

“Product Placement”:

The harmonization of the new Albanian media law with the European Audio-Visual Media Services Directive

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Abstract

With the Audio-Visual Media Services (AVMS) Directive the explicit regulation of product placement is introduced into the framework of European media law. The product placement is today one of most debated issue for the media law experts in Europe. What is the “product placement”? In what kind of programmes the product placement is allowed? What are the conditions these programmes have to fulfill in order to contain the product placement? The AVMS Directive states even the programmes during which is not allowed the product placement. How are reflected into the new Albanian draft-law on audiovisual media services the AVMS Directive obligations? These are some of the questions that the following article tries to answers.

Keywords: product placement, advertising, commercial communication, harmonization.

1. Introduction

In 1998, the Albanian Assembly passed the first law “On the public and private radio and television in the Republic of Albania”. This law aimed to regulate the media market, already in bloom, after commencement of broadcasting of many private radios and televisions. Until these years, there was only the Public Radio-Television, which after 1990, was always criticized as a propaganda instrument of ruling political force. In 1998, the time brought back the necessity of ART return to the public, as well as the setting of rules in the electronic media market which was developing rapidly. The 1998 law, for the first time established the National Council of Radio and Television (NCRT), the regulatory and supervisory authority that would ensure competition in media market and would monitor radios and televisions in respecting of license conditions, consumer protection etc.

During the 1998-2008 periods, this law was amended several times, clear evidence of lack of experience in the radio-television field. These amendments have improved its content, but again did not respond to technological developments and convergence of services provided in electronic communications networks.

The law did not regulate nor mentioned as a concept "product placement". It only regulated "advertising" in Chapter VI, giving the definition of advertising¹, advertising conditions², form of commercial presentation, insertion and duration of their broadcasting, etc. The law, also, defined the prohibited advertising, provided for the protection of minor from abusive advertising, conditions of advertising for alcoholic beverages and medicaments³. Even in terms of advertising, this law represented quite deficiencies and did not meet European standards in the field⁴. In order to meet the obligations for Albania, under the framework of Stabilization and Association Agreement (SAA), to harmonize its legislation with European legislation, it was necessary a new arrangement. The Assembly of Albania, it's been some time that is working on a new draft-law on audio-visual services. This draft-law aims to achieve full alignment with Directive AVMSD and with a range of other European Directives on electronic communications in connection with radio and television broadcasts⁵.

II. The Regulation of Product Placement in the AVMS Directive

Product Placement is not a new phenomenon. It dates back in the 19 century in publishing. Jules Verne, in the novel "Around the world in eighty days", mentioned some shipping companies in the novel. It is unknown if he was paid for that. Product placement is still used in publishing. Product placement was a common phenomenon in the movies industry beginning from 1920. Investors in the field expected that the film product placement increases consumer awareness of a particular brand. Nowadays, it is common used in the movies industry, sports events, advertisement industry, etc. There are, also, a lot of companies specialized in placing products in the public eye.

With the development of this kind of advertisement in the television industry, in order to protect the consumer rights, especially the minors and also guarantee these rights from some products, it was necessary to regulate the product placement by rules. These rules aim to regulate what can be shown and what can not be shown on TV screens, what type of products can be placed in the programs, where product placement is allowed and how placed products can be featured.

¹ Advertising shall be defined as any message intended to promote selling and buying of goods or services, by presenting an idea to attain the effects desired by the advertiser, who has been allocated the respective broadcast time in return for payment or another form of compensation

² Article 50, Law no 8410 "On public and private radio and television in the Republic of Albania"

³ Article 53-58, Law no 8410 "On public and private radio and television in the Republic of Albania"

⁴ See Bushati E., "The audio-visual advertising in the Albanian Law and the harmonization of legislation in the field", Albanian Socio Economic Review, Viti XVII, nr 2 (66) 2011, p. 115

⁵ Directive 2002/21/EC, 2009/140/EC, 2002/20/EC, 2002/19/EC, 2002/22/EC, 2009/136/EC, 98/84EC

The regulation of product placement was introduced to the European regulatory framework with the 2007 Audiovisual Media Services (AVMS) Directive.⁶ The European Commission's initial intention regarding the issue of product placement was full liberalization, but this approach met with the opposition by member states and stakeholders. In the final Directive, we see a compromise between a symbolic prohibition, set off by liberal exceptions introduced within a system of optional harmonization⁷. The AVMS Directive replaced the Television without Frontiers Directive, (TVWF) which was interpreted in many Member States as prohibiting product placement⁸. The inclusion of product placement in audiovisual works goes against the common European idea of not picking and mixing the editorial and commercial content. This principle of separation of commercial from editorial content and of the identification of advertising was imposed by Article 10 (4) of TVWF Directive.

Article 1 (h) of AVMS Directive defines *“audiovisual commercial communications”* as *“images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a program in return for payment or for similar consideration or for self-promotional purposes”*. This article clarifies that *“forms of audiovisual commercial communication include inter alia television advertising, sponsorship, teleshopping and product placement”*.

One of the main changes brought about by the AVMS Directive was the introduction of provisions regulating product placement. Article 1(m) defines product placement as *“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 program, in return for payment or for similar consideration”*.

Article 11 para.2 states that *“product placement shall be prohibited”*. This prohibition is then significantly watered down by a set of broad exceptions. So, paragraph 3 states that, product placement is admissible:

a) *“in cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes”*, provided these are not children's programmes;

Or

⁶ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (2007) OJ L332/27. In this article is cited the codified version of the AVMS Directive

⁷ Angelopoulos. Ch., *“Product Placement in European Audiovisual Productions”*, Iris Plus 2010-3, Product Placement (Susanne Nikoltchev (ed.), European Audiovisual Observatory, Strasbourg 2010) p.7

⁸ Simkins, M. LLP, *“Product Placement in AVMSD, 5 Jan 2010, [http:// www. simkins.co.uk/productplacemet](http://www.simkins.co.uk/productplacemet)*

b) 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 the inclusion in a programme.”

These exceptions must adhere to a list of minimum protection principles. Programmes containing product placement must ensure that:

1. Their content and, in the case of television broadcasting, their scheduling is in no circumstances influenced in such a way as to affect the responsibility and editorial independence of the media service provider;
2. They do not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services;
3. They do not give undue prominence to the product in question;
4. Viewers are clearly informed of the existence of product placement. Programmes containing product placement must 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.

Article 11 continues with a list of exceptions to the exceptions, which detail the circumstances in which, in any case product placement is not permitted:

- a) in relation to tobacco products, cigarettes or products of undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products;
- b) in relation to medicinal products or medical treatments available only on prescription in the member state within whose jurisdiction the media service provider falls.

The provisions of Article 11 apply equally to both on-demand and scheduled audiovisual media services.

Upon the adoption of the AVMS Directive, the European Commission exhorted Member States to take a “light touch” approach towards its implementation, discouraging the adoption of stricter rules, despite having technically left this possibility open under such provisions as Article 11.⁹

Many authors¹⁰ comment that, they are four principles governing legitimate product placement:

⁹ Angelopoulos. Ch., “Product Placement in European Audiovisual Productions”, Iris Plus 2010-3, p.12

¹⁰ Angelopoulos. Ch., “Product Placement in European Audiovisual Productions”, Iris Plus 2010-3, p.14

1. *Undue influence*: programmes containing product placement must in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider.
2. *Undue promotional effect*: programmes containing product placement are prohibited from directly encouraging the purchase or rental of goods or services, in particular by making special promotional references to those goods or services.
3. *Undue prominence*: programmes containing product placement are forbidden from giving undue prominence to the products, services or trade marks that they feature.
4. *Obligation to inform*: the viewers must be clearly informed of the existence of product placement.

According to Article 11(3), product placement in children's programmes is prohibited, even if these programmes are qualified as cinematographic films, films or series made for audiovisual media services, sports programmes and light entertainment programmes. A children's programme is a programme if, by its content, form and time of transmission, it is targeted at persons below a certain age threshold. It is interesting to know that rules on age limits differ drastically among member states of EU.

III. "Product Placement" in the new Albanian draft-law on the audio and/or visual media services.

Based on the obligations deriving from SAA, the Albanian Assembly took the initiative of reforming the legal framework that regulates the media and the audiovisual services, as well as the digital platforms within the territory of Republic of Albania. This initiative aims to regulate the entire field by one law. In January 2007, the Parliamentary Committee of Education and Means of Public Information drafted the first version of this draft-law.

There has been a large number of critics and remarks on this version from the Council of Europe, representatives of the European Commission, OSCE, as well as from groups of interests, radio-television subjects, different NGO's which promote freedom in media etc,. In general, this first version of draft-law did not meet the European standards on the field of media.

After the recommendations given by the experts of the Council of Europe and European Commission, the working group prepared a second version of the draft-law, which was presented as a legislative initiative of a group of MP's of the Albanian Assembly.

This draft-law establishes the principle of regulation on the bases of technological neutrality. Its field of application includes linear and non-linear broadcastings, in accordance with AVMS Directive and in the aim of the directives on electronic

communications and services networks, and it includes as well new programme services and protected services. This draft-law has fully implemented the AVMS Directive.

After the remarks of NCRT, in the "Definitions" article is added this definition: "Audio and audiovisual commercial communication" means public announcements in the form of sound or images, which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such announcements accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audio and audiovisual commercial communications are:

- a) television and radio advertising
- b) sponsorship,
- c) radio or teleshopping,
- d) radio or teleshopping windows,
- e) product placement;¹¹

Further more, in the same article is given the definition of "product placement". *"Product placement" means any form of audio or audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so it is featured within a programme, in return of payment or for similar consideration."*

The detailed regulation of "Product placement" is made by the Chapter IV "Audiovisual Commercial communications and Advertising". In this Chapter, after defining the advertising types, advertisings and teleshopping, audio-visual commercial communications, the article 43 deals with "Product placement during programmes"

In the first paragraph of this article is set the rule *"Product placement during programmes as a hidden and abusive way of commercial communication is prohibited"*. In the same phrase, we see the exception: "unless in films, cinematographic works, serial produced for services of media broadcasting, sports programmes and light entertainment programmes". In this article is not included the paragraph 3(b) of AVMS Directive: "Where there is no payment but only the provision of certain goods or services free of charge, such as productions props and prizes, with a view to their inclusion in the programme."

The paragraph 2 of article states that the exception made above is not valid for any kind of programme dedicated to children.

¹¹ In the article "Definitions" is given as well the definition of "Surreptitious audiovisual commercial Communications"

According to the same article (3), the programmes containing product placement shall meet the following conditions:

- a) their content and programme listing shall in no circumstances be affected in such a way as to affect the responsibility and editorial independence of the media service provider;
- b) they shall not directly affect reception or use of goods and services, in particular by making a special promotional reference to these goods and services;
- c) they shall not dedicate an excessive attention to the goods in question;
- d) the viewers shall clearly be informed on the existence of product placement.

Also, the programmes containing product placement shall be clearly identified at the beginning, during or at the end of the programme and when a programme ends after an advertising break in order to avoid misleading of the viewers.

The programmes can in no case contain product placement for:

- a) tobacco or cigarette products or product placement from companies, persons or entrepreneurships, which main activity is to produce and trade cigarettes or tobacco products, or
- b) pharmaceutical products, medicines and medical treatments available only on prescription.

The law makers of this draft-law have been careful to state in a specific way concerning the placement of products in programmes, despite that every type of audio and audiovisual commercial communication about the tobacco products and the medical treatments available only on prescription is prohibited in the specific articles dealing with commercial communications.

The adjustment made in this version of draft-law is clearly improved comparing with the first version. It is clearly and accurately stated which are the conditions that the programmes containing product placement should fulfill. There is stated as well, the exception concerning the programmes dedicated to children.

As it is obvious from the content of the draft-law, excluding only the article 3(b) of the AVMS Directive, that the Albanian law makers has been loyal to the article 11 of the Directive, fully approximating this directive as far it concerns the product placement.

IV. Conclusions

The current Albanian law on radio and television, although for the time when was approved, served establishing many rules for the chaotic Albanian media market, actually it does not reflect the current trends with the latest European developments in the audiovisual fields. This is the reason that raised the need for legal reform on the audiovisual field. The new draft law, which is expected to be approved soon in the new parliamentary session, is intended to make the full alignment with a series of EU directives, especially with AVMSD.

As stressed above, concerning the question of "product placement", the draft-law has brought a full approximation with Article 11 of AVMSD. The draft-law foreseen that product placement in the course of programme broadcasting, as a hiding and abusive way of commercial communication, is prohibited, as well as it provides the exceptions for cases when it is allowed. The draft-law prohibits the product placement for any programme for the children and establishes the conditions for programmes that contain product placement. In the end, the law clearly mentioned the programmes that in no case may contain product placement, such as beverages or pharmaceutical product available only on prescription.

After adoption of the law, would be National Council of Radio Television (NCRT) that, through its regulations will detail the rules imposed by law. Thus, NCRT in its regulations must take into account the European practice and commentaries regarding how to categorize programmes where product placement is allowed; as will ensure that the product placement will not effect the responsibility and editorial independence of the media service provider; which will be the borderline between the product placement and sponsorship; which will be the rules for placing the warning logo in order to clearly inform viewers of existence of product placement. In addition to the provision of law, these arrangements will serve to Albania to follow European best practices concerning product placement.

Once the new media law will be approved, we will see the effect of the regulation of product placement. Among other things, it puts the focus on the relationship between private and public broadcaster. Who can profit from product placement and who will be dependent on it? It is also complicated because the advertisers' interest in the customer is not necessarily identical to the customer' s interest in "fair" advertising. In the future, we will see how this issue will affect the Albanian media environment.

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