

Input to DCMS

“Consultation on Product Placement on Television”

January 2010



Overview

The BSG welcomes the opportunity to respond to DCMS' latest consultation document on product placement on television.

Our view on this issue reflects that expressed in our submission to the previous consultation in 2008.

The BSG believes that the Government should take advantage of the opportunity to permit product placement on television in the UK as per the framework set out in the Audiovisual Media Services (AVMS) Directive. We believe this is important to ensure that the UK is not at a competitive disadvantage internationally and with the overriding majority of EU Member States that have decided to permit product placement. The BSG also believes that the industry should be allowed to explore what commercial benefits product placement may bring given the real need to innovate new business models to sustain investment in content as traditional ad revenues and business models come under pressure as a result of the convergence of digital media. Both outcomes would be in line with the Government's stated policy objective in supporting the growth of the UK creative industries.

As per our original submission, we fully recognise the need to ensure that permitting product placement does not lead to negative outcomes for consumers. The permission of product placement should augment and not diminish the consumer's viewing experience, for example through providing additional revenue for investment in appealing content. Furthermore, in order for consumers to be able to make informed choices about the content they choose to consume, they should be given clear information about product placement.

It is our view that the needs of the consumer and industry need not be in conflict here. As recognised in the consultation document, consumers are used to product placement in programmes made outside, but broadcast in, the UK and this has not led to any significant complaints or demonstrative consumer harm. The debate about how best to empower consumers whilst giving the industry sufficient flexibility to innovate new services has taken place at a European level and has resulted in the framework contained within the AVMS Directive which we believe strikes the right balance between these two issues.

Given that the Directive requires that products should not have undue prominence, should not influence editorial decisions or encourage viewers to purchase or rent products, this provides a basis on which over-intrusive product placement would not be allowed. Furthermore consumers will vote with their feet, or perhaps more accurately with their remotes by changing channel, if the use of product placement led to contrived programming which they found unpalatable. No provider or broadcaster of content would therefore be commercially incentivised to pursue product placement that their consumers would find unacceptable.

As such, the BSG is of the broad view that if product placement is permitted on television in the UK, it should be based on the framework set out in the AVMS Directive and not seek to go beyond that. In going beyond the terms of the Directive there is the real risk that an overly restrictive implementation of product placement would cancel out the potential commercial benefit.

Furthermore, as DCMS is aware, since its previous consultation on this issue, the BSG has been actively involved in the implementation of the AVMS Directive as it affects Video-on-Demand (VOD) services, which will be able to feature product placement subject to certain conditions as set out in the Directive. The experience of implementation has demonstrated the practical difficulties in legislating in a way that does not clearly reflect the terms of the Directive or in a way that tries to go beyond the framework set out in the Directive.

Whilst the comprehensive set of issues laid out in this consultation document are relevant to the policy considerations at stake, we would strongly recommend that should, as we hope it will, the Government decide to permit product placement on television, that this is executed through transposing the relevant sections of the Directive into UK law. Any additional safeguards that may be decided as necessary should be imposed by means of the Ofcom code which we believe will be a) a more efficient means of implementation and b) will build in more flexibility over time to take into consideration changes to the market to the benefit of both the consumer and the sector as a whole.

Finally, whilst there remains an understandable inclination to ensure more robust regulation for television where content is broadcast into the living room, compared to VOD services where consumers play a more proactive role in selecting the content they want to view, we believe it would be a disappointing outcome if the product placement rules for broadcast were significantly different to those for VOD. This would go against the spirit and intention of the Directive and provide practical and costly difficulties for content commissioned or created for both broadcast and on-demand delivery.

Response to questions set out in the consultation document

We have limited our responses to the areas of the consultation where we feel able to comment and provide tangible input.

Additional safeguards and their implementation

- The BSG does not advocate any additional safeguards further to those required by the AVMS Directive, as we believe the requirements of the Directive satisfy the correct balance between consumer protection and giving the industry sufficient flexibility to explore how product placement could provide commercial advantages.
- We do believe that certain issues may require clarification, for example precise definitions of programme genres.
- However we believe issues of clarification and any additional safeguards that are decided upon should be imposed by means of the Ofcom Code rather than through a Statutory Instrument implementing product placement into UK law.
- Our experience from being involved in the implementation of the AVMS Directive leads us to believe that the Government would face practical difficulties in introducing additional safeguards directly through law and that the Ofcom Code provides for a more flexible and effective mechanism.

Commercial advantages

- The BSG feels unable to contribute to the exact or range of potential financial benefit that product placement may bring.
- We do still contend however that as services continue to evolve and require new business models, that not to permit product placement as an alternative source of revenue would be short-sighted and be in contradiction to the Government's stated objective in supporting the UK creative industries.
- There would be a clear commercial disadvantage for the UK not to be able to explore the commercial advantages when the vast majority of its counterparts in the EU will be taking advantage of that opportunity under the terms of the AVMS Directive.

Programme genres

- The BSG does not advocate that any of the permitted programme genres should be excluded or that any specific prohibitions of product placement in certain other genres should be made in law.
- The issues that DCMS has highlighted here are relevant and there will be a need for more detailed work on programme definitions in order to tackle understandable concerns about whether product placement would be allowed in religious, news, current affairs or consumer programmes.
- However it is our view that this would best be considered when amending the Ofcom Code if the Government amends UK law to allow product placement.
- As previously stated, if product placement is permitted, an attempt to implement beyond transposing the terms of the Directive in law would we believe cause practical difficulties and potential delay for the Government.
- Tackling these issues through the Ofcom Code will, we believe, be more efficient and allow for changes in the market to be reflected over the course of time, which would seem much more appealing than legislating for very specific permissions and restrictions which would be difficult for the Government to amend in law if it chooses to at a late date.

Children

- The BSG would counsel against further restrictions in programmes not made for or specifically targeted at children, which may lead to the situation where potential revenue from some of the most popular programming on television not being able to be realised, and cancelling out the commercial benefit and rationale for allowing product placement in the first place.
- In terms of programmes that may appeal to children, but which are not children's programmes per se, we would urge DCMS to recognise the difference between children's programmes and what could be described as programmes which attract family viewing, where product placement should be placed in the context of adults viewing the content at the same time.
- In relation to potential restrictions on certain types of product for programmes that may be watched by a high child audience, it remains the case that, for example HFSS products are not banned from appearing in such programmes and therefore the inclusion of a particular brand or product would actually add some context and realism to the programme.
- Furthermore, any type of inclusion would of course be subject to the requirements of the Directive in relation to undue prominence, editorial justification and not encouraging purchase or rental. Therefore there is a

distinction here between the inclusion of such types of products under a product placement regime compared to spot advertising where the obvious purpose is to give prominence to the brand and encourage purchase, which would suggest that spot advertising and product placement should not require identical treatment.

- However, we do recognise that some may make a case for ensuring consistency between advertising and product placement of HFSS products, gambling and advertising in those programmes of particular appeal to children (based on the 120 index) and that there could be the case for exploring this issue in more detail.
- However, we would reiterate that this issue should be the subject of deliberation under any potential changes to the Ofcom Code and such details should not feature in the potential implementation of product placement into UK law.

Editorial independence; undue prominence

- We believe the requirements of the Directive are clear in this regard and given that issues of prominence need to be viewed within the editorial context of the programme in question, judgments will need to be made on a case by case basis. Consumer complaints are likely to be a strong indicator of instances where product placement has given a brand undue prominence in light of the editorial context.
- Our experience in contributing to guidance for product placement in VOD services, which DCMS is aware of, shows that whilst it is helpful to provide guidance on undue prominence, it is difficult, inappropriate and arguably ineffective to draw up "rules" to prevent "undue prominence". It is only possible to give guidance as to what may constitute undue prominence in different circumstances.
- The Directive provides the framework and over time, real case examples of infringement will provide a benchmark for Ofcom, consumers and the industry itself on what is appropriate and acceptable and what is not.

Tobacco, alcohol, HFSS foods, gambling

- Given the ban on the advertising of tobacco products, it would seem consistent to also prohibit the placement of smoking accessories.
- We would not advocate the prohibition or restriction per se of the placement of alcohol, HFSS foods or gambling.
- In relation to alcohol, the Directive is clear on the requirements that placement is not aimed to those under 18 or tied into immoderate consumption. For all these products, they will be subject to the restrictions set out in the Directive in relation to undue prominence, editorial justification and not encouraging purchase or rental.
- However, as discussed in the section on children, we can see the case for exploring the extent to which ensuring some consistency between potential product placement of such products with the current advertising regime might be appropriate when looking at the redrafting of the Ofcom Code that a decision to permit product placement on television would provoke.

Monitoring

- These questions seem somewhat premature given that product placement is not currently permitted and if it was it would take some time to come to market and for consumers' responses to it to be monitored. Furthermore, given the uncertainty about the extent of the commercial benefit it seems to be inappropriate to be discussing the concept of some form of levy at this point.

- Given Ofcom's ongoing research and policy interest in consumers' engagement with different types of content, it would seem possible that product placement may be able to feature as part of that broader ongoing work.
- In general, consumer reaction should be telling here, and as mentioned previously consumer complaints should be indicative of consumer reaction to product placement on television.

Other types of product

- We don't believe there are any other product or service categories whose placement should be subject to prohibition or restriction.

Signalling of product placement to viewers

- We believe the requirement as set out in the Directive for notification before and after the programme and after any ad break strikes the right balance between informing the consumer, not bombarding them with potentially annoying messages and not putting a disproportionate burden on broadcasters. We believe broadcasters should have some flexibility in the manner in which they would like to meet those requirements.
- The suggestion of requiring the mention of which products have been placed in the notification seems to go against the undue prominence requirements of the Directive itself.

About the Broadband Stakeholder Group (BSG)

The BSG is the UK government's advisory group on broadband. It provides a neutral forum for organisations across the converging broadband value-chain to discuss and resolve key policy, regulatory and commercial issues, with the ultimate aim of helping to create a strong and competitive UK knowledge economy. Further information about the BSG can be found at: <http://www.broadbanduk.org/>