

UNDERSTANDING THE AVMSD

PRACTICAL GUIDELINES ON THE
IMPLEMENTATION OF THE
AUDIOVISUAL MEDIA SERVICES DIRECTIVE

About us

egta is a Brussels-based trade association for marketers of advertising solutions across (multiple) screens and/or audio platforms, with the aim to optimise revenue around the content edited and broadcast on a linear basis by their TV channels and/or radio stations.

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Today's business models are based on today's situation. In turn, influenced by today's legal framework.

FOREWORD

Six years after its publication, 2013 saw full transposition of the Audiovisual Media Services Directive (AVMSD) by all EU Member States. egta, as the trade body of European television and radio sales houses, considered this an opportune moment to follow up on our Practical Guide to the AVMSD, which we released in December 2007. This new practical guide focuses on the implementation of the directive based on interpretations by national regulatory authorities, as well as input from egta member sales houses. The intention is to give a broad overview of how the different national markets have applied the Directive, with a particular emphasis on the newer elements that were defined in the 2007 text. The practical guide also includes a section on the European and national case law related to the Directive.

A flexible and adaptable regulatory framework is of paramount importance in today's converging media landscape. The European institutions recognised this as a necessity when drafting the AVMSD. Following full transposition by all Member States, now is an apt moment to reflect upon how European broadcasters and national regulators have tackled and embraced advertising techniques such as product placement and sponsorship.

As an association, egta consistently aims to build a promising future for commercial communications. One of the ways in which we do so is by providing a toolbox for our members. We believe that this guide will allow advertising professionals to gain a deeper awareness and understanding of how their colleagues throughout the European Union have responded to the AVMSD.

The past six years have seen a period of constant innovation within the audiovisual industry. This pace of development has coincided with a time of uncertain economic growth. Sales houses and broadcasters look forward to a bright and dynamic future, one in which policy makers enable rather than restrict progress. egta supports creative and better advertising facilitated by a regulatory environment that ensures responsible, consumer-friendly and business-aware commercial communications.

egta would like to thank all its members, in particular the legal and regulatory affairs experts, who contributed their invaluable insights to the content of this guide.

Katty Roberfroid
egta Secretary General



Franz Prenner
egta President



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Building a competitive, connected continent is clearly the foundation stone to best support the cultural and creative industry, and every other industry.

INTRODUCTION

USER'S GUIDE



WORK
SMART.
LET US
GUIDE YOU.

advertising industries. Part III explores the case law, on a topic-by-topic basis at European and national level, arising from the Directive to once again give a broad indication of which subjects have been the most contentious.

SIMPLIFICATION AND ACCURACY

egta strived for the greatest accuracy in all the information provided in this guide. The simplification effort may mean that either details were omitted or exact wordings modified. A legal argumentation should thus not be based solely on this guide. Similarly, summaries are meant to highlight the most important elements but a complete overview requires a thorough reading of all explanations provided in the guide.

Information included in the guide solely reflects egta's reading of the Directive, which can of course be challenged.

Should you wish for more detailed information on particular issues, please **contact egta's Regulatory and Public Affairs team:**

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NAVIGATING THE PRACTICAL GUIDE

The guide is divided into three parts. Part I serves as the starting point to the guide. It also can be seen as a quick reminder of the main elements of the 2007 AVMSD. It presents how the legislation tackles each type of advertising format and each audiovisual platform. On that basis, the applicable advertising rules can be identified in each case.

Parts II and III deal specifically with the implementation and interpretation of the AVMSD at national level. Part II looks at how some of the new provisions from the Directive were transposed into national legislation and is intended to be used as an overview of the current legal situation in the Member States. We are specifically concerned with the advertising issues and concentrate on those areas which have sparked the most debate within the broadcasting and

tical examples from the perspective of egta members have been used to demonstrate how the requirements of the AVMSD are being put into practice. We did not look at all the provisions contained in the AVMSD, but instead focussed on those areas that have caused most debate in the audiovisual advertising sector. Thus this is in no way supposed to be an exhaustive exploration or analysis of the Directive. However, as all Member States have officially transposed the AVMSD into national law, we feel that now is a good juncture at which to reflect on developments in order to fully prepare the industry moving forward.

Conor Murray

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ABOUT THE PUBLICATION

The purpose of this guide is to provide practical insights into how the Audiovisual Media Services Directive (AVMSD) has been implemented into national legislation and the impact on sales houses and broadcasters of the advertising provisions introduced by the Directive. It is not meant to replace egta's 2007 practical guide to the AVMSD, the objective of which was to explain the newly created Directive in the simplest terms to all advertising professionals, but rather should be seen as a complementary tool. The intention is to demonstrate how sales houses, broadcasters, national regulatory authorities and national ministries have tackled the challenges, and rules, laid down by the AVMSD. In other words to show, as much as is feasible, the current state of play with regard to the transposition and implementation of the Directive and the reality that media service providers are faced with. At all times prac-

CONTENTS:

Push or pull content, two types of services

Importance for advertising

Audiovisual commercial communications: the terminology



A changing market needs a framework that responds, to enable and support fresh new ways of working, fit for the future; to embrace the new, not cling on to the old. Not to impede new models – but to enable them.

The AVMS Directive allows audiovisual services to freely circulate, while protecting important policy objectives.

PART I:

// TELEVISION & BEYOND: THE SERVICES AFFECTED BY THE AVMS DIRECTIVE

One of the main reasons behind the publication of the AVMSD was to take account of the, at the time, newer audiovisual services that were competing with traditional television services, e.g. IPTV, mobile TV, video-on-demand services, etc.

It was decided that all of these services should be regulated in a single Directive, regardless of the technology (cable, internet, satellite) or the device (mobile phone, television set, computer, etc.) used to deliver them to the public. The Directive covers much more than just television, hence its title, the Audiovisual Media Services Directive.

Table 1: Classification of services

Audiovisual Media Services (subject to the AVMSD)	Other services (not subject to the AVMSD)
Analogue & Digital television	Radio
Interactive television live streaming/ webcasting/IPTV/Mobile TV	E-newspapers and magazines ²
Video-on-demand	Gambling, lottery, betting services
Advertising or teleshopping broadcasts	User-generated content platforms ³
Advertiser-funded broadcasts	Remote video content on websites
Adscreens (in airports, stadiums, etc.)	Private correspondence
Gaming or gambling broadcasts	Personal websites
Subtitling services of TV	
Electronic programme guides ¹	

¹ Although these services are not audiovisual per definition the Directive specifies that these must be considered audiovisual media services and thus made by all the states established within its jurisdiction.
² So long as they meet all the criteria, e-newspapers and magazines shall be subject to the AVMSD.
³ As soon as real editorial responsibility is exercised by the provider then user-generated content platforms should be considered as an audiovisual media service.

PUSH OR PULL CONTENT: **TWO TYPES OF SERVICES**

One of the main features of the AVMSD is that it covers not only television but all audiovisual television-like services that are developed on mobile, the internet, etc. Considering the variety of services, the need to establish a distinction between those offering push-content and those offering pull-content arose. Due to their fundamental differences, these services cannot be regulated in the exact same way.

For the sake of defining which rules apply, all audiovisual media services subject to the AVMSD must fall within one of the following categories.

Television broadcasts (also referred to as linear services)

This category covers push-content. Essentially, this means that the broadcaster offers a service based on a chronological programme schedule that can be watched simultaneously by one or more people. Therefore, traditional TV, live streaming via the internet or via a mobile phone, webcasting or near video-on-demand falls within this category. Near video-on-demand consists of on-demand programmes that are made available to viewers on the basis of a schedule rather than a catalogue. These programmes are meant to be watched by viewers at a precise time.

On-demand services (also referred to as non-linear services)

This category comprises pull-content. It covers services in which consumers choose the programmes they want to

see, and when they want to see them, from a catalogue of programmes. This catalogue is under the responsibility and control of a media service provider. This covers any type of on-demand service, whether it is on digital television, mobile, the internet, etc.

IMPORTANCE FOR ADVERTISING

Defining whether services must be considered as television broadcasts or as on-demand services has enormous implications for advertising rules. On-demand services are subject to much lighter rules than television broadcasts for two reasons. Firstly, because viewers are in greater control and thus don't need to be over-protected and secondly, because some rules applicable to TV broadcasts are irrelevant in the case of on-demand services.

AUDIOVISUAL COMMERCIAL COMMUNICATIONS: THE TERMINOLOGY

Because of its extended coverage and the distinction between pull-content and push-content services, the AVMSD established new terminology to refer to the different types of commercial communications.

The most encompassing term used is "audiovisual commercial communications". Its definition (article 1h) is broad but remains traditional. Its key features are:

- Audiovisual, i.e. "images with or without sound";
- "Designed to promote directly or

indirectly the goods, services or image" of an economic entity;

- The existence of a payment or a similar consideration was given for the commercial message to be included in the service (unlike announcements by the broadcaster about its own programmes). The definition excludes all announcements free-of-charge, such as some charity appeals or public announcements;
- Forms of audiovisual commercial communication include television advertising, sponsorship, teleshopping and product placement.

For matters of clarity, subcategories were introduced to refer to some very specific forms of audiovisual commercial communications. These are:

- **Television advertising:** this refers to audiovisual commercial communications on push-content/television broadcast services only. Apart from the limitation to television broadcasts, the definition is very similar to that of audiovisual commercial communications;
- **Sponsorship:** most noteworthy is that, according to the definition of sponsorship, it can occur in both television broadcasts and on-demand services;
- **Product placement:** as with sponsorship, the term product placement covers placements both in television broadcasts and in on-demand services;
- **Teleshopping:** teleshopping is different to television advertising with regards to its purpose: "the direct of-

fer to the public" with a "view to supply goods or services", i.e. a possibility to directly purchase the product (as opposed to announcements with the view "to promote", in the case of advertising). In the AVMSD the term teleshopping only covers offers on television broadcasts.

There is no particular subcategory established for designating teleshopping or television advertising in on-demand services. These just fall under the heading *audiovisual commercial communications*, alongside other listed subcategories.

The precise rules for the subcategories mentioned above are included in the appendix to this guide along with all the other notable advertising related articles of the AVMSD.



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Sponsorship compared to product placement

The notion of similar consideration

When do production props attain significant value?

Undue prominence

Minutes per advertising hour

Codes of conduct on advertising HFSS foods to children



“Policymakers and the industry need to engage for the future.”

The creative industries and cultural content have a very strong role to play. Culture helps our society, supporting inclusion, education, and democratic freedom itself. But it also supports our economy: creative industries represent 5 million jobs and 2.6% of EU GDP (2012).

PART II:

// OVERVIEW OF THE CURRENT LEGAL SITUATION IN THE MEMBER STATES

This section of the guide looks at some of the areas of the AVMSD that were most open to interpretation. These include advertising techniques, such as sponsorship and product placement and the rules that govern their application. It also explores in detail concepts including significant value, undue prominence and similar consideration. There is further examination of how media service providers have responded to the challenges put forth to them in the AVMSD. The range of examples given includes not only national legislation but also the rules and implementation from the perspective of broadcasters and sales houses.

SPONSORSHIP COMPARED TO PRODUCT PLACEMENT

According to the European Commission's 2012 AVMS Directive implementation report¹, some Member States have encountered certain issues regarding the rules governing product placement and sponsorship, and a clarification of these rules is necessary. There are common rules that govern both of these forms of commercial communications. For instance:

- The content of a programme cannot be unduly influenced, and editorial independence must be kept;
- Neither product placement nor sponsorship can directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services;

- and viewers must be informed about the presence of sponsorship and product placement in a programme.

However, there are two important points of divergence.

The first point is regarding the financial aspect of the undertaking of the product placement or sponsorship. According to the AVMSD, in the case of product placement, the payment or consideration is made in order to have the product, service or trademark appear in the programme. With regard to sponsorship, however, the fiscal contribution of the sponsor is made in order to finance the audiovisual media service or programmes offered by that service.

The second, and more distinctive, disparity between product placement and sponsorship is how the desired promotional effect is achieved. According to

Recital 91 of the AVMSD:

¹ First Report on the application of the Audiovisual Media Services Directive (AVMSD)

"The decisive criterion distinguishing sponsorship from product placement is the fact that in product placement the reference to a product is built into the action of a programme, which is why the definition in point (m) of Article 1(1) contains the word 'within'. In contrast, sponsor references may be shown during a programme but are not part of the plot."

Many countries have implemented the AVMSD literally (examples include Belgium, Germany and Finland) and do not have additional rules on either sponsorship or product placement. As of 1 July 2013 product placement has been banned by law in Denmark. Interestingly, based on the information at hand France and the Netherlands are the only countries that do not allow an advertiser to sponsor a programme and simultaneously place its products in it (with the exception of prizes in game shows in France).

The following are examples of how broadcasters, sales houses and media authorities in several Member States have made the distinction between product placement and sponsorship.

Belgium (North): As an example of product placement versus sponsorship, a decision was made by the Flemish media regulator, *Vlaamse Regulator voor de Media* (VRM), which states that "reference to a brand of clothes worn by a presenter of a show during a trailer of a programme cannot, but labelled as product placement, but should be labelled as sponsorship" (VRM, 2010/004). Please see the case law section for a more detailed commentary.

Denmark: One broadcaster has established that the difference between sponsorship and product placement is that:

- Sponsorship can consist of a tangible product and/or a monetary contribution, but there is no link between the two, even if both are given by a sponsor to the same production;
- Product placement is the combination of a product and monetary contribution, and if the product is not included in the final production as originally agreed by the parties, the advertiser is entitled to a refund with regard to the monetary contribution.

SPONSORSHIP OR PP?



"The decisive criterion distinguishing sponsorship from product placement is the fact that in product placement the reference to a product is built into the action of a programme, which is why the definition in point (m) of Article 1(1) contains the word 'within'. In contrast, sponsor references may be shown during a programme but are not part of the plot."

Finland: In the preparatory legislative material for the Act on Television and Radio Operations it was stated that it is possible to have both sponsorship and product placement in the same audiovisual work. However, both have to be evaluated based on their respective rules.

Although not specifically stated by the Finnish communications regulatory authority (FICORA), based on its recent decisions, it seems that if an audiovisual work includes product placement, this would automatically also entail that the programme is sponsored. This is partly due to the fact that FICORA sees that there can be no material or significance threshold when evaluating whether a programme is sponsored (unlike the distinction between product placement and insignificant product props). According to FICORA, any financially measurable contribution by a third party to the production of an audiovisual programme, irrespective of its value, shall constitute sponsorship.

Hungary: In the case of product placement the product is integrated into the content, whereas in the case of sponsorship the references for the product are not part of the programme (before, after or even simultaneously). Viewers must be informed of product placement before and after the related programmes.

Italy: Following the legislative definitions (cfr. *Testo Unico dei servizi Media audiovisivi* d.lgs. 177/200, art. 2.3hh and art. 2.3l) one broadcaster has established that the difference between sponsorship and product placement is that:



- Sponsorship is the combination of a product and monetary contribution whose reference can take place at the beginning and at the end of a programme (with due respect to quantitative and qualitative limits), and under specified conditions during the programme, but is not part of the plot;
- Product placement consists of a tangible product and/or a monetary contribution in order to allow the visibility of a product or its brand during the action of a programme in a clearly recognisable manner.

Luxembourg: By law, product placement is signalled to viewers by means of a logo, whereas for sponsorship, viewers are made aware by means of a jingle. Product placement consists of the inclusion of a product inside the programme, which is not a necessity for sponsorship.

Slovenia: One sales house has defined sponsorship as including the opening and closing billboards, advertisements in the breaks of the sponsored show (in premium positions) and a short



INNOVATE
GROW
THRIVE ...

children's programmes, however, it is egta's view that products of significant value that are provided free of charge (in kind) may potentially be considered as being given in return for similar consideration. This would mean that they may fall under product placement rules and therefore be banned in children's programmes.

In many countries, the national legislation does not make any reference to this significant value criterion. According to broadcasters, the fact that all props (regardless of their value) may potentially be classified as product placement seems disproportionate.

The notion of similar consideration has been interpreted in a variety of ways by broadcasters, sales houses and media authorities in the following countries *inter alia*:

Belgium (North): In the Flemish speaking region there is a lot of debate around the interpretation of the notions of similar consideration and significant value. The Flemish media regulator (VRM) has made judgments on the interpretation of production props, product placement and similar consideration. Please see page 57 in the case law section for a more detailed commentary.

Bulgaria: Similar consideration is reached through barter deals - goods or services from the respective client/advertiser (can be content, including advertising for free).

Denmark: Similar consideration is not specifically defined in the Danish Broadcasting Act, and no distinction is made with regard to the value as such

(sponsorship) and Article 11 (product placement) of the AVMSD on pages 71 and 72 of this guide.

THE NOTION OF SIMILAR CONSIDERATION

The concept of *similar consideration* is one that has provoked much debate. In the AVMSD, the concept is mentioned in many contexts, specifically regarding payment. In the definitions of audiovisual commercial communication, television advertising, surreptitious advertising and product placement it defines these as taking place "in return for payment or similar consideration."

What does similar consideration mean?

This expression could be understood to constitute any possible form of return that occurs in exchange for the inclusion of the commercial message, e.g. in kind, rebates, free element of a wider commercial offer, etc.

Any type of message of a commercial nature fulfilling any of the above criteria

five second tag connected to the promotional trailer for the sponsored show. Optionally, sponsorship includes reminders during the show. Product placement is considered as an inclusion of a product, service or brand as part of a scene or script of the show. It is also permissible to sell product placement to a sponsor, if so agreed.

Sweden: One broadcaster has established that:

- Product placement's insertion into the storyline, alongside a prior agreement about product placement, is the decisive factor for whether it is product placement or not. As opposed to production props which set the scene rather than form part of the story;

- A sponsor is announced through a sponsorship identification message. Sponsoring differs from product placement as it is not part of the plot but remains in the background.

For definitions and requirements (banned programmes, identification rules, etc.), please refer to Article 10

ria and accompanying a service falling under the legislation - both television broadcasts and on-demand services - is considered an audiovisual commercial communication.

In the case of product placement, the interesting aspect is that Recital 91 of the AVMSD states:

"Product placement laid down in this Directive should cover 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 provision of goods or services free of charge, such as production props or prizes, should only be considered to be products involved are of significant value."

Therefore, payment or similar consideration is pivotal to product placement in programmes.

Product placement provided free of charge (production props or prizes) is allowed in all programmes, including



vided by the French legal framework is more restrictive than the Directive.

Hungary: According to one broadcaster, the concept of similar consideration exists in the form of barter deals and partnerships.

Ireland: As explained by a broadcaster, if a programme involves significant air travel which is provided free of charge and the airline appears in the programme, that would be interpreted as similar consideration. The same applies to the provision of a prize of significant value where it appears in a programme.

Italy: There is no specific legislative definition of similar consideration. One broadcaster defines similar consideration on the basis of the value of the product and of its visibility within the programme. For instance, if a programme involves the use of a highly recognisable car brand (e.g. 20 Fiat cars or a Ferrari) no other cost will be charged to the goods supplier.

Slovenia: One sales house's interpretation is that when dealing with similar consideration, the product placement logo should be displayed. An example of this would be when a car, supplied free of charge, is the prize in a show, and given the high value of the product, this kind of advertising is treated as part of the product placement agreement.

Interestingly enough, similar consideration has been interpreted in many ways and not always in a financial manner. As an example, in Slovakia, the Council for Broadcasting and Retransmission of the Slovak Republic made a judgement in a case which ruled that *media partnership* can be seen as remunera-

of the products, but if a product has significant value it will be considered to be product placement. According to the Executive Order on Television Advertising, significant value is defined as "a residual value of a not immaterial character", and the residual value is then defined as "a monetary or other economic value for the relevant media service provider apart from the value of the expense which is saved by showing or referring to the product, service or brand in a programme."

According to one sales house, the concept of significant value will only be an issue if, for instance, the broadcaster gets to keep a car that has been used in a production, as this would supersede the cost saved by having the car sponsored.

France: This notion does not exist, as the French regulatory body's (CSA) deliberation on product placement (n°2010-4 on 16 February 2010²) covers only placement in return for payment. When the provision of goods or services is free of charge, it is not legally considered as product placement. The definition of product placement pro-

WHEN DO PRODUCTION PROPS ATTAIN SIGNIFICANT VALUE?

The idea of significant value is naturally tied up with the concept of similar consideration and has proved equally difficult to define uniformly. According to Recital 91 of the Directive, the provision of goods or services free of charge, such as production props or prizes, should only be considered to be product placement if the goods or services involved are of significant value; however, the AVMSD says nothing about the decisive question of how this value is to be ascertained.

Significant value is usually determined in a fiscal manner but is not always a set amount. Examples of the differing ways

tion for advertising. In this context, the remuneration for broadcasting the advertising does not necessarily have to be provided in cash payment. Similar consideration also includes any form of bartering deals or partnerships. Please see page 49 in the case law section for a more detailed commentary.

Another case on absence of payment occurred in Greece, where the European Court of Justice (ECJ) ruled that an absence of payment or similar consideration from the client to the TV channel does not necessarily exclude the intention to advertise surreptitiously. More information on this can be found on page 66 in the case law section.

Table 2: Examples of how significant value has been defined in some EU Member States

Country	Definition
Austria	A set benchmark of EUR 1,000 has been imposed as the dividing line between regulated product placement and unregulated prop placement.
Bulgaria	Significant value shall be a value which exceeds five times the average value of the commercial communications transmitted in the relevant programme, according to pre-announced rates of the broadcaster concerned.
Germany	The applicable amount is more than 1% of the total production costs with a minimum value of more than EUR 1,000. If the production props have a higher value, the programmes containing them have to be identified accordingly.
Ireland	Significant value is defined by the regulator BAI and can be changed from time to time. At the time of writing it is set as a value of EUR 5,000 or more.



it has been interpreted are in Table 2 (on the previous page).

Some markets have approached this question in a less pre-determined fashion.

Belgium (North and South): It is interesting to note that the Belgian authorities (from both the Flemish and French speaking communities) have chosen to systematically consider prop and prize placement as product placement independently of the value of the props and prizes. This implies, for instance, that any prop placement in a programme will need to be identified. In that case the notion of significant value becomes irrelevant.

Denmark: Significant value is not defined by a monetary value. The term significant value is defined as a residual value that is not of minor importance. Minor importance is to be understood as a monetary or other economic value for the relevant media service provider besides the value of the expense that is saved by including or referring to the product, service or trademark in the programme.

Finland: The law includes the concept of "gratuitous product props and product gifts" that shall be considered product placement only in the event that the gratuitous product props and product gifts are significant in value. Significance shall be evaluated based on the production budget and industry standards. No clear guideline or decision practice exists as to what constitutes significant value. One sales house has deemed that significant value is when a product's value is at least 1% of the production price.

France: As mentioned previously, the French regulation covers only placement in return for payment. This means that any free-of-charge production props cannot be considered as product placement.

Hungary: There is no value limit; it is irrelevant whether it is a soft drink or a car. If the brand, trademark, logo or other special identifier of the product/service appears in the content it is considered as product placement regardless of the payment method (cash/barter).

If it is in fact a production prop (deemed necessary for production reasons, but not funded by an advertiser) the broadcasters need to ensure not to show any identifier of the product/service.

Luxembourg: The notion of negligible or significant value is not defined by the Luxembourg *Règlement Grand-Ducal*. The value of the production props and prizes as negligible or significant is determined in relation to the production costs.

Slovenia: According to one sales house

production props include, for example, snacks, beverages for a jury or performers in a show. Under product placement agreements, the low-value products are, for example, vacuum cleaners, cleaning devices and food. Higher-value products are, for example, cars, accessories such as expensive electronic appliances. However, even if the products are of low value they are still part of the sales house's product placement agreement with the advertiser, and therefore the product placement logo is deemed necessary.

Sweden: A broadcaster has pointed out that there is no fair and balanced way to measure significant value. The value of a product differs due to the country, channel and platform and also to the production costs.

United Kingdom: Significant value is not defined in terms of a quantifiable amount. The legislation states that a

product has significant value if it has "a residual value that is more than trivial".

UNDUE PROMINENCE

In the AVMSD, article 11 (3c) states that "Programmes that contain product placement shall meet at least all of the following requirements:

- (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,
- (b) they shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services;

(c) they shall not give undue prominence to the product in question (...)"

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ADAPT: IT'S ALL ABOUT DOING

Bulgaria: The Radio and Television Act does not give a definition of undue prominence, nor does it stipulate the percentage of the screen occupied by the product or how many seconds a product may be shown. It is the sales houses themselves who make an assessment in each particular case. In their view, undue prominence occurs if the product is shown on screen for a certain amount of time, if the camera zooms in on the product, if the product covers too much of the screen, verbal remarks, etc.

As the notion of undue prominence has not been articulated, some Member States have defined the concept in their national legislation. These can be concrete indications, such as how many seconds the product appears on screen, or more vague parameters, such as verbal remarks about the product. A concept that many Member States seem to agree with is that practically speaking, undue prominence should not be separated from the two other legal principles limiting product placement (not to influence the content of the programme, not to encourage the purchase of the product), because they are implicitly linked.

An issue raised by one broadcaster, and echoed by others, is that undue prominence of commercial value should only be assessed by level of exposure. This facilitates the best possible use of logic and transparency in regulation, which in turn gives stability and predictability for production practices.

The following are examples of how the different actors in the broadcasting markets of several Member States have tackled the challenge of defining what

constitutes undue prominence.

Belgium (North): Broadcasters have often indicated that the VRM should take into account the content of the programmes in which the products appear. Lifestyle reports or programmes, for example, are characterised by a positive editorial style. When stating this, the broadcasters referred to the European Commission's interpretative communication on certain aspects of the provisions on televised advertising. In this communication, the European Commission stated that the undue prominence of goods, services or brands may result from the recurring presence of the brand, good or service or from the manner in which it is presented and appears. In the same communication, the European Commission also indicated that "the content of the programmes in which the brand, good or service appears should be borne in mind (feature films, news programmes)". This contention was used by the commercial broadcaster VT4 in 2012. Please see page 61 of the case law section.

Different broadcasters have been fined for infringement of the undue promi-

nence criterion. The factors that were considered by the VRM in these decisions are the following: frequent, long and/or exaggerated reference to and/or display of products, explicit mentioning of the positive effects of products, movements of the camera and the shots (full-screen displays of product, zooming in or out on product). Please see page 62 of the case law section.

Belgium (South): The Belgian CSA provided guidance on undue prominence in its recommendation on product placement of December 2009⁴. Undue prominence is to be construed as the presentation of products or trademarks easily identifiable by an average viewer which is not editorially justified. Indicators can include advertiser contact details such as web site address, frequent quotation/display, and absence of critical view/pluralism or complacency in presenting products.

Other indicators that could be taken into account in order to consider the specificities of different genres of broadcasts include fiction, games, cookery programmes, etc.

For instance:

- The product may be shown on screen for 10 seconds, but it is hard to identify the trademark - this is acceptable and will not be identified by the regulatory body as undue prominence.
- The product may be shown on screen for 3-5 seconds, but the camera zooms into the product with no particular reason or connection with the scenario - this is not acceptable and may be identified by the regulatory body as undue prominence.

Finland: The media regulator FICORA has applied the concept of undue prominence in a few of its decisions. FICORA has, for example, considered the number of times a certain product or a trade mark is mentioned in a programme (tens of times), whether a product or trade mark is emphasised by applying certain filming techniques (zooming), and the proportion of a section in a programme it considered to be commercially influenced (over 10% of programme's total duration).

France: The CSA was reluctant to give a formal interpretation of undue prominence. Jurisprudence of recent years helped the CSA to build the method of *body of evidence* while implementing product placement control to define the undue prominence principle. See below a non-exhaustive list of *evidence*:

- When the story is mainly located in the premises of the advertiser (hotel, shop, boat etc.), the risk of undue prominence is higher.
- Focusing on the product (zooming in on it, talking about it etc.) when it can be hardly justified by the scenario itself.
- Repeated featuring of the product or the trademark.

Germany: The advertising guidelines⁵ provide guidance on undue prominence. They require that product placement is editorially justified. This is deemed to be the case when the product has been built into the action or the plot mostly owing to programme dramaturgy, or when the use or presentation of the product is necessary as information to clarify the content of the programme. Indicators (such as, for instance, manner/duration/intensity of the display of products) will be used to assess, on a case by case basis, whether there is undue prominence.

Ireland: The BAI interpretative guidelines⁶ consider that undue prominence occurs when "the product inclusion is editorially unjustified for the manner the product is presented". Indicators can include camera movements & shots, explicit reference to the product's virtues, evocation or reproduc-

CHANGE: GRASP EVERY CHANGE



tion of advertising content or slogans, accumulated presence in the schedule duration. Promotional reference to the product would also constitute undue prominence.

Italy: A product cannot be given undue prominence during the programme, for example, through: artificial and repeated quotations of recognisable brands and products (e.g. the repeated quotations of brands in dialogues); specific promotional references (e.g. the exaltation of a product properties); emphatic and promotional expressions typical of advertising communication; artful, close-up and repeated shots of brands/products and analytical descriptions of the product's quality.

Luxembourg: The following indicators may constitute undue prominence:

- The presence of a product may under no circumstances be accompanied by a line of arguments;
- The products cannot appear on screen in an explicit way, for example by doing a close-up on the product (or to zoom into the product);

- The presence of the product cannot play a prominent and preponderant role compared to the other products.

Poland: One broadcaster takes the position that the total time of branding may not exceed 8 seconds in any given programme. Other indicators are that the programme in question cannot:

- Expose the product in question too much (too frequently, with excessive zooming in, the product should be in use etc.).
- Encourage directly to purchase or lease the product or service, in particular through promotional reference to it.

Product placement is, to a large extent, still subject to an individual subjective evaluation.

United Kingdom: According to Ofcom guidelines⁷, undue prominence may result from:

- The presence of, or reference to, a product, service or trade mark in programming where there is no editorial justification; or

- The manner in which a product, service or trade mark appears or is referred to in programming.

MINUTES PER ADVERTISING HOUR

Since the publication of the AVMSD and its transposition by Member States into national legislation, one topic that has often been the subject of debate is the question of what forms of advertising are excluded from the hourly limit of 12 minutes. According to the AVMSD, self-promotion by the broadcaster of its own products, services, programmes and channels should be excluded from the 12 minute limitation. However, the distinction between what constitutes cross-promotion as opposed to self-promotion has clouded the issue. This has been the subject of several decisions, which are examined in depth in the case law section. Table 3 illustrates the interpretation of the hourly limit in many national markets.

⁷ Commercial references in television programming

Table 3: Forms of advertising excluded from the hourly limit

Country	Self-prom.	FP	Spots announc.	Teles. prom.	Advertiser-funded progr.	Teleshopping windows (at least 15 mins)	Charity appeals & public service announcements
Austria	Yes	Yes	Yes ¹	Yes	Yes	Yes	Yes
Belgium North	Yes	Yes	Yes	N/A	Yes	Yes	Yes
Belgium South ²	Yes	Yes	Yes	N/A	N/A ³	N/A ⁴	Yes
Bulgaria ⁵	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Croatia	Yes	Yes	Yes	Yes	N/A	Yes	Yes
Czech Rep.	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Denmark ⁶	No	Yes	Yes	No	Yes	No	No
Estonia	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Finland	Yes	Yes	Yes	Yes	Yes	Yes	Yes
France	Yes	Yes	Yes	N/A ⁷	N/A ⁸	Yes	Yes
Germany ⁹	Yes	Yes	Yes	No	No	Yes	Yes ¹⁰
Greece	Yes ¹⁶	No	No	No	No	Yes	Yes
Hungary ¹¹	Yes	Yes	Yes	N/A	N/A	Yes	Yes ¹²
Ireland	Yes	Yes	Yes	No	Yes	Yes	Yes ¹³
Italy ¹⁴	Yes	Yes	Yes	Yes	N/A	Yes	No ¹⁵
Latvia	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Lithuania	Yes	Yes	Yes ¹⁷	N/A	N/A	N/A	N/A
Luxembourg	Yes	Yes	Yes	Yes	No	No	No
Netherlands	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Poland	Yes	Yes	Yes	Yes	No	No	Yes
Romania	Yes	Yes	Yes	No	No	No	No
Slovenia	Yes	Yes	Yes	Yes	No	Yes	Yes
Spain	Yes ¹⁸	Yes	Yes	Yes ¹⁹	N/A	Yes	Yes ²⁰
Sweden	Yes	Yes	Yes	N/A ²¹	N/A ²¹	Yes	No ²²
UK	Yes	Yes	Yes	No	Yes	Yes	Yes

Table 3: Forms of advertising excluded from the hourly limit (Continued)

- 1 For public channels, unless a sponsored programme concerns charitable or other purposes in the public interest, sponsorship announcements shall be included in the advertising limit.
- 2 Hearings, hearings and following shall not be included in the maximum permissible duration.
- 3 References by broadcasters to their own programmes and supporting materials that are derived directly from these programmes.
- 4 Sponsorships to programmes in the service of the general public.
- 5 Initiatives to promote or donate for charitable purposes.
- 6 Opening and closing announcements of sponsored programmes that do not contain any additional advertising message; product placements.
- 7 Transmission times for advertising for courses.
- 8 Visual advertising is also clearly excluded.
- 9 For the private channels.
- 10 The promotion of European firms is also excluded from the calculation.
- 11 Interest advertisements are also excluded from the calculation.
- 12 Not allowed.
- 13 Advertising funded programmes not allowed, no material fall into advertising, so are counted like classical ads.
- 14 The advertising guidelines clarify the situation regarding self-promotion by television broadcasters. They guidelines expressly state that cross-promotion within a group of broadcasters does not need to be included in maximum hourly limits.
- 15 Unrestricted (free of charge).
- 16 Please note that sports events, virtual advertisements if not produced by the broadcaster and (e.g. for advertisements of) not broadcast in community, mental are clearly included in the limit.
- 17 Conversely, media service providers solely broadcasting advertisements and tele-shopping of solely targeted self-promotion are clearly retained from the calculation.
- 18 Some media service providers do not request any consideration in exchange for the publisher like announcement and the latter does not exceed 1 min. Also social and political advertisements are clearly excluded from the limit.
- 19 Only if provided free of charge by the charity.
- 20 Different provisions apply to private and public broadcasters.
- 21 Public service announcements by the Government are not considered part of the advertising limit.
- 22 According to the interpretation of the Radio and TV Commission, cross-promotional advertising should be included in the calculation.
- 23 According to the interpretation of the Radio and TV Commission, when the limits on the duration of sponsorship credits are exceeded, all exceeding amount would be included into calculation of hourly limit.
- 24 Although not included in the 12 minutes limit, self-promotion is submitted to an additional limit of 5 minutes per hour.
- 25 Telepromotions is excluded from the 12 minutes limit when the single message has a duration that is clearly superior to the one of an advertising spot. Telepromotion is submitted to an additional limitation of 3 minutes in total and 36 minutes a day.
- 26 Public and public service advertising broadcasts are not considered as advertisements as long as their aim is not to promote a product or service. At the request of the interested parties and previously to its release, the competent authorial authority will be able to decide not to consider this commercial advertising messages.
- 27 The Spanish regulation does not provide for a specific form of advertising.
- 28 If the hourly calculation asks for the appeal, it is categorised as an ordinary advertising spot and then they are not excluded from the hourly limit.

CODES OF CONDUCT ON ADVERTISING HFSS FOODS TO CHILDREN

The issue of children's exposure to advertising, in particular to HFSS (high in fat, sugar and salt) foods remains high on the policy-making agenda. Article 9 (2) of the AVMSD states that:

"Member States and the Commission shall encourage media service providers to develop codes of conduct regarding inappropriate audiovisual commercial communication, accompanying or included in children's programmes, of foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular those such as fat, trans-fatty acids, salt/sodium and sugars, excessive intakes of which in the overall diet are not recommended."

The European advertising industry welcomed the adoption of the AVMSD as an effective and balanced instrument to bring the EU legal framework for broadcasting and advertising up-to-date in the digital era. The industry remains actively engaged in efforts to put in place

the self-regulatory measures that the AVMSD calls for, especially with regard to food advertising to children.

These efforts are reflected, amongst other initiatives, through the commitments tabled by members of the advertising industry to the EU Platform for Action on Diet, Physical Activity and Health since 2005. The positive achievements to date were recognised in the July 2010 Evaluation of the EU Platform, and the value of the approach enshrined in the Platform was endorsed by the December 2010 Implementation Progress Report on the Strategy for Europe on nutrition, overweight and obesity related health issues⁸.

The progress report highlights that while the implementation of the AVMSD clause on food advertising self-regulation is a work in progress, "the majority of the Member States have agreed with economic operators on a code of conduct within the framework of either a co- or a self-regulatory mechanism for the implementation of the code. Monitoring mechanisms have been put in place by most Member States with the

aim of evaluating the implementation of these co- or self-regulatory mechanisms. These mechanisms are either governed by the Government, by an independent body that oversees the code implementation or by media providers following the compliance of their advertisers with the code."

In its 2012 AVMSD implementation report⁹, the European Commission reiterated that: "in the more specific area of audiovisual commercial communications in children's programmes for sweet, fatty or salty foods or drinks, Member States must encourage audiovisual media service providers to develop codes of conduct regarding inappropriate audiovisual commercial communications in children's programmes."

Table 4 (on the following page) gives an overview of how the Member States have responded to article 9 (2).

It is worth noting that with regard to some of those Member States, such as the UK, Ireland, Sweden, the Czech Republic and Luxembourg, who have not implemented article 9(2) into national legislation, regulatory provisions are already in place restricting the scope for advertising to minors. In other markets, for example Denmark, a code on responsible food advertising to children, agreed upon by all stakeholders, has been in force since 2008 but is not written into law. The following are examples of how media service providers have developed the codes of conduct as they were encouraged to do so by the AVMSD and its national transposition.

Austria: The Austrian Broadcasting Corporation (ORF) and the Austrian As-



sociation of Private Broadcasters (VÖP) issued a code of conduct amending the code of conduct by Austrian Advertising Council (ÖWR) covering audiovisual commercial communications for food products in and/or around children's programmes. The code defines programmes as those that are directed solely or mainly to children under 12 years old. Audiovisual commercial communications for such foods should not encourage overconsumption of such foods or suggest that children lead an unhealthy and unbalanced lifestyle.

Belgium: In the Flemish region, advertisements for confectionery must carry a toothbrush logo. In the French-speaking region, a pictogram is not required, but advertisers must insert a health message.

Bulgaria: Following industry-wide and public discussions, the National Council for Self-Regulation (NCSR), expanded its advertising code on 4 November 2010 with a Framework for Responsible Food Advertising with a special focus on HFSS food advertising in programmes for children. The Ethical Code of the Bulgarian Media includes voluntary rules on HFSS foods and children.

Table 4: Advertising rules surrounding HFSS foods

Country	Media service providers encouraged to develop codes of conduct	Prohibited in children's programmes	Subjected to time/ audience restrictions to protect minors	Other provisions in place (e.g. display warnings)	Further restrictions apply to public service broadcasters
Austria	Yes	No	No	No	No
Belgium North ¹	Yes	No	No	Yes ⁶	No
Belgium South	Public - No Private - Yes	Public - Yes Private - No	No	Yes	No
Bulgaria	Yes	No	No	No	No
Croatia	Yes	No	No	No	No
Czech Rep.	No	No	No	No	No
Denmark ²	No	No	No	Yes ⁷	No
Estonia	Yes	No	No	No	No
Finland	No	No	No	No	N/A ¹²
France	Yes	No	No	Yes ⁸	No
Germany ³	No	No	No	No	No
Greece	Yes	No	No	No	No
Hungary	No	No	No	No	No
Ireland	No	No	No	Yes ⁹	No
Italy	Yes	No	No	No	No
Latvia	Yes	No	No	No	No
Lithuania	Yes	No	No	No	No
Luxembourg	No	No	No	No	No
Netherlands	Yes	Yes ¹⁰	Yes	Yes ¹⁰	No
Poland	Yes	No	No	No	No
Romania	Yes	No	No	Yes ¹³	No
Slovenia	Yes	No	No	No	No
Spain	Yes	No	No	No	N/A
Sweden	N/A	N/A	N/A	N/A	N/A
UK ³	No	Yes	Yes	No	No

Table 4: Advertising rules surrounding HFSS foods (Continued)

1) All types of advertising are banned in children programmes, both in responsible marketing in children developed in 2007.
2) Rules established by Institute of Protection of Media and the Protection of Minors.
3) No commercial communications are allowed during and immediately before and after programmes directed at kids under 12 in both linear and on-line service.
4) No advertising of HFSS products or avoid programmes specially made for children, or of particular appeal to children under 16 and targeted children's channels, also applies to programmes financed by HFSS products. Special prohibitions also concern swimming pools.
5) All communications for HFSS products must display a standard toothbrush icon, must not appear on an excessive excessive context.
6) Chocolate, sweets, soft drinks and snacks advertisements should not indicate that the product may replace regular meals.
7) Messages on the benefits of balanced diets must accompany advertising for all types of processed food and drink with additives on all media.
8) Special accessions, special messages must be displayed in commercial communication of HFSS produced by self-regulatory provisions, when aimed at children younger than 7 years old.
9) Self-regulatory provisions.
10) Advertising is prohibited for Public Service Broadcasters.
11) Television must broadcast the following display warning: "For your health avoid the consumption and alcohol food high in salt, sugar and fat".

Denmark: In December 2007, the Danish food industry adopted a code of conduct on food advertising to children. The Code of Conduct was developed by the Forum for Responsible Food Marketing Communication (representatives of the food industry, consumer goods retailers, media and advertising sectors). It sets specific, category-based nutritional criteria to determine which products can and cannot be advertised to children under 13. Characters that appear in children's programmes are prohibited from appearing in advertisements.

Estonia: Media services providers have adopted a self-regulatory code of conduct on responsible advertising policy in children programmes. It entered into force on 1 January, 2012.

France: There is a system of co-regulation. On the self-regulatory side there is 1) a code of conduct (the Charter for the Promotion of Healthy Diets and Physical Activity during TV programmes and advertising) co-signed by the government, the media sector (TV channels, sales houses and producers) and the food industry, and 2) a recommendation from the French self-regulatory body (ARPP - *Autorité de régulation professionnelle de la publicité*) designed to control the content of food and beverage advertising.

The Charter was signed in February 2009. This code of conduct is made up of seven main principles:

- Advertisers have to reinforce the quality of advertising content; the ARPP (who oversee the copy clear-

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ance procedure on TV advertising) has to enforce the rules that apply to the content of food advertising;

- TV sales houses must give a 60% discount to public communication campaigns devoted to healthy lifestyles and diet;
- Editorial commitments: TV broadcasters must broadcast a minimum annual volume of preventive programmes (between 10 and 35 hours per year – depending on the nature of the programming);
- TV producers shall produce a short TV programme linked to principles promoted by the charter;
- Food-processing companies have to produce programmes of a similar nature;
- Programmes linked to the charter must be followed by the link of the official website of the Health Ministry (mangerbouger.fr);
- The enforcement of these commitments is controlled by both the audiovisual authority and the ARPP.

The ARPP published its *Recommandation Comportements Alimentaires* (recommendation on eating behaviours) in October 2009. This text was aimed at creating a framework for advertisers and agencies when producing advertising campaigns for food and non-alcoholic beverages. It sets minimum standards for marketers based on the International Chamber of Commerce (ICC) framework for responsible food and beverage marketing communications.

The Charter is currently undergoing review and is expected to be amended within the coming months.

Germany: The code of conduct of the German Advertising Standards Council on Commercial Communication for Foods and Beverages has been in force since July 2009. According to this, commercial communication is prohibited if it could be understood as an invitation to excessive consumption or unbalanced nutritional values. Advertising to children must not contain incitements to purchase or consume the goods. Furthermore the advertisements must not undermine a healthy, active way of life.



Finally, advertising to children should not suggest that a particular food may replace a balanced meal.

Italy: Statutory provisions, AGCOM recommendations and the code of practice on TV and minors, signed by Italian TV broadcasters in 2002 and embedded into *Testo Unico della Radiotelevisione* (d.lgs. Legislative decree 177/05) in 2005, provide a high level of attention in children's programming, maintaining three levels of protection – general, extended (07:00 – 22:30), specific (16:00 – 19:00) – for ads insertion. Additionally, advertisements during cartoons are prohibited and so are advertisements using cartoon characters before and after the programme in which they appear. Adverts, promotional messages and all other forms of commercial communications aimed at minors must be preceded, followed and accompanied by messages that clearly distinguish them from other content and are also understandable to children who cannot read and disabled minors.

Luxembourg: The private sector voluntarily displays a visible warning,

which is a toothbrush logo in advertising of sugary products.

Netherlands: The Dutch self-regulatory advertising code for food products (part of the Dutch advertising code) prohibits unhealthy food advertising to children less than seven years of age. This is enforced by the Advertising Code Authority (composed of advertising and media industry professionals). Under the code the following rules apply:

- Confectionery advertising on TV and in the press aimed at children under 14 must feature a toothbrush icon;





- An advertisement for food with a lower energy value (kJ) than the original product, may not lead to higher consumption of that product than of the food product with the original, higher energy (kJ) value;
- An advertisement for a food product that is associated with a certain television programme specifically intended for children, shall not be broadcast in the advertising blocks during and immediately after that programme.

On 1 January 2011 the Dutch self-regulatory body *Stichting Reclame Code* (SRC) redefined the definition of advertising so that it includes new marketing techniques and is in line with the ICC Framework, AVMSD and Unfair Commercial Practices Directives. Article 11 of the SRC's Code for Advertising directed at Children and Young People of May 2011 states that persons starring in audiovisual programmes, who are for that reason held to have influence on children and enjoy their confidence, are not allowed to star in audiovisual advertising.



Poland: The Polish Federation of the Food Industry Union of Employers introduced a self-regulatory code in 2010 called the Code Governing Food Advertisements Addressed to Children. The Code forbids advertising food, except for foodstuffs that meet specific nutrition criteria whenever at least 50% of the target audience is children under 12 years old. Additionally, advertisements targeted at children cannot promote unhealthy lifestyles.

Portugal: Under the 2005 Code of Good Practice in Commercial Communication to Children it is not permissible to show adverts with celebrities or



characters – even animated characters – in or around the same programmes or films where such celebrities or characters appear. This does not apply to campaigns that promote healthy eating habits for children and/or physical activity.

Spain: The 2011 Law on Food Safety and Nutrition contains provisions on certain aspects of food advertising. The law mandates competent authorities to promote co-regulatory agreements with the food and beverage industry and with audiovisual media service providers to establish codes of conduct on food and beverage advertising to children under 15. The Spanish co-regulatory code for food advertising aimed at children (the PAOS code) implements the Law on Food Safety and Nutrition and was extended in 2012 to include online advertising restrictions in the case of web-pages where over 50% of the audience are aged under 15. The provisions for audiovisual and printed media remain applicable to advertising to children under 12.

United Kingdom: Under self-regulatory rules:

- Advertisements must not encourage or condone damaging oral health care practices;
- Article 13.9.2 of the Code of Broadcast Advertising (BCAP) states that advertisements should not encourage children to eat or drink a product only to take advantage of a promotional offer: the product should be offered on its merits, with the offer as an added incentive.

CONTENTS:

- Sponsorship
- On demand services
- Minutes of advertising per hour
- Self promotion
- Interruption of programmes
- Product placement
- Identification requirement
- Similar consideration
- Surreptitious advertising
- Undue prominence
- Surreptitious advertising



Media freedom and pluralism is a cornerstone of democratic European values.

PART III:

// CASE LAW:

NATIONAL AND EU JUDGEMENTS

The final section of this practical guide contains a selection of judgements from national and EU case law. The judgements and decisions are organised by topic and country. This is not intended to be an exhaustive list. However, it highlights the various contentious issues mentioned in the previous sections and gives a good flavour of how the respective Member State and EU competent authorities have ruled on the intricacies of the AVMSD.

SPONSORSHIP

Austria

Promotional sponsor references constitute advertising and must therefore be separated from programme material.

On 5 November 2012, the Austrian Federal Communications Senate (*Bundeskommunikationssenat* - BKS) confirmed that a sponsor reference that was excessively promotional in nature should be separated from the preceding programme by optical, acoustic and spatial means, in accordance with the rules on traditional television advertising. The decision concerned a reference to a photography studio as the sponsor of a programme broadcast by *Burgenländisches Kabelfernsehen* (BKF). The reference was accompanied by the following spoken text: "Steve Haider photography, your partner for modern corporate and wedding photography and dynamic portraits, hopes you enjoy the following programme."

The Austrian Communications Author-

ity, (*Kommunikationsbehörde* - *KommAustria*) considered that the sponsor reference was likely to persuade previously uninformed or undecided viewers to purchase the sponsor's products and services. It should therefore be considered as advertising in the sense of Article 2(40) of the *Audiovisuelle Mediendienste-Gesetz* (Audiovisual Media Services Act - AMD-G), but had not been separated from the preceding programme under the terms of Article 43(2) AMD-G, which required the separation of programme material and advertising.

BKF appealed to the BKS against this decision, arguing that a neutral reference to or description of a product should be considered admissible and that the boundary between a reference to a sponsor and advertising was only crossed if positive value judgments were made or specific features of the product or service emphasised.

The BKS rejected the appeal and agreed with *KommAustria's* reasoning. This was not a case of a simply neutral reference or objective information. The use of the

term modern in connection with corporate and wedding photography was a value judgment, since it would give the average viewer the impression that this company provided a state-of-the-art photography service from both the artistic and technical points of view and portrayed companies and weddings in a contemporary way.

The mention of dynamic portraits could also, in accordance with case law, not be considered neutral information.

Since this was therefore a form of advertising, it should have been clearly separated in a manner likely to indicate to the viewer that advertising was about to be shown. Rather than meeting this requirement, the promotional sponsor reference, broadcast during the programme without any optical or acoustic separation from the editorial content shown immediately beforehand, had formed an integral part of the BKF programme.

Source: Matzneller, P., Promotional Sponsor References Constitute Advertising and Must Therefore be Separated from Programme Material, IRIS 2013-2:1/10.

Decision: BKS decision of 5 November 2012 (GZ 611.001/0002-BKS/2012).

Belgium (North)

Flemish public broadcaster fined for the display of Red Bull and Burton.

On 17 December 2012 the Flemish Media Regulator (*Vlaamse Regulator voor de Media - VRM*) ruled against public broadcaster VRT. During the programme *Café Corsari* on één, a channel of the Flemish public broadcaster VRT, Seppe Smits, a



snowboarder, was interviewed about the Snowboard World Cup in Antwerp. Seppe Smits was wearing a cap with the logo of his sponsor, Red Bull, and a t-shirt bearing the brand of another sponsor, Burton. During the interview with Seppe Smits and during two interviews with other guests, the Red Bull logo and the Burton brand were displayed several times. According to VRM, this practice infringes Article 100, §1, 3° *Mediadecreet* (Flemish Broadcasting Act) stating that product placement is allowed if no undue prominence is given to the products included in the programme.

According to the public broadcaster, the references to this brand and logo could not be labelled as product placement, because the broadcaster did not receive any payment or any equivalent consideration for their display. Furthermore, the public broadcaster emphasised that it did not have the intention to promote these two sponsors of the snowboarder. Finally, the public broadcaster stressed that it did its best to avoid the display of brands and logos in its programmes. Before the interview, for example, Seppe Smits was asked to

give undue prominence to the product, service or brand in question. According to VRM, this means that broadcasters are allowed to exchange the display of brands or logos of the sponsors of an interviewee for an interview with that person.

However, at the end of the interview with Seppe Smits, the logo and brand were displayed 35 times during a period of 200 seconds. VRM decided that the public broadcaster had violated the limits of acceptable attention that could be given to a product in a programme containing product placement. As a consequence, Red Bull and Burton had benefited from undue prominence, in breach of Article 100, §1, 3. Due to the gravity of the violation, VRM decided to impose a fine of EUR 5,000.

Source: Lefever, K., Flemish Public Broadcaster Fined for the Display of Red Bull and Burton, IRIS 2013-3:1/10.

Decision: VRM v. VRT, Decision 2012/036, 17 December 2012.

Finland

Visibility in programme deemed sponsorship by regulator.

In June 2011, the Finnish regulator FICORA published its legally binding decision concerning two programmes *Tuuri* and *Unitupa*. In its decision FICORA found that gratuitous accommodation and food provided to the production company constituted sponsorship, since the party providing the services received in return visibility in the programme *Tuuri*. The party providing the gratuitous services was the location where the programme

take off his cap, but he refused to do so. According to VRM, the positive display of brands and logos during programmes resulted in a positive attitude of the public towards these products. With this in mind, one can reasonably assume that some of the viewers of the programme will be convinced to buy these products. Hence, VRM judged that the systematic display of brands and logos during programmes promotes, if only indirectly, the products, services or images of these companies. Furthermore, the fact that the public broadcaster decided to do the interview with the snowboarder indicates that the broadcaster choose to display the brand and logos in exchange for this interview. In such a situation, the display of brands and logos becomes a commercial product and, thus, should be considered as similar consideration. Given that VRM stressed that the interview with Seppe Smits should be considered as a production aid for the public broadcaster, the several displays of the Red Bull logo and the Burton brand should be labelled as product placement. However, programmes containing product placement may not

was filmed (a shopping centre called Tuuri). In the same decision, FICORA also evaluated another programme called *Unitupa*, an advertiser-funded programme. FICORA found that the product placement contained in the programme constituted undue promotional references to the products and, in addition, that the programme contained surreptitious advertising of the sponsor's products.

Decision: FICORA's decision concerning programmes *Tuuri* and *Unitupa*, 17 June 2011 (1952/9224/2010).

Netherlands

Scribes are not allowed under the Dutch Media Act.

On 14 January 2013, the Amsterdam District Court (*Rechtbank Amsterdam*) ruled that electronically-added advertisements displayed with games results, so-called *scribes*, (i.e., promotional expressions) are not allowed under the *Mediawet* 2008 (Dutch Media Act - Mw). On 10 September 2009 the *Commissariat voor de Media* (Dutch Media Authority) imposed a EUR 60,000 fine on the Dutch Public Broadcaster (*Nederlandse Omroep Stichting* - NOS) for not complying with the sponsorship rules applicable to public service broadcasters (violating Article 2.89 (1)(b) Mw) by using the above-mentioned scribes. NOS filed an objection against the imposed fine, which was rejected by the Dutch Media Authority. NOS appealed the decision of the Dutch Media Authority before the Amsterdam District Court.

NOS argued that the advertisements for the Sponsor Bingo Lottery (hereafter the *Lottery*) that were electronically

added fall within the exemption applicable to charity institutions provided by Article 1.1(2) Mw. The Court, however, did not accept this argument. It states that the viewer is encouraged to buy the Lottery's products, because buying a lottery ticket is the only way in which the viewer could support the Lottery's charities.

Subsequently, NOS argued that the scribes were allowed under Article 2.89(2) Mw, because the scribes were not predominant in the broadcast and were therefore exempted. The Court rejected this argument on the following grounds: Article 2.89 Mw does not cover advertisements that are electronically added to the broadcast. Therefore, scribes do not benefit from this exception.

Thirdly, NOS stated that scribes were allowed because they comply with the criteria of Article 9(1)(c) *Mediabesluit* 2008 (Dutch Media Ordinance), which allows advertisements in certain circumstances. The Dutch Media Ordinance provides specific rules on certain aspects of the Dutch Media Act. According to the aforementioned article, reference to a product or service is allowed if the reference is not exaggerated or excessive. The Court, however, stated that exaggeration and excessiveness is a given fact with regard to scribes.

It was NOS's duty to examine whether scribes were prohibited under the Dutch Media Act. However, the Court found that the fine should be reduced due to the fact that scribes are a completely new phenomenon that the Dutch Media Authority has never sanctioned before. The Court also took into account the fact that NOS had taken

adequate measures to prevent future offences. Therefore, the imposed fine was reduced to EUR 30,000

Source: de Leeuw, A., *Scribes are not allowed under the Dutch Media Act*, IRIS 2013-4:123.

Decision: Judgment of the District Court of Amsterdam, NOS-Eredivisie v. CvdM, LJN BY8744.

United Kingdom

Regulator finds sponsorship credits to be in breach of Broadcasting Code.

In February 2013, Ofcom, the UK communications regulator, decided that a number of sponsorship credits were in breach of its Broadcasting Code. These are credits that identify the sponsors of programmes, as is required for reasons of transparency. Indeed, the code requires that sponsorship is clearly identified by credits that make clear the identity of the sponsor and the relations between the sponsor and the sponsored content. However, credits do not count as part of the advertising permitted under the AVMS Directive, and in order to prevent

the credits from effectively becoming extra advertising, they must not contain advertising messages. This is required both by the Directive and by guidance from the European Commission. The requirements are reflected in the Broadcasting Code, which states that such credits around sponsored programmes must not contain advertising messages or calls to action, and must not encourage the purchase of the products or services of the sponsor. They may only refer to such products or services for the sole purpose of helping to identify the sponsor. Credits during programmes must also not be unduly prominent and must consist of a brief neutral statement identifying the sponsor.

Ofcom reported 11 cases of sponsorship credits that infringed the provisions of the code. For example:

- Sponsorship credits for the Channel 5 programme *Half Built House* by RatedPeople.com, an internet service permitting homeowners to contact tradespersons rated for quality, had included the message "The next time you are looking for a tradesman, make





sure they're rated; Ratedpeople.com sponsors of *Half Built House*."

Messages relating to other programmes included "MakeaMatch sponsors Inside Hollywood; find love today", "Indian idol presented by Lycamobile; call the world for less", and "Powered by Claim Today Solicitors; don't delay, claim today." All were found to be in breach as they included advertising material or a call to action.

In one case, sponsorship of weather forecasts by Qatar Airways included credits showing more pleasant conditions elsewhere in the world accompanied by the company's logo for less than two seconds, with no further identification of the sponsor in the opening credits. Although a voiceover identified the sponsor in the closing credits, Ofcom decided that there was a breach of the Code, as the association between the sponsor and the sponsored content was not made clear in the opening credits.

Source: Prosser, T., Regulator finds sponsorship credits to be in breach of

broadcasting code, IRIS 2013-4: 1/15.

Decision: "Sponsorship Credit Findings" in Ofcom Broadcast Bulletin 223, 4 February 2013.

ON-DEMAND SERVICES

Austria

Video section of newspaper website is notifiable on-demand service.

On 13 December 2012, the Austrian Federal Communications Senate (*Bundeskommunikationssenat* - BKS) ruled that the video section of a newspaper's website meets all the criteria of an on-demand service in the sense of Article 2(4) in conjunction with (3) of the *Audiovisuelle Mediendienste-Gesetz* (Audiovisual Media Act - AMD-G). Under Article 9 AMD-G, its existence must therefore be signalled to the regulatory authority.

The *Tiroler Tageszeitung* operates a news portal, www.tt.com, which contains the online edition of its daily newspaper. Under the subdomain video.tt.com, the operator provides access to videos that are divided into categories (including news, culture, politics and economy) and can be searched. The video section has the same design and general navigation system as the rest of the newspaper's website.

The operator argued that the videos merely supplemented the rest of the website. They were not an on-demand service, since the videos were not the principal purpose of the overall service. Furthermore, they were only short videos, which were not *television-like* in the sense of Recital 24 of the Audiovisual Media Services Directive (2010/13/EU - AVMSD).

The BKS disagreed. Firstly, it was not obvious why the individual videos in the various categories were not *television-like*. In terms of content and form, the videos were no different from traditional linear television broadcasts. In addition, the legislation did not set a minimum duration for a programme.

According to the BKS, the video section should also not be considered an incidental element of the newspaper's website. The videos were part of a separate subdomain that, apart from short descriptions, was exclusively reserved for audiovisual content and represented a *consumable* service without any textual content. The presentation and content of the videos stored in this subdomain confirmed that they did not merely fulfil the secondary or subordinate function of illustrating a particular text. The catalogue of programmes contained in the video section was therefore separate from the rest of the www.tt.com website and should therefore be treated as an independent service. According to the AVMSD, and in line with the AMD-G, such on-demand audiovisual services are notifiable and subject to the corresponding regulations.

Source: Matzneller, P., Video section of newspaper website is notifiable on-demand service, IRIS 2013-3: 1/9.

Decision: BKS decision of 13 December 2012 (GZ 61.1.191/0005-BKS/2012).

Sweden

Radio and Televisions Act applies to newspapers' web TV services.

On 29 October 2012, the Swedish Broadcasting Commission (*Gransknings*



snärmmnden för radio och TV - SBC) delivered four decisions regarding the application of *Radio och TV-lagen* (The Radio and Televisions Act - RTL) in relation to Web TV sections on newspapers' websites. The cases were of a similar ilk and related to the websites of the newspapers Aftonbladet, Dagens Nyheter, Helsingborgs Dagblad and Norran.

Firstly, the SBC had to decide whether the RTL applied to a Web TV service as such. According to the *travaux préparatoires* of the RTL, which refer to the Audiovisual Media Services Directive 13/2010/EU, the primary objective of a service must be to provide a programme in order for the service in question to fall within the definition of an audiovisual media service. The SBC found that the TV programmes on the websites constituted separate services compared to other content on the newspapers' websites. Moreover, the programmes were made available to the general public at the request and at the time chosen by the user, and programmes were also classified in catalogues such as *Sports and News*. In light of these facts, SBC established the Web TV sections of the newspaper websites



web TV services, IRIS 2013-1:1/35.

Decisions:

- Swedish Broadcasting Commission's decisions in Case No. 12/00777 of 29 October 2012.
- Swedish Broadcasting Commission's decisions in Case No. 12/00778 of 29 October 2012.
- Swedish Broadcasting Commission's decisions in Case No. 12/00779 of 29 October 2012.
- Swedish Broadcasting Commission's decisions in Case No. 12/00780 of 29 October 2012.

United Kingdom

ATVOD's rulings on what is a video-on-demand service overturned.

If a service in the United Kingdom constitutes a *video-on-demand* service, it should so notify ATVOD - the Authority for Video on Demand - so as to come under its regulatory jurisdiction regarding editorial content and pay an annual fee. Interpreting the criteria in concrete cases is, in the first instance, the responsibility of ATVOD; however, it is the UK communications regulator Ofcom that has the ultimate legal responsibility, and thus the right of appeal should be directed to Ofcom.

The VOD criteria (in implementing the Audiovisual Media Services Directive) are retrofitted through the Audiovisual Media Services Regulations 2009 and the Audiovisual Media Services Regulations 2010, as Section 368A of the Communications Act 2003. This defines an On-Demand Programme Service (ODPS). One of the main criteria is that ... *"its principal purpose is the provision of programmes, the form and content of*

which are comparable to the form and content of programmes normally included in television programme services." (Section 368A(a)).

The two cases in question involved BBC Worldwide, with respect to two of their YouTube channels. One was Top Gear and the other BBC Food. According to ATVOD, these were on-demand programme service (ODPS). BBC Worldwide argued that, whilst the relevant content was similar to television programme services, it was "in the form of clips of programmes, not programmes in themselves". Clips were of approximately 5 to 8 minutes (and a maximum of 15 minutes) duration whereas, e.g., BBC iPlayer (regulated by ATVOD) presents full-length programmes.

In determining whether a VOD constitutes an ODPS, Ofcom adopts a two-stage test: (i) what is the principal purpose of the service (i.e., is it to provide programme services?) and (ii) the comparability test (is the material sufficiently comparable to television programme services?).

In reviewing the appeal, Ofcom considered that the form and content of audiovisual material on the service, provision of which is its principal purpose, is not comparable to the form and content of linear television programme services. The service was not, therefore, an ODPS within the meaning of section 368A(1) of the Act.

Based on this, Ofcom overturned the decision by ATVOD, upheld the BBC's appeal and substituted their decision for ATVOD's.

Source: Goldberg, D., ATVOD's rulings

on what is a video-on-demand service overturned, IRIS 2013-4:1/14.

Decision: Ofcom BBC Food Youtube decision, published on 18 January 2013, Ofcom BBC Top Gear decision, published on 18 January 2013.

MINUTES OF ADVERTISING PER HOUR

Italy

Advocate General gives opinion on different hourly limits for PSB and private broadcasters.

On 15 May 2013, Advocate General Kokott delivered her opinion in case C-234/12 *Sky Italia*. The case concerns the compatibility of the Italian rule that sets out different hourly limits for television advertising for free-to-air broadcasters and pay-TV broadcasters. Under Italian law, a maximum of 14% of a given hour can be devoted to advertising on Italian pay TV, whilst that figure is 18% on free-to-air private TV.

The opinion follows Decision No 233/11/CSP of 13 September 2011, in which the Italian *Autorità per le Garanzie*



nelle Comunicazioni (AGCOM) imposed a fine of EUR 10,329 on the broadcaster Sky Italia s.r.l. for an infringement of the maximum transmission time for television advertising. According to AGCOM's findings, between 21:00 and 22:00 on 5 March 2011, Sky Italia transmitted a total of 24 television advertising spots on its pay-TV station Sky Sport 1, the total duration of which was 10 minutes and 4 seconds, which is more than 16% of the hourly programming time. Consequently, in that time period the permitted maximum transmission time for television advertising, which at that time, under Article 38(5) of Legislative Decree 177/2005, was 14% of a given clock hour, was exceeded by more than two percentage points.

Sky Italia appealed the decision at the Tribunale Amministrativo Regionale per il Lazio. Sky Italia essentially claimed that the decision is unlawful because its legal basis, in the form of Article 38(5) of Legislative Decree 177/2005, is contrary to EU law. The parties to the main proceedings are in dispute in particular as to whether different maximum transmission times for television advertising are compatible with the general prin-



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ciple of equal treatment under EU law and whether they are likely to impair the freedom and pluralism of the media.

AG Kokott considers that the compatibility of the Italian rule depends upon the objective pursued by the Italian legislation, and it is essentially for the referring court to decide whether the rule pursues a purely economic aim incompatible with Union law (by ensuring that free-to-air broadcasters receive higher advertising revenues) or a legitimate objective capable of restricting fundamental freedoms (protection of consumers).

Opinion: Opinion of Advocate General Kokott in Case C 234/12 Sky Italia [2013].

Italy

ECJ rules on Italian provision on television advertising.

On 18 July 2013, the European Court of Justice ruled that the Italian provision on television advertising, which lays down lower hourly limits for advertising for pay-TV broadcasters than for free-to-air TV broadcasters, is, in principle, compatible with European Union law.

The Court notes, first of all, that the Directive does not completely harmonise the areas to which it applies, but lays down minimum requirements.

Consequently, Member States have the option to lay down more detailed or stricter rules and, in certain cases, different conditions, provided they comply with European Union law. Accordingly, where the Directive provides that the proportion of television advertising and

teleshopping spots are not to exceed 20%, it does not preclude the Member States from imposing different limits within that threshold. The national rules must, nevertheless, observe the principle of equal treatment.

The Court then points out that the principles and objectives of the rules on television advertising limits are intended to establish a balanced protection, on the one hand, of the financial interests of television broadcasters and advertisers and, on the other hand, of the interests of writers and producers, in addition to consumers as television viewers.

That balance varies according to whether or not television broadcasters transmit their programmes for payment.

The financial interests of pay-TV broadcasters, which obtain revenue from subscriptions taken out by viewers, are different from those of free-to-air TV broadcasters, which do not benefit from such a direct source of financing and must finance themselves, *inter alia*, by generating income from television advertising. Such a difference is, in principle, capable of placing pay-TV broadcasters in a situation that is objectively different.

The situation of viewers is equally different, depending on whether they are subscribers to pay TV (in which case they pay to enjoy television programmes) or they use free-to-air television.

It follows that, in seeking a balanced protection of the financial interests of broadcasters and of viewers, the national legislature may set different hourly broadcasting limits for advertising on pay-TV and on free-to-air TV.

Finally, the Court points out that the Italian legislation could amount to a restriction on the freedom to provide services.

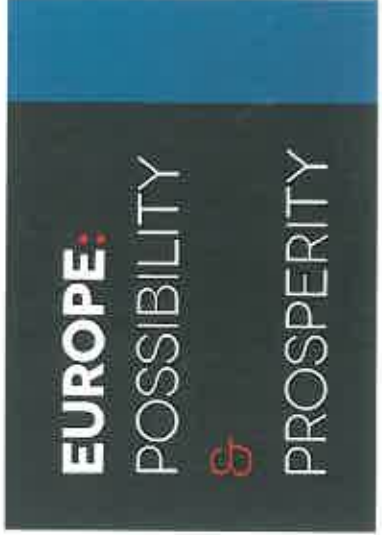
In that regard, the Court states that the protection of consumers against abuses of advertising nevertheless constitutes an overriding reason relating to the general interest that may justify restrictions on the freedom to provide services, provided that those restrictions are such as to ensure achievement of the aim pursued and do not go beyond what is necessary for that purpose. It is for the referring court to assess whether those conditions are satisfied.

Decision: Judgement of the Court (Second Chamber) of 18 July 2013.

Slovakia

Media Partnership as remuneration for advertising.

On 21 February 2012, the Council for Broadcasting and Retransmission of the Slovak Republic (Council) received complaints about an excessive amount of advertising within certain programmes



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of the major commercial TV broadcaster in Slovakia.

In the case at hand, an examination carried out by the monitoring department of the Council revealed two advertising breaks that together lasted exactly 12 minutes within the examined hour. However, another announcement of 20 seconds about a forthcoming musical at the state theatre was broadcast within this period.

Although placed outside the commercial break among other trailers, this announcement contained short extracts of the musical along with phrases such as "full of fun and emotion", "musical that was long waited for" etc. Due to the promotional nature of this announcement, the Council started a legal investigation in view of a possible violation of the legal maximum of 12 minutes of advertising during one hour of broadcasting.

In its response, the broadcaster claimed that the announcement merely informed the audience about the forthcoming musical. The state-owned theatre could not be treated as a regular commercial enterprise, and the promotion therefore could not be qualified as advertising. The purpose of this announcement was solely to promote Slovak culture, carried out free of charge. Hence, it should be considered as "a message broadcast in the public interest".

The Council disagreed and imposed a fine of EUR 3,319. It stated that the announcement fulfilled the definition of advertising and thus had to be included in the total time of advertising. Besides merely informing about the premiere,

the announcement was worded clearly in a promotional manner. Furthermore, in cases where it is clear that the purpose of the announcement is to promote the supply of goods or services there is no other logical reason for a broadcaster to air such announcements than to gain profit of some kind.

The Council also stated that even though the theatre is state-owned, the revenues of its plays form a considerable part of its income. In this context, the remuneration for broadcasting the advertising does not necessarily have to be provided in cash payment. Similar consideration also includes any form of bartering deals or partnerships. These may never appear in the accounts of the broadcaster and thus are untraceable but find expression in any kind of media partnership whatsoever.

The broadcaster repeated its argument in its Supreme Court appeal. The Court, however, fully upheld the Council's decision and its conclusions in its ruling of 11 September 2012 and followed the opinion that the remuneration for advertising is not limited to cash payment. Hence, the Court also confirmed

that media partnership fully qualifies as a form of similar consideration for TV advertising.

Source: Polák, J.: Media partnership as remuneration for advertising, IRIS 2013-1:1/36.

Decisions:

The Council for Broadcasting and Retransmission of the Slovak Republic decision, RP/012/2012.

Supreme Court's decision of 11 September 2012, 3S2/6/2012.

Slovakia

Broadcasting of a film trailer is advertising.

On 13 November 2012, the Supreme Court confirmed a decision of the Council for Broadcasting and Retransmission of the Slovak Republic (Council) in which the Council had imposed a fine of EUR 3,319 on the major commercial TV network broadcasting the channel TV JOJ for airing more than 12 minutes of advertising in one hour.

The Council's monitoring revealed that during one of the examined hours the broadcaster transmitted advertising



spots that altogether lasted 11 minutes and 59 seconds. However, during the same hour, another message (of 19 sec.) about a film that was coming to cinemas that week was broadcast. This spot was aired amongst announcements made in connection with the broadcaster's own programmes. The announcement contained short extracts from the film with brief text information on its plot. The words "in the cinemas from ..." with the name of the distribution company was displayed at the end of the message.

During the legal investigation, the broadcaster claimed that the particular spot was a usual trailer for its own programme and should not therefore be counted as advertising time. In order to sustain this statement, the broadcaster presented the license agreement that entitled it to transmit the film on its TV channels. It also claimed that viewers must have understood that the film is its own programme because of the time slot of the spot (amongst other trailers, not among advertising spots).

In its decision, the Council stressed that any announcement must be assessed on the basis of its content and nature and not by the provisions of a particular contract. The spot itself did not carry any kind of message that would inform viewers about the fact that the broadcaster would air this programme in future. On the other hand, the spot contained very clear information about the date of the cinema premiere.

The Council also reviewed the contract and pointed out that according to its provisions the broadcaster was not allowed to broadcast this film on its TV channels for at least one year and three



Spain

ECJ rules on other types of advertising within the 12 minute rule.

The judgement from 24 November 2011 concerns the case from the Commission against Spain (2008) on the definition of the concepts of *advertising spots* and *other forms of advertising* and the application of the corresponding rules contained in Directive 552/89, as modified by Directive 97/36. The Spanish authorities regarded as *other forms of advertising* four specific types of advertising that the Commission considered to be *advertising spots*.

In the European Commission's view, Spain misinterpreted the EU's Television without Frontiers Directive by defining *advertising spot* too narrowly. This means that it does not count various forms of advertising like micro-slots, short telepromotions and advertorials within the 12 minute per hour limit. These familiar features of Spain's audiovisual landscape are subject to a different 17 minute per hour limit, despite having all the characteristics of spot adverts.

Fully supporting the Commission's position, the ECJ found that:

Any type of television advertising broadcast between programmes or during breaks constitutes, as a general rule, an advertising spot, unless:

- The type of advertising concerned is covered by another form of advertising expressly governed by the Directive;
- It requires a duration greater than that of advertising spots, because of

months from the broadcast of the so-called trailer. On the contrary, it was obliged under the contract to promote this film on its TV channels one week before its cinema premiere. Based on these facts, the Council stated that despite the fact that the broadcaster owns the broadcasting rights for this film, the purpose of this message was clearly to promote the premiere of this film in cinemas. Thus, the spot qualifies as an advertising spot and must be counted within the total time devoted to advertising.

The broadcaster claimed in its appeal that no regulation sets any time restrictions regarding announcements made in connection with own programmes. The Court however dismissed the broadcaster's appeal and agreed with the Council that a regular viewer could not have known that the featured film would be aired on the broadcaster's TV channels.

Source: Polak, J.: Broadcasting of a film trailer is advertising, IRIS 2013-3-1/28.

Decision: Supreme Court decision of 13 November 2012, 35Ž/10/2012.



the way it is presented. This exception would however only apply when the application of the hourly time limit set out in the Directive for advertising spots would, without valid justification, amount to disadvantaging the form of advertising concerned compared to advertising spots.

If a specific type of advertising has inherently - because of the way it is presented - a duration that is slightly longer than the usual duration of advertising spots, this fact alone is not sufficient for it to be considered an *other form of advertising*.

The Court declared that, by tolerating a situation in which the broadcasting of certain types of advertising, such as advertorials, telepromotion spots, sponsorship credits and micro-ads, on Spanish television channels has a duration which exceeds the maximum limit of 20% of the transmission time within a clock hour, as laid down in Article 18(2) of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit

of television broadcasting activities, as amended by Directive 97/36/EC of the European Parliament and the Council of 30 June 1997, the Kingdom of Spain has failed to fulfil its obligations under Article 3(2) of that Directive.

Decision: Judgment of the Court (First Chamber) of 24 November 2011, OJ C 25, 28.1.2012.

SELF-PROMOTION

Belgium (South)

RTBF infringes self-promotion provisions of Broadcasting Act.

On 28 February 2013, during a news programme on RTBF, the French-language public broadcaster in Belgium, a news report was shown regarding an upcoming episode of RTBF's programme *The Voice Belgique*. According to the audiovisual regulatory body (*Conseil Supérieur de l'Audiovisuel - CSA*) this report infringed Article 14, § 1 of the *décret coordonné sur les services de médias audiovisuels* (the Broadcasting Act) requiring that commercial communication must be readily recognisable as such. The CSA also argued that the

report was in breach of Article 18, § 3 of the Act which prohibits the inclusion of self-promotion in news programmes.

RTBF denied having infringed the self-promotion provisions of the Act. Firstly, according to RTBF, it was justifiable to include a report about the particular episode of *The Voice Belgique* in the news programme, because it was a hot topic that day (newspapers also referred to the episode on their front pages). Secondly, the reference to *The Voice Belgique* did not differ from other references made in the news programme to other programmes on the public broadcaster, such as *Questions à la Une*. As a result, RTBF argued that this report could not be labelled as self-promotion.

However, CSA did not share RTBF's opinion. According to CSA, a programme could be presented in two different ways: in an informative way or in a promotional way. The latter should be referred to as self-promotion, that is, any message transmitted at the initiative of a broadcaster to promote its own programmes, channels, services or products that have a direct link with the programmes - Article 1, 3° of dé-

cret coordonné sur les services de médias audiovisuels. CSA stated that *The Voice Belgique* report did not promote the programme in an informative way, but rather in a promotional way. In particular, the way in which the news report about *The Voice Belgique* was presented differed from the way the other news reports were made. *The Voice Belgique* report was characterised by any lack of criticism. Furthermore, CSA judged that this news report could not be compared with the references made to *Questions à la Une*, because that programme was made by the same news department of RTBF.

As a result, CSA decided that this report should be labelled as self-promotion and that the broadcaster had infringed Articles 14, § 1 and 18, § 3 of *décret coordonné sur les services de médias audiovisuels*. On this occasion, the CSA decided not to impose a fine on RTBF but instead issued the broadcaster with a warning.

Source: Lefever, K.: RTBF infringes self-promotion provisions of Broadcasting Act, IRIS 2013-6:1/8.

Decision: CSA, Decision of 28 March 2013.

INTERRUPTION OF PROGRAMMES

Belgium (North)

Flemish Commercial Broadcaster allowed to interrupt a film for advertising.

On 31 December 2011 at 20:20, the film *Ratatouille* was broadcast on VTM, a Flemish commercial broadcaster. This movie was interrupted three times by

advertising breaks. The Flemish media regulator (*Vlaamse Regulator voor de Media* - VRM) received a complaint. According to the plaintiff, this movie should not have been interrupted by advertising because it is a children's programme (Article 80 (2) *Mediadecreet* (Flemish Broadcasting Act)). However, VRM judged that this Article was not violated.

The general rule about the interruption of programmes by advertising is that broadcasters can choose when they interrupt their television programmes for advertising, on the condition that the integrity of the programmes, taking into account natural breaks in and the duration and the nature of the programme, and the rights of the rights-holders, are not prejudiced (Art. 80 (1)). However, children's programmes cannot be interrupted for advertising (Art. 80 (2)).

According to the plaintiff, the film *Ratatouille* should be labelled as a children's programme. As a result, it was forbidden to interrupt this film with advertising blocks. However, VRM judged that *Ratatouille* should not be labelled as a children's programme. Article 2, 19° of the Flemish Broadcasting Act defines children's programme as "a programme that is mainly aimed at children, evidenced by the content, the time of the broadcast, the design, the presentation and the way it is announced". A child is defined as "a person under the age of twelve" (Art. 2, 18°). The VRM emphasised that not all programmes suitable for children would fall under the definition of children's programme. Only the programmes that primarily aim at children under the age of twelve years do fall under the scope of this defini-



tion. The content, time of broadcast and presentation of the film *Ratatouille* (criteria mentioned by the legislature) demonstrate that the film was aimed at a broad audience, including both children and adults. Different reviews of this film even indicate that it is a child-friendly film, but that adults might like it more because of the nuanced humour and references aimed directly at adults. Additionally, the film was not aired at a time when VTM would normally broadcast children's programmes. As a result, VRM judged that the film *Ratatouille* cannot be classified as a children's programme and, thus, could be interrupted by advertising.

Source: Lefever, K.: Flemish commercial broadcaster allowed to interrupt a film for advertising, IRIS 2012-5:17.

Decision: P.V. v. VMMA, Decision 2012/006, 20 February 2012.

CONVERTING
CREATIVE
IDEAS INTO
BUSINESS
PRACTICE

PRODUCT PLACEMENT

Identification requirement

Slovakia

Non-compliance with product placement identification requirement.

On 15 January 2013, the Council for Broadcasting and Retransmission of the Slovak Republic (Council) imposed a fine of EUR 1,500 on the major commercial broadcaster for the failure to inform the public about the existence of product placement in its programme and for giving undue prominence to the product in question.

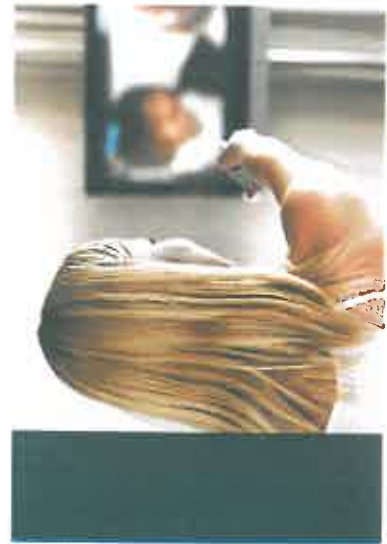
The programme was a reality show taking place in a bar. Even though the bar was an operating business, it was built solely for the purpose of producing the reality show. The bar contained many products with commercial logos visible. Since this programme was under the exclusive editorial control of the broadcaster, it was considered by the Council that this was no case of incidental display of commercial trademarks.

The Council therefore began a legal

investigation and queried the broadcaster as to whether any payments had been made in connection with these products or whether products had been provided free of charge. However, the broadcaster did not provide any information to the Council.

The Council refrained from imposing charges in respect of seven out of eight products, reasoning that there was no clear evidence that references made to these products fulfilled the definition of product placement, due to reasonable doubts about the existence of remuneration. All of the products were items that naturally occur in the given environment (beer tap, glasses, menus, coffeeemaker, etc.). The Council stated that it could not be ruled out that the broadcaster obtained these items itself and included them in the programme with the intention of increasing the credibility of the appearance of a real bar. References to these products also did not support the idea of commercial placement since these products were in no case shown in a prominent way (all references were visual and the products were displayed in the background only). With regard to these products, the Council maintained its *in dubio pro reo* approach already adopted in previous cases (host of the show wearing a t-shirt with a trade mark, open notebook with visible logo in its back) when it also did not impose fines in cases when the broadcaster denied or did not confirm the product placement in the programme and the products were not displayed in a clearly promotional manner.

The Council instead did impose the sanction due to the references made to the last product - a bottle of champagne.



The programme contained two zoomed shots aimed directly at the label of the bottle rendering the trade mark clearly visible. The Council stated that promotional references to the product are references that cannot possibly serve any other than a promotional interest. Such references are always made in return for payment or some other similar consideration. The actual form of this consideration - cash payment, barter deals, written contracts or gentleman's agreements - is irrelevant.

The Council also stated that the programme gave undue prominence to the product in question. When assessing the *prominence* of the product it is necessary to review whether specific shots of the product may serve any reasonable editorial purpose. When there is no other logical explanation for featuring a product in the demonstrated manner it means that the intention is to promote this product. The Council emphasised that merely having a bottle of champagne in the given scene (champagne in a hot tub) is editorially understandable within the concept of the show. However, there is no editorial reason for the detailed shot of the label while the champagne is being poured into the glasses.

The broadcaster paid the fine on 26 March 2013 and did not appeal against the decision.

Source: Polak, J.: Non-compliance with product placement identification requirement, IRIS 2013-5:1739.

Decision: Decision of the Council for Broadcasting and Retransmission of the Slovak Republic of 15 January 2013.

Similar consideration

Belgium (North)

Flemish Media Regulator judged that production props can be seen as meeting similar consideration requirements.

On June 18 2012, the Flemish Media Regulator (VRM) published its decision against public broadcaster VRT on production props as similar consideration. In one episode of the programme *Tomfersterom*, the presenter Tom Waes, tried to learn how to ski jump. When learning how to do this, the presenter wore special ski clothing. On his ski glasses, the brand UVEX was displayed. According to the broadcaster, this could not be labelled as product placement, because neither the broadcaster nor the production company received any payment for using these UVEX glasses. However, the VRM judged that the provision of the ski glasses should be seen as production props. Given that the glasses could be labelled as production props, the requirement of similar consideration has also been met.

Decision: VRM v. VRT, Decision 2012/015, 18 June 2012.



Surreptitious advertising

Belgium (North)

Decision by Flemish media regulator on product placement and encouragement to purchase.

In January 2010, the Flemish media regulator (*Vlaamse Regulator voor de Media - VRM*) published decisions on two instances of product placement in two distinct episodes of a reality programme where participants compete to restore an apartment:

- After the presenter had praised the displayed boiler, an Electrabel representative summed up its advantages: "This boiler will certainly provide a lot of comfort to you";
- A participant paints a wall using the paint Levis and clearly expresses his admiration for the paint by saying "this is really good paint... It's incredible... it covers the wall with one layer."

The regulator noted that by highly praising the product, the programme directly encouraged its purchase.



The sanction was a EUR 10,000 fine, which can be attributed to the fact that the programme was broadcast during primetime and that these were the first cases to be judged.

Source: Cannie, H.: First decisions on product placement and sponsorship under the New Media Decree, IRIS 2010-4: 1/8.

Decision: VRM vs. NV SBS Belgium, 18 January 2010 (No 2010/005).

Belgium (South)

Decision by CSA on product placement and editorial responsibility.

On 1 July 2010, the Belgian audiovisual regulator (CSA) made a decision on product placement that took place during a popular cooking show *A table, on riz*. The cooking programme covered 10 short (1'30") programmes broadcast during two weeks in February 2010. It consisted of a popular TV presenter giving cooking tips for oriental dishes and was sponsored by a rice brand and an oriental food product brand.

The CSA found four instances of product placement by the sponsors and decided that the influence of the advertiser was prominent at all stages of production and filming and thus undermined the editorial independence of the broadcaster. They also determined that the content was tailored to serve the interests of the advertiser (although only four episodes contain product placement, all ten recipes contain the brand's products). Furthermore, the presenter of the programme was chosen and appointed by the advertiser; influence in the filming was seen (tech-

niques closer to advertising language than to those of a cookery programme) and the recipes were made available on the advertiser's website (redirection from the broadcaster's website).

As a result, the sanction was a EUR 10,000 fine as well as a requirement for a notice ratifying the product placement.

Source: Jongen, F.: RTBF guilty of product placement; IRIS 2010-8:1/13.

Decision: CSA decision of 1 July 2010.

Netherlands

Decision by Dutch Media regulator in hit show De Wereld Draait Door on product placement.

In November 2012, the Dutch media regulator (*Commissariaat voor de Media*) made a decision regarding unsolicited advertising through product placement on the show *De Wereld Draait Door* (Crazy Spinning World) on the Dutch public broadcaster's channel VARA.

In an episode of the show, Yvon Yaspers's new line of Kakebont tableware was shown in the following manner. The tableware was hidden under a tablecloth and then shown by Yvon Yaspers and show presenter Matthijs Van Nieuwkerk. A broader conversation about the product ensued, followed by a series of close-up camera shots.

The media regulator decided that referral to the product's name and subsequent displaying of the tableware constitutes unsolicited advertising, which is prohibited under the Dutch Media Act for public service channels.

The fine was originally set at EUR 100,000. Almost a year after the initial broadcast both parties reached a compromise, and the fee was reduced to EUR 50,000.

Decision: Dutch media regulator decision of November 2012, 25522/2011014639.

Undue prominence

Austria

BKS treats sponsor logo wall in sports broadcasts as product placement.

On 14 December 2011, the Austrian Federal Communications Board (*Bundeskommunikationsssenat* - BKS) commented on the character of sponsor logo walls and sew-on badges worn by experts in sports broadcasts and ruled that unlawful product placement had taken place in a specific case.

The case concerned the broadcast of a football match by the Austrian public service broadcaster (*Österreichischer Rundfunk* - ORF). During the pre-match coverage from the stadium concerned, the presenter interviewed a football

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expert. One camera shot showed the expert in front of a transparent wall displaying four colourful logos of four different brands. In addition, two other company logos were pictured, covering a large area (8 x 5cm and 7 x 3cm) of the expert's jacket. On average, these logos covered a total of 50%-60% of the screen. The same shot was used during the half-time and post-match analysis. In all, the company logos were visible for more than five minutes. At the start of both the pre-match coverage and the match itself, the broadcaster displayed the message "p - supported by product placement" at the top of the screen.

In its assessment, the BKS agreed with the decision of the Austrian Communications Authority (*Kommunikationsbehörde Austria* - KommAustria) of 18 October 2011, which stated that product placement had taken place and that the brands had been given excessive prominence. Although ORF agreed that the logos on the expert's jacket constituted product placement, it disputed this in relation to the logo wall. ORF argued that interview positions in the stadium depended firstly on its contract with the Bundesliga and secondly on the stadi-

um rights of the club concerned, which was also responsible for the layout of the official logo walls. Regardless of that, however, ORF claimed that neither the Bundesliga nor the football clubs had an influence on the actual inclusion of logos in ORF programmes. ORF did not receive any payment or any other remuneration in return for conducting interviews in front of a logo wall.

Referring to KommAustria's decision, the BKS disagreed with ORF's argument. The sole purpose of the aforementioned contractual provisions was to ensure that the relevant logos were actually included in a broadcast. According to the BKS, it was therefore by definition a case of product placement in the form of inclusion of brands in a broadcast in return for payment or a similar service.

ORF also disputed KommAustria's view that the display of the logos had not been justified on either dramatic or editorial grounds. When drawing up this criterion, KommAustria had referred, *inter alia*, to the relevant guidelines of the German Land media authorities (*Landesmedienanstalten*). ORF argued that the relevant provision of the current *ORF-Gesetz* (ORF Act) no longer required such a dramatic or editorial justification, in contrast to a previous version (where such a justification was deemed necessary). It said that KommAustria had therefore unlawfully reconstructed a criterion which had been deliberately removed by the legislature during a reform of the Act.

This argument did not convince the BKS. The view that a dramatic or editorial justification could be used to assess whether a brand had been given exces-



sive prominence was directly supported by the origins of the provision of the EU Audiovisual Media Services Directive (2010/13/EU) in connection with the European Commission's interpretative communication of 28 April 2004 on certain aspects of the provisions on televised advertising.

The BKS also agreed with KommAustria's opinion on the intensity of the sponsors' logos and explained that the logos on the expert's jacket and the sponsors' wall had been presented in an extremely prominent and striking manner on account of their excessive size and the length of time for which they had been visible during the interview and commentary scenes. The logos had therefore been given excessive prominence, infringing the relevant provisions of the ORF Act.

Source: Matzner, P.: BKS treats sponsor logo wall in sports broadcasts as product placement, IRIS 2012-2: 1/8.

Decision: BKS decision of 14 December 2011 (GZ 611.009/0007-BKS/2011).

Belgium (North)

The Flemish media regulator has made several judgements on the notion of undue prominence in the Northern Belgian market. The following are a selection of some of the more noteworthy cases.

- In 2012 the programme *Huizerjacht*¹¹ contained an item in which an interior designer informs a couple about the renovation of a specific room in



their house. When doing so, the interior designer gives a 3D presentation on a computer screen. During this presentation, a bottle of Martini Brut, which was standing next to the computer, was shown clearly displaying the logo and the brand (11 times during this three minute-item). At the end of the presentation, while the interior designer and the couple were drinking a glass of Martini Brut, the bottle was once more displayed. The broadcaster argued that it is the tradition of *Huizerjacht* to drink a glass of cava after the presentation. As a result, drinking a glass of cava is an intrinsic part of the context of the programme. However, the VRM disagreed with this reasoning. *Huizerjacht* is a programme about house hunting, renovating and decorating houses. Given that neither the concept nor the nature of the programme is related to sparkling wine, the drinking of a glass of cava is not an intrinsic part of the programme (VRM, 2012/002).

¹¹ K. Lefever (2012), "Flemish Commercial Broadcaster Infringes Product Placement Provisions", IRIS 2012-4/11; K. Lefever (2013) "The thin blue line between monitoring advertising rules and commercial freedom in broadcasting: The case study of product placement", pp.229-244, in: Donders, K.; Pauwels, C. and Loisen, J. (Eds) *Private television in Western Europe: Content, markets and policies*. Basingstoke: Palgrave Macmillan.



report did also contain a positive presentation of the complete range of products of the store ("shop sensation", "fantastic", "unique", "beautiful", etc.). As a result, the VRM judged that this way of promoting Sissy Boy has created undue prominence for the new store, which is a violation of the product placement rules (VRM, 2010/027)¹².

- In its Seppe Smits decision, the VRM stated that programmes containing product placement may not give undue prominence to the product, service or brand in question. According to the VRM, this means that broadcasters are allowed to exchange the display of brands or logos of the sponsors of an interviewee for an interview with that person. However, at the end of the interview with Seppe Smits, the logo and brand were displayed 35 times during 200 seconds. VRM decided that the public broadcaster had violated the limits of acceptable attention that could be given to a product in a programme containing product placement (VRM, 2012/036)¹³.

Germany

Neustadt. Administrative Court extends admissible prominence of product placement.

In a ruling of 17 December 2012 (case no. 5 K 1128/11.NW), the Administrative Court (*Neustadt an der Weinstraße - VG*) upheld the appeal by the TV broadcaster Sat.1 against a decision of the

- In another decision, the VRM judged that the label Marie Jo had benefited from undue prominence, given the multiple displays of both the name of the collection and various items of this collection. Additionally, the VRM stated that the limits of acceptable attention to the products were exceeded because the report lacked any critical comment (VRM, 2010/015).

- In its Kwint decision, the VRM indicated that the name of the new restaurant was repeatedly mentioned and depicted during the report. Given that the comments accompanying the report were without exception full of praise, the VRM emphasised that the manner in which the restaurant was presented should be seen as a violation of the undue prominence criterion (VRM, 2010/026).

- In its Sissy Boy decision, the VRM indicated that the name of the shop was continually mentioned. The



Rhineland-Palatinate media authority (LMK) concerning unlawful product placement.

The Licensing and Monitoring Commission (ZAK), a joint body created by the *Landesmedienanstalten* (regional media authorities) to monitor the media at national level, had found the broadcaster guilty of violating Articles 44 and 7(7)(2) (3) of the Inter-State Broadcasting and Telemedia Agreement, under which product placement must not "give excessive prominence" to the product concerned.

Referring to this decision, the LMK lodged a complaint about the broadcast of a Europa League match on Sat.1. Although the use of product placement had been mentioned in accordance with Article 7(7)(3) RStV, the programme had twice switched to the so-called *Hasseröder Männercamp* (a beer-sponsored mobile entertainment centre for men). According to the ZAK, the presenter and an expert had repeatedly made positive comments about Hasseröder beer. The beer company's logo had also been visible many times on beer bottles and other objects in the studio, for which

there had been no editorial justification.

The *VG Neustadt* held a different view: In its opinion, product placements could be clearly visible during a programme, even if the showing or naming of the products was avoidable. Unlawful *excessive prominence* was only given if the product placement was the single dominating element, to the extent that the actual programme content was no longer recognisable.

However, the disputed switch to the *Hasseröder Männercamp* had formed part of the concept of the sports broadcast. The product placement was judged not to be overly conspicuous. The TV broadcaster had therefore not breached the aforementioned provisions of the RStV on product placement.

Source: Matzneller, P.; Neustadt Administrative Court extends admissible prominence of product placement, IRIS 2013-2: 1/17.

Decision: Decision of the *Neustadt an der Weinstraße Administrative Court*, 17 December 2012 (case no. 5 K 1128/11.NW).

¹² *Ibid.*
¹³ K. Lefever (2013). "Flemish Public Broadcaster Fined for the Display of Red Bull and Burton". IRIS 2013-3/10. <http://merlin.obs.coe.int/iris/2013/3/article10.en.html>.

United Kingdom

Visual reference to Skype may constitute product placement.

In September 2011, the UK communications regulator, Ofcom, decided that a continuous visual reference to Skype during an interview may constitute product placement.

Sky News broadcast an interview via a video call in its coverage of the Utøya island massacre in Norway. Whenever the interviewee was shown full-screen, the words "VIA SKYPE" were shown almost continuously in a caption in the top right-hand corner. There was no product placement agreement with Skype, and Ofcom was concerned that this amounted to giving undue prominence in a programme to a product, service or trade mark, which is prohibited by the broadcast code implementing the Audiovisual Media Services Directive.

Sky stated that it had included the caption to explain the relatively low production values for picture and sound quality in the interview, especially as a growing proportion of viewers watched the HD

version of the channel. No fees were paid for the use of the brand name, while the word *Skype* has become common parlance for *video conferencing*. Sky had declined to use the Skype logo and had used the brand name instead.

Ofcom noted that the presenter had made a verbal reference to Skype at the beginning of the interview, and the separate locations of presenter and interviewee were frequently indicated by graphics during the interview. This should have been sufficient to explain to viewers the lower production quality of the interview. Thus there was little editorial justification for displaying the Skype brand name throughout the ten-minute interview. However, in view of the fact that Sky has decided to reduce in future the prominence of references to services such as Skype in order to ensure compliance with the code, no penalty was imposed. References to material broadcast via webcam or via video link were found to be unlikely to raise issues under the code, but any brand references should be editorially justified and brief.

Source: Prosser, T.: Visual reference to Skype may constitute product placement, IRIS 2011-10: 1/20.

Decision: Sky News, Ofcom Broadcast Bulletin, Issue 190, 26 September 2011, page 25.



SURREPTITIOUS ADVERTISING

France

CSA allows social networks to be named on air.

On 4 January 2013, in plenary assembly, the audiovisual regulatory authority (*Conseil Supérieur de l'Audiovisuel* - CSA) revised its decision to ban specific references to social networks in radio and television broadcasts. It has become a frequent occurrence for channels to refer viewers to the pages devoted to their programmes on social networks, such as Facebook, or to invite them to respond with a Tweet. Until now, radio and television broadcasts have only been allowed to use the generic term "social networks".

In May 2011, the CSA indicated that it considered referring viewers or listeners to a social network without mentioning its name was informative, whereas giving the actual name of the social network constituted advertising, which contravened the provisions of Article 9 of the Decree of 27 March 1992

prohibiting surreptitious advertising.

The CSA, keen to take account of the evolution in habits while ensuring compliance with the regulations on advertising in the interests of consumers, now allows social networks to be named in reference to a source of information. Similarly, it is now allowed to refer the public to a social network if the reference is occasional and discreet, does not constitute advertising and is not a sustained encouragement to connect to the network. On the other hand, the CSA found that including the name of a social network in the title of a programme, and displaying the registered brand names of social networks or the distinctive signs habitually associated with them, was contrary to the ban on surreptitious advertising. The court recalled that the social networks are brand names used by commercial companies, and the ban may not, under the current version of the legislation, be waived.

Source: Blocman, A.: CSA allows social networks to be named on the air, IRIS 2013-2:1/22.



Decision: Recommendation by the CSA on mentioning social networks during radio and television broadcasts, 4 January 2013.

Greece

Provision of payment or of consideration of another kind is not a necessary condition for establishing the element of intent in surreptitious advertising.

On 10 June 2011, the European Court of Justice (ECJ) issued a ruling concerning surreptitious advertising in the framework of a complaint made by the Greek audiovisual regulator against a Greek TV channel. The ruling provides an interpretation of the definition of surreptitious advertising as included in the old EU Television Without Frontiers (TWFF) Directive, which remains unchanged in the current Audiovisual Media Services Directive (AVMSD). In particular, it states that an absence of payment or similar consideration from the client to the TV channel does not necessarily exclude the intention to advertise surreptitiously, which is banned according to EU regulation.

The judgment concerns the presentation

(including information on efficacy and costs) during a TV programme of a three-stage cosmetic dental treatment by a presenter and a dentist, who, in particular, describes the treatment as a "worldwide innovation". The presentation of the service was judged by the Greek audiovisual authority to be surreptitious advertising, and the broadcaster was therefore condemned to pay a fine of EUR 25,000 on the basis of EU legislation.

Following the appeal by the broadcaster, the Greek Council of State referred the case to the ECJ, and, in particular, raised the question of whether the definition of surreptitious advertising included in the TWFF Directive should be interpreted as meaning that the provision of payment or of consideration of another kind (i.e. for free but, for instance, in exchange for a production aid) is a necessary condition for establishing the intentional nature of surreptitious advertising.

According to the ECJ ruling, although the provision of payment or similar consideration is indicative of an intention to advertise, it is clear from the defini-



tion set out in the EU Directive, and from its purpose and general scheme, that the lack of such payment or consideration does not mean that such an intention can be ruled out. In other words, the ECJ stated that the provision of payment or of consideration of another kind is not a necessary condition for establishing the element of intent in surreptitious advertising. Furthermore, given the difficulty, or even the impossibility, in certain cases of proving the provision of payment (or of consideration of another kind) for TV advertising that nevertheless displays all the characteristics of surreptitious advertising, treating payment as a necessary condition could undermine the protection of the interests of TV viewers and deprive the prohibition of surreptitious advertising of its effectiveness.

Please note that the case is also linked to the issue of diverging translations of the EU Directive into national languages (the Greek translation differs from the EU original text, as it does not include the phrase "in particular" in the EU definition "representation is considered to be intentional, **in particular**, if it is done in return for payment or for simi-



lar consideration"). Based on this, the ECJ's judgment states that the need for a uniform interpretation and application of EU law means that the text of a provision must be interpreted and applied in the light of the versions existing in the other official languages.

Decision: C-52/10 - Eleftheri tileorasi and Giannikos.

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Seize the opportunities of the future instead of protecting the procedures of the past.

APPENDIX:

// ADVERTISING RELATED ARTICLES OF THE AVMS DIRECTIVE

Please note that the codified version of the AVMSD is used.

ARTICLE 1: DEFINITIONS

For the purpose of this Directive:

(a) "audiovisual media service" means:

(i) a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC. Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph;

(ii) audiovisual commercial communication;

(d) "media service provider" means the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised;

(e) "television broadcasting" or "televi-

sion broadcast" (i.e. a linear audiovisual media service) means an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule;

(f) "broadcaster" means a media service provider of television broadcasts;

(g) "on-demand audiovisual media service" (i.e. a non-linear audiovisual media service) means an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider;

(h) "audiovisual commercial communication" means 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 programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement;

(i) "television advertising" means any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking or natural person in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment;

(j) "surreptitious audiovisual commercial communication" means the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the media service provider to serve as advertising and might mislead the public as to its nature. Such representation shall, in particular, be considered as intentional if it is done in return for payment or for similar consideration;

(k) "sponsorship" means any contribution made by public or private undertakings or natural persons not engaged in providing audiovisual media services or in the production of audiovisual

works, to the financing of audiovisual media services or programmes with a view to promoting their name, trade mark, image, activities or products;

(l) "teleshopping" means direct offers broadcast to the public with a view to the supply of goods or services, including immovable property, rights and obligations, in return for payment;

(m) "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;

ARTICLE 9: RULES APPLICABLE TO ALL SERVICES

1. Member States shall ensure that audiovisual commercial communications provided by media service providers under their jurisdiction comply with the following requirements:

(a) audiovisual commercial communications shall be readily recognisable as such. Surreptitious audiovisual commercial communication shall be prohibited;

(b) audiovisual commercial communications shall not use subliminal techniques;

(c) audiovisual commercial communications shall not:

(i) prejudice respect for human dignity;

(ii) include or promote any discrimination based on sex, racial or ethnic ori-

gin, nationality, religion or belief, disability, age or sexual orientation;

(iii) encourage behaviour prejudicial to health or safety;

(iv) encourage behaviour grossly prejudicial to the protection of the environment;

(d) all forms of audiovisual commercial communications for cigarettes and other tobacco products shall be prohibited;

(e) audiovisual commercial communications for alcoholic beverages shall not be aimed specifically at minors and shall not encourage immoderate consumption of such beverages;

(f) audiovisual commercial communication for medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the media service provider falls shall be prohibited;

(g) audiovisual commercial communications shall not cause physical or moral detriment to minors. Therefore they shall not directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity, directly encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, or unreasonably show minors in dangerous situations.

2. Member States and the Commission shall encourage media service providers to develop codes of conduct regarding inappropriate audiovisual commercial communications, accompanying or



included in children's programmes, of foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular those such as fat, trans-fatty acids, salt/sodium and sugars, excessive intakes of which in the overall diet are not recommended.

ARTICLE 10: RULES APPLICABLE TO SPONSORSHIP

1. Audiovisual media services or programmes that are sponsored shall meet the following requirements:

(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;

(b) they shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services;

(c) viewers shall be clearly informed of the existence of a sponsorship agree-



ment. Sponsored programmes shall be clearly identified as such by the name, logo and/or any other symbol of the sponsor such as a reference to its product(s) or service(s) or a distinctive sign thereof in an appropriate way for programmes at the beginning, during and/or at the end of the programmes.

2. Audiovisual media services or programmes shall not be sponsored by undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products.

3. The sponsorship of audiovisual media services or programmes by undertakings whose activities include the manufacture or sale of medicinal products and medical treatment may promote the name or the image of the undertaking, but shall not promote specific medicinal products or medical treatments available only on prescription in the Member State within whose jurisdiction the media service provider falls.

4. News and current affairs programmes shall not be sponsored. Member States may choose to prohibit the showing of a sponsorship logo during children's programmes, documentaries and religious programmes.

ARTICLE 11: RULES APPLICABLE TO PRODUCT PLACEMENT

1. Paragraphs 2, 3 and 4 shall apply only to programmes produced after 19 December 2009.

2. Product placement shall be prohibited.

3. By way of derogation from paragraph

2, product placement shall be admissible in the following cases unless a Member State decides otherwise:

(a) in cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes;

(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 their inclusion in a programme.

The derogation provided for in point (a) shall not apply to children's programmes.

Programmes that contain product placement shall meet at least all of the following requirements:

(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;

(b) they shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services;

(c) they shall not give undue prominence to the product in question;

(d) 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 set out in point (d) provided that the programme in question has neither been produced nor commissioned by the media service provider itself or a company affiliated to the media service provider.

4. In any event programmes shall not contain product placement of:

(a) tobacco products or cigarettes or product placement from undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products;

(b) specific medicinal products or medical treatments available only on prescription in the Member State under whose jurisdiction the media service provider falls.

ARTICLES 19 - 26: RULES APPLICABLE TO TELEVISION BROADCASTS ONLY

Article 19

1. Television advertising and teleshop- ping shall be readily recognisable and distinguishable from editorial content. Without prejudice to the use of new advertising techniques, television advertising and teleshop- ping shall be kept quite distinct from other parts of the programme by optical and/or acoustic and/or spatial means.

2. Isolated advertising and teleshop- ping spots, other than in transmissions of sports events, shall remain the excep- tion.

Article 20

1. Member States shall ensure, where television advertising or teleshop- ping is inserted during programmes, that the integrity of the programmes, taking into account natural breaks in and the dura- tion and the nature of the programme concerned, and the rights of the right holders are not prejudiced.

2. The transmission of films made for television (excluding series, serials and documentaries), cinematographic works and news programmes may be interrupted by television advertising and/or teleshop- ping once for each scheduled period of at least 30 minutes. The transmission of children's programmes may be interrupted by television advertising and/or teleshop- ping once for each scheduled period of at least 30 minutes, provided that the scheduled duration of the programme is greater than 30 minutes. No televi- sion advertising or teleshop- ping shall be inserted during religious services.

Article 21

Teleshopping for medicinal products which are subject to a marketing au-



thorisation within the meaning of Directive 2001/783/EC, as well as teleshopping for medical treatment, shall be prohibited.

Article 22

Television advertising and teleshopping for alcoholic beverages shall comply with the following criteria:

- (a) it may not be aimed specifically at minors or, in particular, depict minors consuming these beverages;
- (b) it shall not link the consumption of alcohol to enhanced physical performance or to driving;
- (c) it shall not create the impression that the consumption of alcohol contributes towards social or sexual success;
- (d) it shall not claim that alcohol has therapeutic qualities or that it is a stimulant, a sedative or a means of resolving personal conflicts;
- (e) it shall not encourage immoderate consumption of alcohol or present abstinence or moderation in a negative light;
- (f) it shall not place emphasis on high alcoholic content as being a positive quality of the beverages.

Article 23

The proportion of television advertising spots and teleshopping spots within a given clock hour shall not exceed 20 %.

Paragraph 1 shall not apply to announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived

from those programmes, sponsorship announcements and product placements.

Article 24

Teleshopping windows shall be clearly identified as such by optical and acoustic means and shall be of a minimum uninterrupted duration of 15 minutes.

Article 25

This Directive shall apply mutatis mutandis to television channels exclusively devoted to advertising and teleshopping as well as to television channels exclusively devoted to self-promotion.

However, Chapter VI as well as Articles 20 and 23 shall not apply to these channels.

Article 26

Without prejudice to Article 4, Member States may, with due regard for Union law, lay down conditions other than those laid down in Article 20(2) and Article 23 in respect of television broadcasts intended solely for the national territory which cannot be received directly or indirectly by the public in one or more other Member States.

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