

The Regulation of the Product Placement in the European and Hungarian Media Law

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Abstract

In the 2007/65 Directive of audiovisual media services (in codified version 2010/13 EU directive: AVMSD) a new media policy of the European Union appeared. One of the main aims of the regime was to provide a more liberal and flexible legislation for advertisements and other similar commercial messages. Accordingly, the burdens on the publication of commercials have eased, new ways and forms of publication have been introduced, and it has become possible to place open commercial content simultaneously with the edited content or programmes, as well. Related to the formerly mentioned publication possibility, a popular and widespread commercial communication form has been introduced overseas, called product placement. In contrast to other commercial publications, in this case, commercial content appears embedded in the plot of the programme. The viewers directly meet the commercial content when seeing the programme, they have no opportunity to avoid the content. This study wishes to discuss what kind of media political debates preceded the introduction of product placement: the arguments for and against will be detailed. The kind of concept appears in the Directive and what minimum rules the Union has, will also be discussed. As the formerly mentioned form of communication was earlier regarded surreptitious by the media law, the demarcation criteria in particular will also be discussed. This study aims at the presentation of the member states' reactions to this new institution, how the community provisions have been implemented, whether the member states have created and applied more rigorous and detailed regulations, in case they have, what kind of unique solutions they have applied. Accordingly, both the union regulations and the regulations of the particular member states concerning the publication of product placement will be analyzed in order to present their specific solutions.

Keywords: AVMSD, harmonization, commercial communication, product placement, surreptitious advertising,

Introduction

AVMSD categorises commercial contents as 'commercial communication', which is a common collective term. Within the general category, specific genres are named. Sponsorship, television advertising, teleshopping and product placement – which is the subject of this study – are regarded as commercial communication. According to the regulation concept of the Directive, the common requirements of commercial communication are stated within the general provisions, while it states further specific provisions regarding the particular cases. Independent of their nature, however, it can be claimed that all provisions reflect modern media political thinking. The regulation of commercial communication is significantly more liberal and flexible compared to the earlier union regulation, as the media content providers have more room to man oeuvre in order to communicate their content. By modernising the regulations, the main aim of the union legislator has been to strengthen the commercial nature of the audiovisual media service and to boost their competitiveness.

Market-based media content providers are now in a better position due to the more permissive provisions, as they are able to get more income from the publication of commercial contents. In the European area without internal borders, due to the opportunities created by new technologies, new platforms and the impact of media convergence, this new regulatory environment has paved the way for the development of market-based media. The directive has stated its minimal rules considering common market conditions, transparency and legal certainty, and they have been implemented by all member states according to national traditions, practices and cultural differences.

Analysis

1. The reasons and precedents for the introduction of product placement

In the new technological environment (especially in the case of on-demand media service) the legislator had to consider that keeping to the earlier rigorous publishing rules would mean a threat to the media market losing access to funds necessary for its operation. If the commercial content provider is not capable of linking appropriate viewing data with its programme or programmes, then the economic operator will have no interest in publishing the commercial content, therefore the media service provider will lose access to the necessary income sources. That is why the legislator has paved the way for the application of new placement methods and techniques and solutions where the viewers are unable to avoid commercial content. Moreover, in a multi-actor service sector the competition of the market participants depends on the consumers' selection. For the consumer, it is a favorable situation as the providers in the plural media market can satisfy the viewers' main need for information and entertainment in a varied and diversified way with their mass communicational cultural tools intended for the public, and the media market competition has positive impacts on keeping the consumers extensively informed. Accordingly, the media content provider as a market participant has considerable economic interests in raising viewing figures, as the viewing figures of the programmes make the advertising slots offered to the economic operators more popular and valuable.

In this context, the role of the viewers is changing and becoming more significant, they no longer appear only as consumers in commercial communication, but also as media consumers in the media service market. In contrast to the earlier regulations, AVMSD often refers to media service viewers as consumers not only in the context of commercials. The Hungarian Constitutional Court claims that: Technological developments have changed the structure of mass communication, the individuals have become consumers, interactive consumers if they are lucky. With regard to legislation, this fact may lead to the expansion of the scope of state intervention – due to the multiplication of information channels and alternatives. This situation raises the neutral state's dilemma to merely observe the processes or intervene at a certain level with the aim of correction. [Decision of Constitutional Court 165/2011.(XII.20.) IV.1.2.]

One reason for corrective intervention is the protection of the consumers. In the case of a communicational form such as product placement – the chosen subject matter of this study – the formerly mentioned principle should particularly apply. As the commercial content is placed embedded in the plot of the programmes, the consumer has no defence against commercial messages – no matter how active the consumer is in the sphere of the media –, as the consumer shall meet the commercial messages within an edited content, a programme that is. As the union regulations and member state regulations before 2007 regarded commercial content embedded in a programme as surreptitious advertising, it was really difficult for the union legislators to make the regularisation of this new solution acceptable. The main concern was related to the economic influence made on the editors' decisions, and so the vulnerability of creating a programme and of the editors' freedom, also moving away from the principle of separation and the influence and deception of the consumer were mentioned. According to one of the main counterarguments, the media consumer may meet commercial contents in a much more direct way than earlier and the freedom of choice is violated when the consumer is targeted with economic advertisements in a programme no matter whether he has the intent or not.

As a result of the debates, a highly specific legislative solution has been created. According to AVMSD article 11, paragraph 2-3 as a general rule, product placement shall be prohibited, however, by way of derogation from paragraph 2, product placement shall be admissible in some cases unless a Member State decides otherwise. (The legislation may be defined as an opt-in and opt-out system.) (M.BRON 2009.) This solution has brought a compromise between the prohibition defended by the Germans and the commercial viewpoint of the majority defending the introduction. The ambiguous settlement of the new genre indicates that we are generally reluctant to accept the techniques applied and proved overseas. However, if we intend to make the European industry competitive on a global scale, then it is unacceptable to prevent the producers of European works and programmes of a highly lucrative source of income. According to Angelopoulos (2010) the symbolic prohibition of the directive lays down liberal exceptions. The reason for the application of product placement is the complete liberalisation so that the position of the European audiovisual industry could be strengthened against the foreign partners even if the contradictions between the application of the editorial and commercial contents are taken as deep-rooted taboos.

2. The term of product placement and its legislation in AVMSD

1. According to AVMSD Article 1.1 (m) defines product placement as follows: ‘product placement’ means any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within a programme, in return for payment or for similar consideration. The key feature of this economic content is, that the product, the service, their trade mark or any reference to them appear in the programme embedded in the plot in all cases. The purpose of all commercial communications including product placement is promotion, however, in this case we are faced with an indirect way of promotion: the main focus is on the content of the programme instead of the economic content.

„Product placement can occur in audio-visual works in three different forms:

- The product is openly discussed in the works (there is a verbal reference).
- The product is being used by one of the characters in the works (active placement).
- The product is captured in a shot in a film or a television show or placed in a virtual environment (passive placement).

By the verbal reference we understand not only pronouncing the brand name, the producer’s name or the service, but also pronouncing basic characteristics by which the brand, the producer or the service is identified. Extended information availability in combination with the eye-catching effect of video presentations as well as the fun using the interactivity reaches the goal to attract the customer attention.” (Kramoliš, Drábková 2012). According to the term, the content is only regarded as product placement if the content is featured within a programme in return for payment or for similar consideration. Product placement is based on a commercial contract including the definition of consideration in return for communication (without such contract, payment or similar consideration in return for the media content provider’s service, instead of product placement, there is scope for the application of a surreptitious commercial).

Although the decisive criterion of product placement is communication in return for consideration, the Directive, by way of derogation, makes the so called free product placement admissible in the case of other programmes which are not included in the positive list. In this case, there is no payment. However, certain products or services (such as production props or prizes) are provided for the media service provider free of charge with a view to their inclusion in a programme. The AVMSD states no further conceptual requirements as for the further conditions of free product placement, however, in the praeambulum paragraph 91 states further restrictive criteria. Accordingly, product placement free of charge should only be considered to be product placement if the goods or services involved are of significant value. As for the exact meaning of the former criterion the Directive provides no further guidance, however, as will be explained later, it shall be interpreted by the particular member states.

2. In case the member states give their permission, product placement may be applied only in programmes made after 19 December 2009 and are included in the positive list as defined by AVMSD. The permitted programmes are the following: cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes (with the exception of children’s programmes) and, according to the above, where there is no payment but only the provision of certain goods or services free of charge, such as production props and prizes, with a view to their inclusion in a programme.

3. Prohibited products which are not to be communicated in product placement are also named in the Directive. Article 11 (paragraph 4) claims that programmes shall not contain product placement of tobacco products or cigarettes or product placement from undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products, moreover, specific medicinal products or medical treatments available only by prescription. As a matter of fact, the legislation of product placement applies the conventional expectations concerning earlier commercials to the new genre.

4. The application of product placement shall only be regarded legitimate within the context of the full respect of the conditions included in the AVMSD, article 1, point 3 a)-d). In order to protect the edited content and the editorial independence, (a) their content and, in the case of television broadcasting, their scheduling shall in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider;

Communication may not focus on the product, accordingly, product placement shall not directly encourage the purchase or rental of goods or services and product placement shall not give undue prominence to the product in question.

All viewers shall be clearly informed of the existence of product placement. Programmes containing product placement shall be appropriately identified at the start and the end of the programme, and when a programme resumes after an advertising break, in order to avoid any confusion on the part of the viewer. Also, viewers must be informed in a clear and specific place and way of the existence of product placement. This obligation is based on the general requirement of separation set out concerning commercial communication. In order to avoid misleading the viewers, they must at all times be aware of the fact that they are exposed to commercial content. Viewers shall be clearly informed of the existence of product placement. Programmes containing product placement shall be appropriately identified at the start and the end of the programme, and when a programme resumes after an advertising break, in order to avoid any confusion on the part of the viewer. (By way of exception, Member States may choose to waive the requirements provided that the programme in question has neither been produced nor commissioned by the media service provider itself or a company affiliated with the media service provider.)

The AVMSD adapted the legal settlement of the new institution to the effects on the consumer and the former clause of separation along priority values. For instance, the clause of separation is realized through the obligation to inform the consumer; the prohibition of direct exhortation aims at the protection of the consumer (and it is compatible with the requirements of fair competition), but the prohibition of the influence on editorial independence and responsibility also applies. (Castendyk, Dommering, Scheuer 2008).

5. Prior to AVMSD, product placement exhausted the category of surreptitious commercial. When comparing product placement to surreptitious commercial, the Directive claims in the *praeambulum* (paragraph 90) that: „The prohibition of surreptitious audiovisual commercial communication should not cover legitimate product placement within the framework of this Directive, where the viewer is adequately informed of the existence of product placement. This can be done by signaling the fact that product placement is taking place in a given programme, for example by means of a neutral logo.” Further conceptual details of the principle of separation are not covered in the AVMSD, however, amongst the conditions of product placement provision of information is mentioned on which the principle of separation is founded.

6. Product placement compared to sponsorship is different. In the case of sponsorship, sponsorship reference may appear at the start, at the end or during a programme but it may never be shown built into the plot. According to AVMSD, the decisive criterion distinguishing sponsorship from product placement is the fact that in product placement, the reference to the product is built into the programme. In contrast, sponsor references may be shown during a programme, but are not part of the plot. (AVMSD *praeambulum* paragraph 91)

3. Specific national solutions

It can be claimed that the member states, under the possibility offered by the AVMSD, have introduced the institution of product placement. In the member states product placement may be applied with the minimum restrictions laid down by the Directive. Those provisions have been implemented by the member states. The main question we have to pose now is whether we may find any specific solutions in the legislation of the member states compared to the minimum restrictions mentioned above.

1. In most cases the member states have applied the term defined by the AVMSD, however some countries have built in further criterion elements – for instance those laid down only in the *praeambulum* of the Directive – also, they defined the content of the criterion elements. The Hungarian Media Council has come up with a soft law nature of recommendation in order to interpret the legal provisions of product placement. It deals with the question of consideration and the term ‘free of charge’. It is claimed that practically, the provision of a product or service is usually referred to as product placement free of charge, however, in the real sense of the word it is not free of charge, as the placement of a product or service represents financial assets, therefore the provision of a product or service in return represents financial assets as well. The term ‘free of charge’ may only be used in the sense that there is no financial transaction. Some member states as mentioned above have dealt with the definition of the term ‘significant value’ related to product placement. For instance, in the German legislation when setting out the provisions, it was controversial whether significant value should be defined in the absolute or relative sense of the word, meaning a specific value or percentage should be defined. The advantage to the absolute definition is that it is simpler for the legislators, however it might lead to unfair values if the absolute value is negligible compared to the production costs. (Gibbons, Katsirea 2012).

Eventually, the German legislation chose an exact solution to define significant value representing both principles: production props shall be regarded as significant when their value is more than 1 percent of the programme budget, and one thousand euros. The United Kingdom has created two categories called 'product placement' and 'prop placement' when defining 'significant value'. According to the definition of Ofcom Broadcasting Code, placement shall be regarded as product placement if it is not regarded as prop placement. The defining criterion between the two categories is 'significant value' the definition of which is laid down in the Code. (Ofcom Broadcasting Code, Guidance Notes 1.46–1.47). The member states generally have not included provision of information in the term so as to distinguish between surreptitious commercial and product placement, however, the German term has included the criterion of the 'identified' as a conceptual element to distinguish product placement from surreptitious commercial.

2. The majority of the member states have transposed the four limitations to the publication of product placement. Some states deal with the conditions in a more detailed form than the AVMSD. The Ofcom Broadcasting Code for instance puts forward which conditions are to be examined to determine whether there is an incentive (for example direct or indirect invitation to purchase; commercial communication, provision of information about price and availability, direct reference to positive advantages, related slogans, promotions (either explicit or implicit).

The principle of the prohibition of undue prominence is based on the intent to prevent commercial nature. According to European Council's Notice 2004, undue prominence is declared when particular attention is drawn to the presentation and the period of time is unnecessarily long. Accordingly, the advertising intent can be inferred, except for the case when the presentation of the product is unavoidable. The particular states have dealt with its circumscription in a detailed form as well. In the guidelines of the German Media Authorities [Werberichtlinien Fernsehen 2012. 4(3)3.] one of the criteria to undue prominence is stated, that is a requirement to be editorially justified. On the other hand, the Ofcom Code states that undue prominence is given to a product, service or trade mark when such prominence is not justified by the editorial requirements or the manner in which they are given prominence. The Code also states that editorial justification should be clear and appropriate, accordingly the media service provider must always consider whether product placement is editorially justified [Ofcom Broadcasting Code, Guidance Notes, 9.10/1.97- 1.104/ 20-21.]

The identification of product placement is one of the basic conditions of its publication, as through identification it will be possible to avoid any confusion on the part of the viewer. Therefore, in all member states where product placement is allowed in accordance with AVMSD product placement shall be appropriately identified at the start and the end of the programme, and when a programme resumes after an advertising break. Some countries also refer to how long the neutral information should be shown. Neutral information may be provided by graphical representations, pictograms (for instance in France, the UK, Poland) or in other countries by text (for instance in Hungary) or both at the same time (in Germany). According to Ofcom Code the duration of presentation may not be less than 3 seconds, according to the German legislation pictograms and textual information must be shown for 3 seconds.

An unique solution to provide information has been applied in Poland, where even the manufacturer, service provider or seller of the product in question shall be identified at the end of the programme. In Ofcom Broadcasting Code there is an exceptional solution when it is possible for the media service provider to publish the list of the particular products, services and trademarks placed within the programme in communications at the end of the programme (or by the help of other tools such as channels or websites of the programme). In such cases communication requirements must be complied with, as well. The Code does not establish a requirement to show a list at the end of the programme, but if it so happens, then the general restrictions related to the list must be followed.

3. It is generally true that the member states make product placement possible in the same programmes as the AVMSD. In some particular cases, however, they specify and interpret the programmes that belong to the positive list. It specifically applies to the category of light entertainment programmes, a term difficult to interpret. In Germany the genres belonging to 'entertainment' are specifically – not exhaustively – defined by the law: cabaret, comedy, film, series, show, talkshow, games, music. [Staatsvertrag für Rundfunk und Telemedien (Rundfunkstaatsvertrag – RStV) §2 (2) 18.]

Light entertainment programmes are further restricted, as product placement is prohibited in programmes which are mainly of informative nature containing some entertaining elements, consumer or advisory elements. [RSTV. §15 (2)]. The German legislation pays specific attention to the necessary distinction between entertaining and informative programmes. Therefore, programmes which are basically of informative nature containing some entertaining elements are excluded from light entertainment programmes. (For instance consumer and advisory programmes.) The German legislation represents such a rigorous viewpoint that even in the case of product placement that is free of charge, it names prohibited programmes. Namely: news and current affairs, advisory and consumer programmes, children's programmes or religious programmes. In Portugal talk shows, reality shows and television competitions are regarded as light entertainment programmes. According to the Hungarian recommendation, non-fiction programmes which primarily aim at entertaining the viewers shall be regarded as entertainment programmes. Talk shows, musical show programmes, reality programmes, cabaret, farce, radio cabaret, competitions, magazine programmes (lifestyle, hobby, travelling, tabloid, cooking) and sports programmes which are not broadcasted with the exception of sport news.

In some countries there are further limitations within the category of children's programmes and accordingly they actually define which age group may be considered as children. Hungary does not permit product placement in programmes for children younger than 14, while in Slovakia product placement is prohibited in programmes for children younger than 12 (in UK: younger than 16). Along with the prohibition of product placement for payment or similar consideration in children's programmes, the particular states have laid down further prohibitions. As for programmes produced under its jurisdiction, the British legislation names programmes in which product placement is prohibited: religious programmes, consumer advice programmes, or current affairs programmes. [Ofcom Broadcasting Code 9.12;/Guidance Notes 1.109]. In the Czech Republic product placement is permitted in films, television series, entertainment and sport programmes which are not for children, also in competitions in the form of a prize. [Radio and television broadcasting and on amendment of other acts, as amended (RTBO Act) section 53a]

The AVMSD, article 11 (paragraph 4) prohibits the placement of products which are not to be promoted. According to the British Broadcasting Code (9.13.), the list of prohibited products are: alcoholic drinks, foods or drinks high in fat, salt or sugar (HFSS), gambling, baby food, all medicinal products, electronic or smokeless cigarettes, cigarette lighters, cigarette papers, pipes intended for smoking. According to the Programme Service Law of Malta, article 16m the placement of alcoholic beverages with more than 12.2 percent of alcohol content is not permitted between 6:00 am and 9:00 pm, gambling products are not permitted between 6:00 am and 7:00 pm, moreover, the placement of baby food, arms and ammunition is also prohibited. In Poland several prohibited products are also listed such as: alcoholic beverages, health care, card games, dice game, bet and gaming machines. Hungary has added gambling services to the list of prohibited products if they have no permission from the State Tax Authority.

Conclusions

1. The AVMSD has laid down a flexible and liberal set of standards for commercial communications as a whole. Compared to the former – more rigorous – principle of separation in time and space, it is now possible to place such contents simultaneously with the programme, during the programme or within the programme, for instance in the case of product placement which has recently been introduced.
2. Product placement creates a new source of income for the European media service providers coming from the economic participants promoting their products in the formerly mentioned way. In order to make it possible for the service providers to have access to these sources, the Union legislator has built in only minimum restrictions. Accordingly, the legislator has had the intent to enhance the competitiveness of the European media market as well as to strengthen the self-sustaining character and operational efficiency of media services. Following the same conception, the member states have generally not created stricter restrictions and prohibitions to this commercial activity, and have not fallen into the trap of overregulation either.
3. The EU lays down the conditions of legal product placement along with the symbolic prohibition. After analysing the provisions of the member states, it can be claimed that they have made use of the option to apply product placement, meaning that they have permitted product placement in their national law.

When creating the rules and provisions of legal product placement, although they had the opportunity to create more rigorous and detailed provisions, they have mostly adopted the provisions of the AVMSD with the exception of a few derogations, so they generally have chosen not to create more rigorous provisions regarding the media service providers.

4. Some particular member states have attempted to define and interpret the content of the conceptual elements included in the AVMSD. That is why the regulatory solution of the United Kingdom has made a distinction between prop placement and product placement.

5. We have seen more unique solutions in connection with some particular prohibited programmes and products (such as the protection of young persons and distancing from political content and economic influence). At the same time, there is a relatively common position of the member states about product placement, which should be permitted in programmes defined by the AVMSD.

6. Also, there is a common legislation for surreptitious commercials. The prohibition of surreptitious advertising (commercial communication) has remained, from which they have endeavoured to distinguish the new institution by laying down unambiguous distinctive criteria.

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Summary

The member states have been successful in implementing the EU's new media provisions relating to commercial communications in a flexible way. They have basically set out not to create a disadvantage to their own and the European legislature. The liberal legislation has been well received. The legislature of the Union has introduced a solution long-awaited and called for by the member states supporting the commercialization of the media market. After implementing the rules, it can be claimed, that the legal provisions will be further sophisticated by the law enforcement practice of the member states. Soft law nature recommendations and codes laid down by market surveillance are typical in this field. Regarding practice, the main problem is the distinction between product placement and surreptitious commercial, also, the undue prominence of the product in question. It can be claimed that the purpose of product placement – and commercial communications – is promotion; however it may not have any other commercial elements (for example the encouragement to purchase). In practice, most unlawful actions are due to the formerly mentioned excesses.