in legislation. Ofcom should be tasked with drawing up detailed rules following consultation. The regulatory will need to be sufficiently vigilant and flexible to be able to address innovation in content and advertising, and efforts to circumvent whatever rules are established.

Non-EU satellite channels uplinked from the UK

The existing country of origin rules are set out in the Television Directive (1989, amended 1997). The CPBF thinks that the current application of the country of origin policy by the UK (amongst others) has created concerns in other member states. As Alison Harcourt points out: 'The UK's lax regulatory regime for satellite broadcasters has created a situation of regulatory arbitrage in Europe. A significant number of broadcasting companies have relocated to the UK, away from their original location'.[6] For this reason there has been a move by some member states to seek derogation from the COO policy where it has been infringed and Article 2.3 seeks to address the issue of jurisdiction in this problematic area.

[6] Harcourt, A. (2005: 28) *The European Union and the regulation of media markets*. Manchester: Manchester University Press

Q39. Should there be arrangements of some kind to regulate broadcasts from non-EU broadcasters which are uplinked from the UK?

Yes. We believe that non-EU broadcasters that are uplinked from the UK for reception in the UK should be required to comply with the same broadcasting regulation that applies to all UK licensed broadcasters. It is right that the Government should ensure that non-EU broadcasters under its jurisdiction meet the minimum content requirements set out in the Directive. These include the right of reply (article 23) and the requirements for broadcasting a majority of European works and devoting at least 10 % of programme budgets for European works created by producers who are independent of broadcasters (articles 4 and 5).

A particular concern for the CPBF is that impartiality rules should apply in the case of non-EU news channels. In his evidence to the House of Lords Select Committee on Communications, Ed Richards, the Chief Executive of Ofcom, stated that foreign-based news channels such as al Jazeera and Fox are not subject to the impartiality regulations which govern the BBC, ITN and Sky because, firstly, 'they are targeted, very clearly and explicitly, at a different audience', and second, 'they have extremely small audience shares'. However, the significant difference between Fox and all the other foreign-based news channels licensed by Ofcom is that the former's presenters engage in constant and strident on-screen editorialising. Recently on Fox News the presenter Bill O'Reilly characterised those wishing to bring about democratic reform in the American media as 'loons', 'unstable', 'a threat' and 'fascists'. As Fox News is licensed to broadcast in Britain by Ofcom it is presumably subject to Ofcom's Broadcasting Code, section five of which is based on the principle that 'news, in whatever form, is reported with due accuracy and presented with due impartiality'. Unless the word 'due' is interpreted so broadly as to render it virtually meaningless Fox News is in almost constant breach of this principle. We call on the Government to explain why, in these circumstances, Ofcom continues to grant a broadcasting licence to Fox News?

Q40 What legal powers should the Government or Ofcom have in order to ensure that there can be effective intervention if unacceptable content is broadcast by a non-EU channel uplinked from the UK?

The CPBF continues to oppose against any relaxation of the current impartiality rules in broadcasting (as suggested, for instance, in the Ofcom document *New News, Future News*). We have warned that the abolition of the "fairness doctrine" in the US led not a plethora of diverse channels but a narrowing of the range of views on offer in a radio market dominated by shock jocks and a television system polluted by the values of Fox News. At a CPBF organised public debate in 2003, Richard Tait, ITN's former editor-in-chief, warned of the danger of allowing broadcasting in Britain to go down the American route. He feared that if Channel 5 was able to ape Rupert Murdoch's Fox News Channel then the public's high level of trust in broadcasters would plummet. At the time, the Independent Television Commission had just given the pro-war Fox News the all clear after British viewers complained about bias in its coverage of the conflict in Iraq. The ITC rejected nine complaints, saying that Fox News, which holds a British licence, had not breached the programme code on "due

impartiality" because the regulations did not require broadcasters to be "absolutely neutral on every controversial issue".

Q41 What responsibility, if any, should uplink providers have in relation to the channels they uplink?

Uplink providers should be required to ensure that channels comply with all relevant broadcasting codes and regulations. When notified of any breaches by channels the uplink provider should comply with any requirements, subject to appeal, including the removal of channels that fail to comply with Ofcom's codes, where they apply, or with the minimum requirements of the AVMS Directive.

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