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Towards the liberalisation of product placement on UK television?

Amandine Garde

Since February 28, 2011, product placement has been allowed in certain programmes on UK television. The liberalisation of product placement has given rise to vivid debates at both EU and national levels: if product placement may be an additional source of revenue for broadcasters, it may also be an insidious advertising technique, and thus is considered in (i) of this article. The rules which have finally been adopted, and on which this article focuses, reflect the tensions and compromises that have been made (ii), as well as the attempt to balance the free movement of services within the European Union and the need to ensure a high level of public health, consumer and child protection (iii).

I From prohibition to liberalisation

Until February 28, 2011, product placement, which consists of the inclusion of a product or a service within a programme in return for consideration, was unconditionally prohibited in all imported programmes and in films originally made for the cinema. The prohibition did not extend to prop placement, which does not consist of the inclusion of a product within a programme by the television service provider or the programme maker.

As product placement is a potential source of revenue for broadcasters, the question arose at both national and EU level whether it should not be liberalised to support the competitiveness of the UK and the EU broadcasting industry. Thus, in December 2005, Ofcom launched a public consultation to gather the views of stakeholders on the issue. It received 67 responses which highlighted the absence of consensus on both the benefits and the risks such liberalisation would entail. As Ofcom found that the economic benefits of product placement were likely to be rather modest, and that further work was required to determine the precise breadth of liberalising product placement, it decided to postpone any changes to the UK regulatory framework to after the revision process to the ‘Television Without Frontiers’ (TVWF) Directive was completed.

Even though there were controversies regarding whether the TVWF Directive should be interpreted as prohibiting product placement in television programmes produced in the EU, the general view was that product placement was banned as a result of the separation principle enshrined in the Directive that ‘television advertising shall be readily identifiable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means.’

During the consultation phase of the revision process of the TVWF Directive, the Commission argued that product placement should be allowed on two main grounds. Firstly, it claimed that the liberalisation of product placement would allow European audiovisual media services providers to obtain an additional source of revenue by which to bolster diminishing revenue streams and which would facilitate the production of better quality programmes. Secondly, the Commission argued that liberalising product placement would render European audiovisual media services more competitive in that it would lessen the problems associated with dual regimes in which product placement would be allowed in programmes originating from outside the EU but not in programmes originating from within the EU. Nevertheless, the liberalisation of product placement was not viewed favourably by all parties: several stakeholders opposed liberalisation not only on public health and consumer associations, but also some Member States (not least northern countries and Germany). One argument against liberalisation is that product placement is unfair to consumers: firstly, because it has a more insidious influence than traditional forms of advertising insofar as viewers are not always aware of brand presence in the programmes they watch, and secondly, because it relates the product to the situation in which it is used and arguably constitutes a more aggressive marketing technique as a result.

In December 2007, the Audiovisual Media Services (AVMS) Directive was finally adopted. The AVMS Directive extends the scope of the TVWF Directive to all audiovisual media services, including the internet and on-demand services. Article 11 deals exclusively with product placement. Nevertheless, it must be read in light of article 9 which contains the rules applying to all forms of audiovisual commercial communications.

Article 11 starts with a statement of principle prohibiting product placement.14 Immediately afterwards, however, it provides for derogations: product placement is allowed in a range of programmes, on the conditions that certain requirements are respected and unless Member States decide otherwise.15 The AVMS Directive therefore liberalises product placement in certain programmes, while offering an option to Member States to opt-out and maintain the prohibition of product placement in all programmes. Nevertheless, the AVMS Directive contains exceptions: irrespective of the programme genres concerned, no product placement is allowed either in children’s programmes or in programmes for tobacco products and medicines or medical treatments available only on prescription. Article 11 thus lays down a prohibition on product placement, followed by an exception to the prohibition, followed by an exception to the exception to the exception to the prohibition.16 The complexity of the mechanism established by the AVMS Directive, which is based on a clause of optional harmonisation, indicates the fact that the AVMS Directive is also a measure of minimum harmonisation, which allows Member States to adopt more protective measures, subject to compliance with the general provisions of the EU Treaties, and in particular articles 34 and 56 of the Treaty on the Functioning of the European Union dealing respectively with the free movement of goods and the freedom to provide services in the EU.

In July 2008, the Department for Culture, Media and Sport launched a public consultation, seeking views on how the UK should implement the AVMS Directive. The Government received 59 responses, with 41 focussing specifically on product placement.17 On this basis, Andrew Burnham (then responsible minister) issued a statement in favour of maintaining the existing prohibition, noting in particular that the consultation had failed to produce a convincing case for product placement. He pointed to the lack of sufficient evidence of economic benefits, along with very serious concerns about blurring the boundaries between advertising and content.18 Nevertheless, some months later, his successor Ben Bradshaw effected a U-turn: ‘After careful consideration, the Government is now reconsidering the position. The Government is currently minded to permit product placement on UK television, subject to safeguards’.19 The Department for Culture, Media and Sport thus launched another consultation on November 26, 2009, three weeks before the deadline for the implementation of the AVMS Directive was due to expire. The Government received as many as 178 responses from a range of stakeholders,20 and it is arguable that the significant mobilisation from the public and from the non-profit sector has allowed for the adoption of tighter restrictions than the Government seemed to have envisaged.


The regime for product placement on UK television

The second part of this article focuses on the rules which have been adopted in the UK as part of the implementation process of the AVMS Directive. In particular, it compares the rules laid down by the AVMS Directive, a measure of minimum harmonisation which, as such, allows Member States to adopt stricter provisions for broadcasters established on their territories.23 The Directive sets conditions relating to the programmes genres (i), the manner in which product placement can take place (ii) and the products placed (iii). Before discussing these three sets of rules, it is first necessary to consider the definition of product placement (i).

(i) What is product placement?

The AVMS Directive identifies product placement as one form among others of audiovisual commercial communications. It consists in ‘the inclusion of or reference to a product, a service or the trademark thereof so that it is featured within a programme, in return for or for similar consideration’.24 Product placement therefore has two defining features: the product, service or trade mark must feature within a programme, and the reference must be in return for payment or for similar consideration.

This second requirement distinguishes product placement, which must comply with the rules laid down by the AVMS Directive, implemented in Member States, from prop placement, which is not required to comply with product placement rules. It is therefore necessary to determine what constitutes ‘payment or for similar consideration’. Recital 91 of the AVMS Directive states that ‘the provision of goods or services free of charge, such as production props or prises, should only be considered to be product placement if the goods or services involved are of significant value’.25 Thus, prop placement involving the supply of goods or services which are of ‘significant value’ should be treated as product placement and must therefore comply with product placement rules.

The question of determining whether value is ‘significant’ therefore entails important practical consequences.

According to Ofcom, ‘significant value is when the value of a prop to the broadcaster, programme producer or a connected person is more than the cost saving a broadcaster, programme producer or connected person has made as a result of acquiring the prop for use in the programme’.26 If the prop was kept for a producer personal use or re-sale it would have a residual value that was more than trivial. If a consumable low-value prop, like a food product, was retained, for instance, its ‘residual value’ would be likely to be trivial.27 The wording employed by Ofcom is somewhat more restrictive than the wording employed in the AVMS Directive: ‘material benefit’. The AVMS Directive is therefore defined as ‘more than trivial’. Product placement could potentially cover a luxury watch or designer clothes. The decisions Ofcom has handed down on the meaning of ‘material benefit’ and the broad scope of product placement rules. For example, in December 2009, the ‘CNN YouTube Debate on Climate Change’ was broadcast from Copenhagen. During the debate, the United Nations Copenhagen Climate Change Summit was being held. The programme consisted of videos which members of the public had uploaded via YouTube, to which various references were made throughout the programme as a result of a contractual arrangement requiring that CNN would display and integrate prominently a ‘range of visual references to YouTube within the programme, including its branding and logo. In return, Google undertook to promote the programme on the Google and YouTube websites, and provide the YouTube platform for viewers to submit their questions by video. The question arose whether this arrangement amounted to product placement. In May 2010, Ofcom found that it did: in exchange for the promotion of the programme, and the promise of further of similar consideration.28 Product placement therefore has two defining features: the product, service or trade mark must feature within a programme, and the reference must be in return for payment or for similar consideration.

Once the two defining conditions for product placement are fulfilled, the relevant rules apply. Neither the AVMS Directive...
Towards the liberalisation of product placement on UK television?

This article discusses the liberalisation of product placement on UK television, with a focus on the AVMS Directive and UK implementing rules. It examines the rationale behind the liberalisation, the conditions under which product placement is allowed, and the measures to ensure compliance with the terms of the Directive.

The article highlights the following key points:

1. The need for a balance between commercial interests and the public interest in television programming.
2. The importance of clear and transparent disclosure of product placements to inform viewers.
3. The role of the broadcasting industry in self-regulation and compliance with the AVMS Directive.
4. The impact of product placements on the viewing experience and the potential for viewer protection measures.

The article concludes by suggesting future research questions and areas for further discussion.

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to lay down the conditions relating to the information of viewers. In rule 9.14.4.9, the information requirement laid down in the AVMS Directive, and on February 14, 2010, following another consultation of stakeholders, Ofcom disclosed its conclusions to the public at a relatively early stage that they intended to liberalise product placement without necessarily relying on convincing cost-benefit analysis. As a result, only Denmark has elected to expect a tightening of existing rules. The scheme set up by the AVMS Directive combines a clause authorising, within the current legal framework, recourse to product placement in programmes produced by broadcasters covered by the TWF Directive. See: <ec.europa.eu/avpolicy/reg/history/codecision/ index_en.htm>.


Notes

1 The definition of product placement is discussed below. Programme makers in the UK are required to provide the presence of brands was editorially justified and not unduly prominent. The distinction between product placement and prop placement is still relevant following the European Media Law (The Hague: Kluwer Law International, 2007) 11/327.

2 Ofcom’s statement is available at: <stakeholders.ofcom.org.uk/binaries/consultation/product_placement/summarypolicy.pdf>.

3 The AVMS Directive contains some (particularly weak) provisions regarding the promotion of alcoholic beverages and unhealthy food to children. In particular, ‘audiovisual commercial communications for alcoholic beverages shall not be aimed specifically at minors and shall not encourage immediate consumption of such beverages’, and ‘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 such as fat, sugar and salt, low in calories and low in nutrients, excessive intakes of which in the overall diet are not recommended’. Notwithstanding the detrimental impact which the heavy marketing of alcoholic beverages and unhealthy food has on children’s consumption patterns, their diets and ultimately their health, the EU has not followed the recommendations of several stakeholders to ban such marketing.

In implementing these rules, the UK has used the discretion it has under the AVMS Directive to increase the level of consumer protection. Rule 9.11.1 reproduces the requirement of article 11(b) of the AVMS Directive by prohibiting:

i. the placement of cigarettes and other tobacco products;

ii. the placement by or on behalf of an undertaking whose principal activity is the manufacture or sale of cigarettes or other tobacco products; and

iii. the placement of prescription-only medicines.

However, rule 9.13.1 extends the ban on advertising, in programmes produced under UK jurisdiction, of:

1. alcoholic drinks;

2. foods and drinks high in fat, salt or sugar (HFSS);

3. gambling;

4. infant formulae (baby milk), including follow-on formula;

5. all medicinal products;

6. electronic or smokeless cigarettes, cigarette lighters, cigarette papers, or pipes; and

7. any product, service or trade mark that is not allowed to be advertised on television (including guns, weapons and escort agencies).

By exceeding the minimum level of protection provided at EU level in certain of the 11 freedoms guaranteed by the Directive, it is arguable that UK implementing rules strike a more balanced between competing interests: on the one hand, the liberalisation of rule 9.14.4.9, the information requirement laid down in the AVMS Directive is fraught with practical difficulties. The notion of ‘products’ is defined broadly in that it covers all products, send by trade mark. It is also irrelevant whether the products or services placed are branded or generic.

The AVMS Directive bans the placement of two categories of products, due to the specific risks their consumption entails for public health: firstly, tobacco products or cigarettes or product placement from undertakings whose principal activity is the manufacture or sale of cigarettes or other tobacco products; and secondly, specific medicinal products or medical treatments available-protected prescription for another provider whose jurisdiction the media service provider falls. Moreover, the AVMS Directive contains some (particularly weak) provisions regarding the promotion of alcoholic beverages and unhealthy food to children. In particular, ‘audiovisual commercial communications for alcoholic beverages shall not be aimed specifically at minors and shall not encourage immediate consumption of such beverages’, and ‘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 such as fat, sugar and salt, low in calories and low in nutrients, excessive intakes of which in the overall diet are not recommended’. Notwithstanding the detrimental impact which the heavy marketing of alcoholic beverages and unhealthy food has on children’s consumption patterns, their diets and ultimately their health, the EU has not followed the recommendations of several stakeholders to ban such marketing.

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20 To the 178 responses, one should add the 1250 emails sent to support the

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For more information on the definition of the different genres, see O Castendyk

Assessment in annex. The Regulations amend the 2003 Communications Act

google.co.uk/url?sa=t&source=web&cd=1&ved=0CBsQFjAA&url=http%3

sent via Members of Parliament. The consultation also received remarkable

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For example, Austria considers that any prop of more than €1,000 is of signifi-

may set a given threshold beyond which value is deemed to be significant:

Alternatively, one considers a prop with a value of under 1% of the budget as

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however, the possibility to apply the stricter national standards which they may impose on the

broadcasters established on their territory.

This is required by art 2(1) of the AVMS Directive: Each Member State shall

ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of legal accountability for audiovisual media services intended for the public in that Member State.

In particular, the Government noted:

7. Under the new AVMS Directive, a majority of Member States will allow product placement in the permitted genres of programmes (e.g. nongovernmental works, films and series made for audiovisual media services, sports programmes and light entertainment programmes). Others will permit product placement in (at least) those programmes that their public service commercial broadcasters may use in their programmes.

8. Many Member States are seeking to implement the stricter national standards which they may impose on the broadcasters established on their territory.

9. The issue of product placement is still under active discussion in both France and Germany, but it seems likely that both of these jurisdictions will require a position in which some product placement is permitted, at least in fully commercial television broadcasting.

10. This is confirmed by the Guidance at para 1.116 and is all the more remarkable in terms of consumer protection, as the products listed in r 9.13 are unlikely to be advertised in programmes with a consumption-related message.


org.uk/tv/obb/prog_cb/obb169/issue169.pdf>, at p 8. This decision contains explanation and/or analysis of current events and issues, including developments on product placement, which is one of the permitted activities of a programme service under the jurisdiction of the UK (for the purposes of the State of establishment principle).

55 Article 11(3)(d).

50 Article 11(4). This prohibition applies to all programmes, notwithstanding whether they have been produced or commissioned by the broadcaster. Article 11(4)(b) is a specific application of the requirements laid down in art 9(3)(d) and (e) banning all forms of audiovisual commercial communications (including product placements).

65 Article 9(1) of the AVMS Directive provides that ‘audiovisual commercial

communications shall not cover legitimate product placements’. As 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’. In fact, one wonders whether the ECJ’s views on the necessity for the definition of product placement excludes, in any event, prop placement from its scope. As discussed above, one of the key defining features of product placement is the payment of consideration of significant value.

66 At para 32.


71 Of course, this does not apply 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’. In fact, one wonders whether the EU legislature felt that the precision was necessary, as the definition of product placement excludes, in any event, prop placement from its scope. As discussed above, one of the key defining features of product placement is the payment of consideration of significant value.

74 Rule 9.13 should be read in light of paras 1.109 to 1.116 of the Guidance.

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61 O Castendyk, E Dommering and A Scheuer, European Media Law

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19 The consultation ran from November 26, 2009 to January 9, 2010, and there-

the consultation included the AVMS Directive had to be implemented in all Member States by December 19, 2010.

20 To the 178 responses, one should add the 1250 emails sent to support the

21 The 178 responses were not sought to support the continued prohibition of product placement on television and the 50 messages sent were six of Members of Parliament who received completed media

coverages. For a summary of the consultation, see: <www.
google.co.uk/url?sa=t&source=web&cd=1&ved=0CBsQFjAA&url=http%3

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