



# Consultation on the proposed Ofcom Broadcasting Code: Response from the Satellite and Cable Broadcasters Group

## 1. Introduction

The Satellite and Cable Broadcasters Group (SCBG) represents the interests of a wide range of channels operating in the commercial multi-channel sector. SCBG members run more than 70 channels in the United Kingdom and also operate services in Europe and the Middle East. Members' services span entertainment, factual, sports, music, arts and culture, children's and a number of specialist services for ethnic communities.

The SCBG supports Ofcom's aim to create a more coherent, targeted regime for content regulation. However, we are concerned that the draft Code retains too many of the attitudes of previous regulatory regimes. In order to deliver the Government's objective of the most dynamic and competitive communications industry in the world, and to

allow appropriate freedom of expression, Ofcom needs to avoid micro-management of content regulation.

The genesis of the existing programme and sponsorship Codes was the public service broadcasting landscape in which viewers were protected by blunt instruments of time restrictions, namely the 'watershed'. Over ten years later, the communications sector is a very different landscape: over 500 television channels, digital television penetration of 55% of UK households, an increasingly media literate society and the emergence of consumers who are in control of their television viewing. Ofcom's Broadcasting Code must reflect evolving consumer expectations. Where technologies enable viewers to make informed choices, Ofcom should ensure that its regulatory framework is not designed to restrict those choices or to make them on consumers' behalf.

Ofcom is required by the Communications Act to deliver light-touch regulation. So Ofcom's Broadcasting Code should focus on the application of the generally accepted standards enshrined in the TWF Directive. It should avoid over-prescription and should not import redundant standards and practices from the former regulatory regimes.

The low level of programme-based intervention exercised by the predecessor regulator, the ITC, demonstrates how the commercial broadcasting sector continues to steward itself responsibly. There were few programming complaints in 2002, and only 4.4% of these were upheld. Fewer than 50 programmes broadcast in 2002 were found to have breached the Programme and Sponsorship Codes. The majority

of complaints across all channels in 2002 concerned language (20 of the 49 programmes) and 10 related to sponsorship. The cable and satellite sector, which numbers over 400 channels, was responsible for 26 of these programmes, seven of which involved misinterpretations of the Sponsorship rules. Overall, these statistics are testament to the high level of programme compliance being applied in the sector, indicating the responsibility exercised by broadcasters.

A single Broadcasting Code would enable Ofcom to streamline regulation and adopt a framework of fair competition and freedom of expression. In order to achieve this, the draft Code needs to be amended considerably to align UK practice with EU partners.

We address each section of the consultation paper below. First, we wish to comment on Ofcom's approach to issuing supplementary guidance. In the Summary section of the consultation document Ofcom states that it is not required to consult on guidance and that the guidance it issues will be non-binding. We are concerned that Ofcom is not willing to consult on the guidance it proposes to apply to interpretations of the Code. The ITC allowed a six week consultation period with industry and interested parties on guidance notes on advertising and programming issues. We believe that consultation on all aspects of content regulation is a necessary and appropriate approach to better regulatory practice.

Although guidance will be non-binding, it will shape how broadcasters interpret the Code. If Ofcom is to adopt general principles and rules that are clarified in guidance, it is crucial that licensees – or a body representative of cross-industry interests – are able to comment on

the detailed guidance that Ofcom plans to adopt. The consultation document acknowledges that the guidance will be revised to “respond to changes in society” and “the way the public view broadcasting standards”. If Ofcom is prepared to revise its guidance on the basis of research or public opinion then it seems reasonable for the industry affected by any key changes to interpretations of the Code to be invited to comment on the proposed revisions.

## **2. Response to draft Code Sections**

### **2.1 Introduction to the Draft Broadcasting Code**

RIA 3a) The SCBG believes this section adequately sets out the purpose and background to the Code.

RIA 3b) The SCBG supports the concept of one Broadcasting Code.

RIA 3c) The SCBG welcomes the specification of six criteria against which acceptable standards will be judged. These are reproduced below for reference:

- a) the degree of harm and offence likely to be caused by the inclusion of any particular sort of material in programmes generally or in programmes of a particular description;
- b) the likely size and composition of the potential audience for programmes included in television and radio services generally or in television and radio services of a particular description;
- c) the likely expectation of the audience as to the nature of a programme’s content and the extent to which the nature of a

- programme's content can be brought to the attention of potential members of the audience;
- d) the likelihood of persons who are unaware of the nature of a programme's content being unintentionally exposed, by their own actions, to that content;
  - e) the desirability of securing that the content of services identifies when there is a change affecting the nature of a service that is being watched or listened to and, in particular, a change that is relevant to the application of the standards set under this section;
  - f) the desirability of maintaining the independence of editorial control over programme content.

In order for the Code to be as coherent as possible, we propose that any rule adopted in the Code must link to at least one of these six principles. We have set out below those occasions where we think there is some contradiction between the rules and these principles.

RIA 3d) The SCBG believes strongly that any framework must apply without exception across the audio-visual sector.

## **2.2 Protecting the Under Eighteens (Section 1)**

RIA 4a) Are the principles, rules and meanings necessary, consistent, proportionate and achievable? If not, can the wording be improved and, if so, how?

The SCBG is extremely concerned that this section proposes rules that are inconsistent with the TWF and the objectives set by the

Communications Act 2003. Ofcom proposes an obligatory prohibition in Section 1 via “must not”, in contrast to former prescriptions of “should avoid”. This major change represents a disproportionate brake on freedom of expression.

The terms “should not/should avoid” must be retained in order to allow broadcasters some discretion on content and scheduling decisions, in line with the criteria set out in the Introduction to the Code.

## **2.2(i) Scheduling and Content Information**

The rules within this section do not reflect Article 22 of the TWF Directive as suggested in Ofcom’s narrative. The wording of the rules goes further than the requirements of the Directive, and consequently places a greater degree of restriction on broadcasters than before. Whilst acknowledging the statutory duty to extend the level of content protection to under 18s, Ofcom has imposed a disproportionately restrictive regime by adopting more prohibitive wording than that of the TWF Directive.

Rule 1.1 places an outright prohibition on the broadcast of “material that might seriously impair the moral, psychological or physical development of children” by stating that such material “must not be broadcast”. This rule goes further than the corresponding provision in the Directive which qualifies the rule by *“Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include any programme which might seriously impair the physical, mental or moral development of minors, in particular programmes that involve*

*pornography or gratuitous violence*" (article 22(1) TWF). The rule should be reworded as follows:

**"Broadcasters should avoid the inclusion of material that might seriously impair the moral, psychological or physical development of children, in particular programmes that involve pornography or gratuitous violence".**

In contrast to rule 1.1, the watershed retains the ITC wording *"Material unsuitable for children should not, in general, be shown before 21.00 or after 05.30hrs"*. In the interest of consistency the wording of rule 1.1 needs to be brought into line with the definition of the watershed.

The SCBG does not believe that more use of labelling is necessary. Multi-channel viewers already receive a high level of programme information via the Electronic Programme Guide and are able to restrict access to certain channels or types of programming, thus enabling viewers to make informed choices. In order to bring regulatory practice up to date and in line with criteria set out in the Introduction to the draft Code i.e. the nature of the channel, its likely audience and the viewers' expectations of that channel, the exceptions to the rule should not be limited to pre-watershed news programming.

### **Offensive Language**

We believe rule 1.17 "offensive language should not feature in children's programmes" should be qualified to "offensive language should be avoided in children's programmes" as offensive

language is a subjective judgement and broadcasters should be able to judge appropriateness of the language in respect of the age of the likely audience.

Rule 1.18 appears to go further than the existing ITC rules regarding less offensive language as the draft rule states that “less offensive language must not be broadcast before the watershed, unless it is justified by the context”. We do not support the application of an obligatory prohibition on less offensive language from pre-watershed programmes and believe this contradicts principles B and C set out in the Introduction. As a minimum, we suggest that that the wording be amended to “less offensive language should be avoided before the watershed, unless it is justified by the context”.

### Sex

Rule 1.19 reflects the essence of the legacy Codes but does not make clear the parameters regarding sexual material presented in an educational context. We are concerned that the requirement in the draft rule “material of a sexual nature (verbal and/or visual) should be inexplicit and appropriately limited, if broadcast before the watershed” could place an unnecessary restriction on health-focused programming carried by some member channels. We recommend the following wording: “material of a sexual nature (verbal and/or visual) should be inexplicit if broadcast before the watershed, unless there is an editorial justification”.

## The participation of people under the age of eighteen in programmes

This section containing rules 1.22-1.25 reflects the rules of the legacy Codes and has been reworded to cover people under 18. We support rules 1.22 and 1.23 but are concerned that rule 1.24 “The exploitation of persons under the age of eighteen is unacceptable, irrespective of any consent given by persons under the age of eighteen or by a parent, guardian or other person over the age of eighteen in loco parentis” could place broadcasters in a situation of uncertainty and risk. For instance, where programme makers secure consent by the parent/guardian in accordance with the requirements on consent a change of heart by a guardian or the person themselves potentially makes all consents invalid and effectively renders the programme non-compliant. This rule appears to contradict the practice of due diligence to secure consents and place an unreasonable burden on broadcasters which could have significant financial implications for programme-makers. In the absence of prima facie evidence to support such a rule, we do not believe the addition of this rule represents necessary and proportionate regulation.

**RIA 4c) Are the proposed definitions of children and young persons appropriate?**

We support the definitions listed in the draft Code but believe there is so scope for further refinement to reflect market segmentation.

RIA 4d) Do we need rules regarding violence and dangerous behaviour, smoking, drug taking etc as proposed in the Code or are such matters already covered by the other rules?

### Smoking, alcohol, drug and solvent abuse

Rule 1.10 goes further than the predecessor rule, 1.2(i) of the ITC Code Children and Imitative Behaviour, by restricting any inclusion to “a clear educational purpose” rather than “a strong editorial case”.

Rule 1.11 groups smoking, alcohol, drugs and solvent abuse together and adopts a more restrictive approach to the existing Code. The existing Code requires programmes likely to be widely seen by children and young people, to include smoking, alcohol consumption and drug abuse only where context and dramatic veracity requires it. The draft Code appears to rule out the inclusion of such footage before the watershed in any programme irrespective of its likely audience “unless there is an editorial justification”. We do not believe Ofcom should be strengthening the rules in the absence of any evidence that the previous framework was inadequate.

The SCBG believes that sections 1 and 2 of the draft Code set out adequate provisions to protect children and young people on the matters of public health addressed in question 4d).

### Violence and Dangerous Behaviour

Rule 1.12 reflects the requirements of the TWF Directive and section 1.7 of the ITC Code regarding “violence that has the potential to cause

moral or psychological harm” but the draft rule goes further than the legacy regime by restricting material containing such violence to post-watershed.

Rule 1.14 adopts a similar approach regarding dangerous behaviour (that is easily imitable by children in a manner that is dangerous) as that applied by the ITC. However, the wording “should not be broadcast before the watershed, unless it is editorially justified” is more restrictive than the ITC rule. This could be unnecessarily restrictive on factual cab/sat channels and their loyal, grown-up audiences who expect documentaries to be accurate rather than sanitised. Similarly a channel, such as the Chinese Channel, which serves a community whose cultural expectations vary enormously from the general mores of UK society, should be free to schedule films containing martial arts according to the composition of their audience in line with principles B and C. Logically all broadcasters should be allowed to judge the acceptability of material based on the nature of a channel and its audience make-up (principle B). The SCBG does not support the adoption of this rule.

Rule 1.15 prohibiting the presentation of violence and violent behaviour “as a positive means to an end in programmes broadcast before the watershed, unless there is an editorial justification. Such material should not be featured in children’s programmes unless it serves a clear, educational purpose” is an unwarranted addition. We support the intention of the second sentence of the rule excluding such material from children’s programmes but, given that the protection of children and young people is covered in rule 1.1, we do not see any justification for a detailed rule here.

**RIA 4e) Which of the options described in the RIA regarding the watershed on premium subscription services is the best option and why?**

The SCBG supports option three to remove the watershed from premium subscription services. Members of the SCBG pioneered PIN technology over five years ago, and know from research and customer feedback that the technology provides adequate levels of protection whilst enabling freedom of choice among subscribers. Given the absence of any negative reaction to PIN protections, the SCBG sees no justification for imposing additional protective mechanisms.

**RIA 4f) Which of the options described in the RIA on the scheduling of programmes regarding the paranormal is the best option and why?**

The SCBG believes the retention of a rule on the paranormal is an 'accident of history' and an unnecessary import from the legacy regulator. If Ofcom is truly committed to regulation being necessary, consistent and proportionate, we see no grounds for including a detailed rule on paranormal programming. Any concerns regarding potential harm to people under eighteen should be adequately addressed by rules 1.1 and 1.2.

**RIA 4g) Should cash prizes be specifically forbidden in children's programmes?**

We support the rule's proposal that "prizes offered in programmes to children must be appropriate to the age range of both the target audience and participants".

**RIA 4h) Should there be rules linking the scheduling of films to the BBFC classification?**

Given the criteria set out in the Introduction, it is inconsistent to include scheduling rules linked to BBFC classifications. BBFC classifications are intended for very different media to television and can act only as a general guide to broadcasters. Such matters should be left to the discretion of the broadcasters based on the requirements of rules 1.1 and 1.2. The SCBG objects to this proposal.

## **2.3 Harm and Offence (Section 2)**

**RIA 5a) Are the principles, rules and meanings necessary, consistent, proportionate and achievable? If not, can the wording be improved and, if so, how?**

Rule 2.4 states "programmes must avoid anything that individually, and/or taken as a whole and in context, is likely to encourage violent, dangerous or seriously antisocial behaviour". The SCBG is concerned that this rule is ill-targeted and could in practice be interpreted as a 'catch-all', irrespective of the criteria set out in the Introduction. This type of blanket protection might have been considered appropriate for

viewers of the conventional terrestrial channels some years ago but does not give today's viewers credit for knowing their channels and managing their choices, a factor prevalent in digital, multi-channel homes. We believe this rule represents unnecessary and unwarranted regulation.

The SCBG supports rule 2.6 requiring that paranormal programming be treated with "due objectivity". A number of our members have carried this type of entertainment programming for some years and the programmes receive strong support from viewers who clearly treat the programmes as entertainment. We would further refer you to the outcome of detailed ITC research on this issue that represents the most accurate analysis of consumer expectations in relation to paranormal programming (Beyond Entertainment, BSC/ITV, November 2001). The requirement to label all such programmes goes further than the predecessor Code and interferes with the creative freedom of programme makers. We believe that there should be no requirement to label such programming after the watershed, though members that broadcast this type of programming consider it responsible to do so before the watershed. If Ofcom is to impose prescriptive rules, the rules must be supported by evidence that ensures the rule is proportionate to the harm it is intended to prevent.

**RIA 5c) Should a rule on hypnosis be included and if so what evidence of harm or potential harm is there regarding the use of hypnosis on television and radio audiences?**

Common sense should prevail here. We believe proposed rule 2.7 is unnecessary, self-evident and already covered under proposed rule

2.1. We believe rule 2.1 should adequately provide for the potential harm the legacy rule was intended to avoid.

**RIA 5c) Is the inclusion of R18 and R18 standard material compatible with the TWF Directive which requires that nothing is included in licensed services which might seriously impair the physical, mental or moral development of minors? 5d) If yes, are there technical and other protections that broadcasters and platform operators can put in place to protect the under eighteens, who should not, and adults who may not wish to, access R18 and R18 standard material?**

The SCBG supports option two proposed in the RIA (5c). This should facilitate viewer choice, subject to existing PIN technology being applied, and bring Ofcom in to line with other European Union member states. The ITC research *The Public's View 2002* showed widespread support (76% of the 1200 adults surveyed) for people to be able to pay to access sexual material on television. We don't believe any additional protections other than PIN technology are necessary.

**RIA 5h) Should there be a prohibition on the transmission of films, videos and DVDs refused a BBFC certification? If not, should there be any rule and, if so, what rule should apply?**

Given the global nature of communications and diversity of audiences and their expectations, the SCBG does not support the retention of a prohibition on material refused a BBFC certification. Broadcasters should be able to judge the acceptability of such material against the core rules in sections 1 and 2 and the expectations of their audiences.

**RIA 5i) Can a lesser level of technical intervention achieve the same protection for those with photosensitive epilepsy?**

The question specifies that the same protection be achieved as under the ITC rules. We understand that the current risk level of 3 flashes per second is based on only 3% of the photosensitive population being susceptible. We therefore believe more research is needed to determine the level of risk to this group so that Ofcom can identify a proportionate solution. We believe the rule should allow broadcasters to provide warnings before broadcasting material containing flash photography or flashing images. For those already aware of their susceptibility, it is reasonable to expect them to take note of pre-programme warnings and EPG information and adjust their viewing conditions accordingly.

**2.4 Crime (section 3)**

The SCBG has no comments on this section of the draft Code.

**2.5 Religion (section 4)**

The SCBG has no comments on this section of the draft Code.

## **2.6 Due Impartiality, Due Accuracy and Undue Prominence of Views and Opinions (section 5)**

**RIA 8a) Are the principles, rules and meanings necessary, consistent, proportionate and achievable? If not, can the wording be improved and, if so, how?**

The SCBG supports the principles, rules and meanings in this section of the draft Code.

**RIA 8c) Does this section encourage imaginative and challenging programming on matters of political and industrial controversy or public policy?**

We note Ofcom's desire to encourage imaginative programming but think that the approach to standards regulation is being blurred by aspirations of public service broadcasting. The key issue is whether the principles, rules and meanings in this section adequately guarantee freedom of speech for broadcasters to choose the subjects they cover and the manner in which they handled them.

**RIA 8d) In particular do rules 5.11, 5.12 and 5.13 and the associated meanings of "personal view" and "authored" programmes give broadcasters enough flexibility to produce challenging programmes while ensuring that the Act is complied with?**

The SCBG does not have any objections to the definitions of 'personal view' and 'authored' programmes. We do, however, question the

rationale for rule 5.12 that appears to target presenters who might exploit regular appearances as a platform to give views undue prominence. It is not clear if the term presenter is directed at programme hosts or regular contributors to programmes. If the rule is directed at the presenter, who in effect represents the broadcaster, we believe the issue is adequately covered by rule 5.6.

**RIA 8e) Would appropriate labelling help the UK audience understand the nature of retransmitted news services (not primarily intended for the UK market)?**

The SCBG does not support labelling of retransmitted news services (not primarily intended for the UK market). We believe this could have negative consequences for journalists for whom an impartial reputation is crucially important for reasons of safety as well as credibility.

## **2.7 Election and Referendum Reporting (section 6)**

Although some members of the SCBG voluntarily carry election and referendum reporting, the SCBG has no comments on this section of the Code.

## **2.8 Fairness (section 7)**

The SCBG does not have any comments on this section of the Code.

## **2.9 Privacy (section 8)**

RIA 11a) Are the principles, rules and meanings necessary, consistent, proportionate and achievable? If not, can the wording be improved and, if so, how?

### **Private lives, public places and legitimate expectations of privacy**

The SCBG is concerned at the vagueness of the wording in this section. For instance, the lack of reference to the public domain and closed-circuit television cameras in rule 8.5 could result in a catch-all protection to anyone filmed in a public place in the UK or abroad. In effect, it increases the restrictions imposed by the legacy Code, although we are unaware of any case law to warrant such an amendment.

### **Consent**

The SCBG is concerned that the wording of rule 8.6 "If a programme would infringe the privacy of anybody featured in it, that person's consent should be obtained before the programme is broadcast, unless the infringement of privacy is warranted" could require programme makers to have to secure consents from virtually anyone featured in a programme despite the material being in the public domain. We believe this goes further than the predecessor Code although there is a lack of case law to support the need for such an amendment.

Rule 8.10 "in potentially sensitive places such as ambulances, hospitals, schools, prisons or police stations, a separate consent

should be obtained from those in sensitive situations unless the individuals identity has been concealed (unless not obtaining consent is warranted)” does not recognise the international origin of many cab/sat programmes and the impracticalities of securing consents for acquired material, such as documentaries filmed abroad. We suggest the wording be revised to include “where practicable”.

### Suffering and distress

We are concerned that rules 8.16-8.20 depart from the normal structure of the draft Code (principle, rules and practices) by listing a set of safeguards that broadcasters are expected to follow when dealing with people in situations of suffering and distress. We believe these elements should be issued as web-based guidance. Specifically, rule 8.16 “Broadcasters should not take or broadcast footage or audio of people caught up in emergencies, victims of accidents or those suffering a personal tragedy, even in a public place, where that results in an infringement of privacy unless it is warranted” may prevent many cab/sat channels from using footage of emergencies. The wording is very prohibitive “should not take or broadcast” rather than “should avoid”. We are also concerned that the current wording of the rule creates a risk of retrospective complaints where individuals later consider their privacy to have been infringed despite the information being in the public domain.

### **3. Sponsorship, Commercial References and Other Matters (sections 9 & 10)**

#### **Introduction**

For many members of the SCGB sections 9 and 10, and the regulatory impact assessment on the rule relating to merchandise, offer considerable commercial opportunities for the future. However, the changes proposed in the Draft Broadcasting Code offer limited growth in sponsorship income.

Since the last Sponsorship Code was published by the ITC in the autumn of 2000, the broadcasting and commercial landscape has changed radically. Digital television in one form or another is now available in 55% of all UK households, with Ofcom and the government looking to switch off analogue within the next six years. The number of channels available on digital platforms has increased substantially, with over 300 channels broadcasting currently and this figure increasing all the time.

With the range of channel choice and the new technologies available with digital television, there will inevitably be a decline in spot advertising revenues as more and more viewers skip the advertising breaks. Already research shows that channel hopping has increased significantly since the advent of multi-channel television.

To retain quality and choice broadcasters are going to have to find ways of increasing revenues through sponsorship and other forms of commercial arrangements with advertisers to cope with this inevitable decline in revenue.

Nothing in the Broadcasting Code should put Ofcom television licensees at a disadvantage to television delivered via the internet or via 3G systems. There is a danger that some aspects of the Draft Broadcasting Code are shaped by public service broadcasting requirements, which could limit the benefits for viewers on other channels where quality programming may become more and more dependent on sponsorship/advertiser supplied programming as advertisers spend less on spot advertising. Without a healthy sponsorship marketplace serious damage could be done to the programming output on many channels.

It is the SCGB's view that though the Draft Broadcasting Code has liberalised the rules from the ITC Code of Programme Sponsorship and Section 8 of ITC Programme Code, Ofcom has still not gone far enough in producing rules for the present and future multi-channel broadcasting environment.

Furthermore, some of the rules are drafted in such a way that they are open to a wide range of interpretations. These could deter potential sponsors and other commercial partners from committing to investment.

In a television world where viewers have a choice of so many channels and of other technologies providing information and entertainment, broadcasters are unlikely to allow advertisers to control the programming agenda to the detriment of their viewers. In the world of so many channels the remote control is instantly ready and available to switch channel or turn-off the television.

Furthermore, we live in a world surrounded by commercial images. They exist at virtually every level of our lives. To treat television differently from newspapers and magazines no longer makes sense, especially when the reader and viewer is so familiar with brand images and advertising messages, and seems competent at filtering them out if they have no interest in them.

Now is the time to be bold and to liberalise the limits allowed under TWF and UK law.

### **3.1 Sponsorship (section 9)**

#### **3.1 (i) Principles**

The Draft Broadcasting Code states three central principles behind the regulation of Sponsorship that, in SCBG's view, are uncontroversial.

They are:

- Ø Transparency - ensuring the viewer is clear when programmes are sponsored;
- Ø Separation – ensuring that editorial is properly separated from advertising;
- Ø Editorial independence – ensuring programmes are editorially independent from outside commercial.

These principles are vital for a healthy broadcasting environment, but the key issue is how these principles are applied in practice. In the SCGB's view some of the principles may be applied too stringently by

the draft Code and go beyond the requirements of TWF and UK law. We highlight our areas of concern in our response to the draft rules.

### **3.1 (ii) Sponsorable Content (9.1 & 9.2)**

Whilst we acknowledge that news and current affairs cannot be sponsored under the current rules, the SCGB suggests that Ofcom adopt a flexible interpretation of what constitutes news and current affairs. Though there is no definition of current affairs within the draft Code we believe there should be more scope for sponsorship in relation to business and finance programmes.

The SCGB believes that whole channels should be available for sponsorship for the following reasons.

- Ø As long as the sponsorship is clearly labelled, transparent to the viewers, and separated from the advertising it should satisfy Article 17 of the TWF.
- Ø The only advantage, but an important advantage, over a channel having all its sponsorable programmes sponsored by the same sponsor is the sponsor's name in association with the channel rather than just individual programmes.
- Ø This situation already exists both in television and radio, with a number of EMAP channels named after their magazines (Smash Hits, Kerrang etc) and a radio channel named after French Connection.

- Ø For niche channels this could provide an important new source of programming income and allow viewers to benefit through the increased quality of programmes.
- Ø Such sponsorships of channels are unlikely to be permanent, and therefore in practical terms the viewer is unlikely to view the channels as belonging to or influenced by the sponsors.
- Ø Furthermore, the transparency of such a sponsorship will ensure that it will be obvious to the regulator, if the content of the channel has been influenced to the extent of destroying the editorial independence of the licensee.

### **3.1 (iii) Prohibited and restricted sponsors (9.3, 9.4 & 9.5)**

The SCGB generally supports the rules in this section, but hopes the issues surrounding betting are resolved quickly and liberalised. It makes little sense to ban betting companies from horse and dog racing, while they can sponsor other sports for which betting is now widespread, and vice versa with gaming.

We believe that 9.4 should be modified to read:

**“Scheduling restrictions that apply to advertising on the relevant media should apply to sponsorship, unless there is a clear benefit to the viewer”.**

For example, condom advertising is restricted to post 2100 but there may be health programmes suitable for transmission before the watershed where sponsorship by a condom manufacturer would make

absolute sense, and help to reinforce public health policies. This has been allowed in the past by the ITC, which recognised the validity in limited circumstances for a sponsor who could not advertise before 2100 being allowed to sponsor programmes at an earlier time.

Sponsorship is different from advertising, as it is not promoting the sale of the product, and therefore the look and feel between an advertisement and a sponsorship credit is likely to be different.

### **3.1 (iv) The Content of Sponsored Programmes (9.6 & 9.7, 10.3, 10.4, and 10.5)**

Whilst in full agreement with rule 9.6 we believe that rule 9.7 is too vague. This is because there is no clear definition of the meaning of 'promotional'. Dictionary definitions show that there is a wide range of meanings for the word 'promotional', which at their most restrictive would mean that any branded product seen in a programme could be defined as promotional. Though we know that it is not Ofcom's intention to prevent products being seen in programming, such vagueness in the draft Code may cause significant problems in the future.

The same lack of clarity arises in the Broadcasting Code definition of 'undue prominence' and 'product placement', and therefore it makes sense to deal with all these rules at the same time, as they all involve the appearance of products/services within programmes.

We believe the definition of 'undue prominence' can be changed so as to cover the present use of 'promotional' and the concept of 'product

placement’.

The key issues are:

- Ø to protect editorial independence of the broadcaster;
- Ø to ensure that programmes are not used to advertise products or services;
- Ø to ensure all references to products and services within a programme are editorially justified/

In the draft Code there is no definition of what constitutes a ‘promotional reference’, nor why a promotional reference is worse for a sponsor in a programme they are sponsoring, than a promotional reference in a programme that is not sponsored. In fact, transparency, which is seen as a key issue, is clearer with the sponsored programme than the programme without sponsorship.

The draft Code definition of undue prominence is:

“Undue prominence may result from [but is not limited to] the recurring reference to or presence of a product or service (including company names, brand names, logos etc) in a programme, or from the manner in which a product or service is presented or appears in a programme.)”

This is vague and allows the regulator too much discretion to decide what constitutes ‘undue prominence’, especially such phrases as ‘but is not limited to’ and ‘or from the manner in which a product or service is presented or appears in a programme’.

The terminology used to define 'product placement' does not reflect the definition found in the TWF, and if taken literally would rule out what is allowed under the ITC Code of Programme Sponsorship (15.2)

*"Where their use is clearly justified editorially, products or services may be acquired at no, or less than, full cost. Provision of the article must not be conditional on a specific agreement as to the manner of its appearance in the programme".*

Clearly 15.2 was inserted to take account of the realities of programme making. The placing of cars by an advertiser in a police drama series at no cost to the television company seems to fit the definition of 'product placement', as cars are very expensive and would in most people's minds be considered a 'valuable consideration' to the programme maker under 10.5. This is avoided in the ITC Sponsorship Code, by qualifying the definition of 'product placement' with rule 15.2.

A significant omission is that under draft rule 10.5 most films made for the cinema and sporting events would be in breach, because there is no general exclusion in the draft Broadcasting Code as there is under rule 3 of the ITC Code of Programme Sponsorship:

*"This Code applies also to acquired programmes, including those programmes acquired from outside the UK. Films made for the cinema, and coverage of sporting and other events taking place outside the UK, however, may deviate from the Code where this is unavoidable".*

The EU directive (TWF) does not contain an outright prohibition on product placement. It does prohibit "surreptitious advertising", defined as

*"the representation in words or pictures of goods, services, the name, trade mark or activities of a producer of goods or provider of services in programmes", but prohibited only if three conditions are fulfilled :*

- *the representation must be intentional on the part of the broadcaster;*
- *the representation must "serve advertising";*
- *the representation might "mislead the public as to its nature".*

*The representation is considered to be intentional "in particular if it is done in return for payment or similar consideration".*

The draft Code definitions of 'product placement' and 'undue prominence' seem to ignore the three conditions laid out in the TWF, which all need to be fulfilled before the appearance of goods or services within programmes can be deemed to breach TWF. This TWF definition seems remarkably clear and would help resolve many of the difficulties that broadcasters licensed by Ofcom presently face. The current definitions in the ITC Code of Programme Sponsorship have led to general confusion and different standards being applied by different licensees. For example, the same American produced series acquired by different Ofcom licensees are edited differently due to differing interpretations of 'undue prominence'. The cost of re-editing acquired shows can be considerable but the lack of clarity in the present

definition of 'undue prominence' has meant some broadcasters have played it safe rather than risk breaching the rules.

Furthermore, it is well known that series such as 'Sex in the City' and 'Friends' had rate cards for product placement, but that the producers of these series would never have compromised editorial independence and the quality of the programmes by allowing product placement to editorially interfere with the quality of the programmes.

New virtual technologies already in use, similar to those that have been used in sport for over a decade, allow producers of programmes to brand products in programmes with brands recognised in the country of broadcast. This means that, in particular, American drama series can be adapted for each marketplace so that the products sold in the country of broadcast are placed within the programme.

An alternative to the confused approach in the Draft Broadcasting Code would be to remove 9.7 and 10.5 and provide a different meaning of 'undue prominence'.

In the present ITC Code of Programme Sponsorship rule 11.1.4 would provide an excellent basis for a new definition of 'undue prominence'.

*"Credits must not contain any direct exhortations to purchase or rental of the sponsor's goods or services. They may not include specific references to the attributes, benefits or prices of those products or services"*

We propose the following be adopted:

**Undue Prominence is defined as the presence of products or services within a programme where their presence cannot be editorially justified, and/or where there are specific references to the attributes, benefits or prices of those products or services.**

This definition would meet the requirements of TWF, particularly the requirement for editorial independence.

The present 9.7 would then read:

**There may be no 'undue prominence' for a sponsor within a programme they are sponsoring.**

10.4 could remain the same and 10.5 could be deleted.

**3.1 (v) Sponsorship Credits (9.8, 9.9, 9.10)**

The SCGB has no comments on the above section

**3.1 (vi) Television (9.16, 9.17, 9.18)**

The SCGB has no comments on the above section

## **3.2 Commercial References and Other Matters (section 10)**

This section of the draft Broadcasting Code is generally supported by the SCGB though, apart from 'undue prominence' and 'product placement' which are dealt with under the section on Sponsorship, we do have a few points where we believe improvements can be made.

### **3.2 (i) Principles**

SCGB supports the principles behind the rules in this section.

### **3.2 (ii) Rules (10.1 & 10.2)**

The SCGB agrees with the above rules.

### **3.2 (iii) Products and Services in Programmes (10.3., 10.4 & 10.5)**

The core of this section has already been commented on under 'the content of sponsored programmes' in the discussion of the meaning of 'undue prominence'.

### **3.2 (iv) Programme related material (10.6, 10.7 and 10.8)**

In the eyes of the SCGB these rules are viewed as a valuable change to the present Section 8 of the Programme Code. For documentary channels this will give more opportunities for viewers to interact with programmes. Furthermore, removing the limited definition of what

constitutes 'programme related material' in the present Programme Code reflects the reality of the growing opportunities to offer viewers a range of products and services directly derived from programmes that could benefit their viewing experience.

The only rule we believe needs to be amended is 10.8. It has always been accepted that a sponsor of a programme can also be the sponsor of 'programme related material'. Therefore, it makes little sense when the sponsor is both the sponsor of the programme and of the 'programme related' material to insist on separate credits. It is difficult to see the logic for insisting on this separation, especially as sponsorship credits under 9.16 are required to be separated from the programme.

### **3.2 (v) Premium rate (10.9 & 10.10)**

The SCGB has no comments on this section

### **3.2 (vi) Competitions (10.11 & 10.12)**

The SCGB believes that 10.11 is a sensible step forward from the present rules on Viewer Competitions in the ITC Code of Programme Sponsorship. In our view we believe the prohibition on a brief mention for the prize provider in a promotion containing a viewer competition is an unnecessary restriction (10.12), and particularly disadvantages satellite and cable channels where a considerable part of their output may be acquired programming. The opportunity to run competitions with programmes may be severely limited, and this can put smaller channels at a disadvantage to the large terrestrial broadcasters.

Programme and channel promotions are required to be identifiably separate from advertising, and we believe that this is the basis of 10.12. Though we accept that there has to be clear separation between promotions and advertising, we do not believe that a brief factual mention of the brand of a prize will confuse viewers. In fact by allowing a brief factual reference to the brand of the prize, viewers may be far clearer as to the prize in the competition. For example computer games, popular prizes on children's channels, are often only available for specific proprietary platforms. By not being able to make this clear in a viewer competition within a promotion there is a significant danger that the viewer could be misled about the prize. As entry to many competitions have a cost, it would seem sensible to name the brand to ensure that the audience is not misled.

Furthermore, brand names already appear in promotions when a programme is sponsored, as allowed by 9.18. Our suggested change to the draft rule 10.12 is as follows:

**Competitions containing brand mentions may only take place within a programme, and cannot stand alone as programmes in their own right. Trailers for programmes may include competitions with a brand mention, as long as the reference remains brief, secondary and factual.**

### **3.2 (vii) Use of Advertisements in Programmes (10.13)**

The SCGB has no comments on this section.

### **3.2 (viii) Charity appeals and Community Service Announcements (10.14 & 10.16)**

The SCGB welcomes this change to the present Programme Code, which will give broadcasters a chance to help charities, especially those related to their programming. For example, numerous cab/sat channels feature social action stories or whole programmes given over to some charitable rescue work. Both 10.14 and 10.16 could, therefore, help bring benefits to both charities and broadcasters.

### **3.2 (ix) Events (10.18 & 10.19)**

This section seems completely unnecessary and would be covered adequately by our proposed definition on 'undue prominence'. Sport, in particular, and commerce go hand in hand. A reflection of many sports channels' success is their ability to get advertising at, and sponsorship for, the events. Their success is largely in proportion to the interest the sport has from television viewers.

Furthermore, broadcasters have to ensure the cameras cover the sport - the branding will always be secondary otherwise viewers will simply switch off.

In the case of virtual advertising, it is not practicable for broadcasters to adhere to 10.19. In general it is the sport or event rights holder that controls the rights not the broadcaster. Furthermore, many sports programmes are now produced by independent production companies (some at the behest of the sport) and when acquired by the broadcaster it is often not clear whether virtual advertising has been

used. The existence of virtual advertising could only be ascertained by checking the real advertising signs that were or are physically present at an event.

10.19(iv) seems unnecessary and a restraint on trade. Is Ofcom suggesting that sales houses cannot trade in virtual advertising, when most sales houses not only sell advertising for numerous Ofcom licensees, but are also branching out into other areas of media buying? The broadcaster is not the sales house.

This section seems to be a throwback to the days when the regulator was micro-managing the medium and when there were few channels licensed by the UK regulator.

Our suggestion would be that the present 10.18 and 10.19 is deleted and event coverage be regulated under our suggested definition of 'undue prominence'.

### **3.2 (x) Conclusion for Sections 9 and 10**

It is the SCGB's view that this consultation provides a chance for a radical overhaul of the Code of Programme Sponsorship and Section 8 of the Programme Code. In today's increasingly competitive communications world, television broadcasting needs to achieve similar commercial freedoms with other sectors such as broadband and 3G. Though we understand the limitations imposed by TWF and UK law, we believe that Ofcom must phrase the rules to allow broadcasters the maximum operational headroom allowed by EU and UK legislation. Furthermore, commercial partners require considerable

certainty before they invest, and therefore some of the rules need to have greater clarity, as in their present form they will allow Ofcom considerable discretion as to how they are interpreted.

A healthy broadcasting climate for the future requires the present rules to be liberalised and simplified. The SCGB believes the present draft Broadcasting Code with our suggested changes will achieve these aims without weakening rules to ensure editorial independence, transparency and the separation of advertising from programming.

#### **4. Regulatory Impact Assessment for the SCGB submission under Section 9 and 10**

##### **4.1 Whether there should be separate rules regarding merchandising?**

Historically, if the merchandising was developed before a programme then the programme was considered unacceptable. This has led to enormous unfairness, as 8.6 of the ITC Code of Programme Sponsorship specifically states that programmes cannot be made around existing merchandise, but programmes could come to merchandising arrangements for characters or products based on the programmes. This precludes a programme maker from making a programme based around pre-existing merchandise even if it was editorially a very strong proposition – unless of course, as with Thomas the Tank Engine, it was based on a pre-existing book.

Furthermore, 8.6 states that companies that come to a merchandising agreement with the programme makers cannot fund the programmes from which the merchandise is developed.

In reality, very few children's programmes, for example, are made without a merchandising agreement being in place. The funding may not directly go to the programme makers, but up-front payments for merchandising rights plus royalties to the programme makers frequently more than cover the costs of the production. A toy manufacturer when planning a new product will often look to television programming as part of the marketing mix. There are many examples of programming out there where the merchandise and the programme have been developed hand in hand.

The options are to retain the present rule, to ban all merchandising agreements with programmes, to apply a stated period during which no products related to the programme are sold after the programme transmits, or to ensure that whatever appears on screen is editorially justified and does not promote the attributes and benefits of the product (see the proposed definition for 'undue prominence').

We would suggest the present rule has not worked effectively, but simply caused confusion for broadcasters. The options of banning merchandising arrangements or preventing any programme related merchandise from being sold for a specified time after a programme first transmits would be virtually impossible to regulate and would be anti-competitive while the BBC indirectly funds significant amounts of their children's animation through merchandising deals. The SCBG

believes the only workable solution is to encompass merchandising under our suggested definition of 'undue prominence', which states:

**Undue Prominence is defined as the presence of products or services within a programme where their presence cannot be editorially justified, and/or where there are specific references to the attributes, benefits or prices of those products or services.**

## **5. Conclusion**

The SCBG supports the adoption of a single Broadcasting Code and the inclusion of clear criteria against which the regulator will judge acceptable standards of programming. However, in order for broadcasters to accurately judge the acceptability of their content against these criteria, it is important that all rules in the Broadcasting Code complement the published criteria. We have highlighted the areas where we believe certain rules contradict these criteria or go beyond the requirements of the predecessor Codes and, as a consequence, fail to produce a framework of necessary and proportionate regulation. In the areas of sponsorship and commercial references in programmes we have argued that greater liberalisation should be adopted in line with the requirements of the TWF Directive. The detailed recommendations in section three demonstrate how certain revisions could produce a more workable, regulatory framework without diluting basic principles of separation of editorial from advertising.

The SCBG hopes that the consultation process gives rise to a Code that is responsive to the reality of consumer behaviour and the pace of change in our sector. Our members look forward to working within a suitably light-touch framework designed to facilitate a healthy commercial sector and enhance consumer choice for the foreseeable future.

**This statement represents the position of SCBG but does not necessarily represent the view of every individual member in every respect.**