

**AVMS Implementation: Product Placement
Comparative Background Document for the plenary session
Emmanuelle Machet, EPRA Secretariat**

Public version

Introduction

The issue of product placement has been discussed on many occasions at EPRA meetings during the past ten years, at first indirectly through debates on the separation between editorial and advertising content and the prohibition of surreptitious advertising and, as early as in 2005¹, as a topic of its own right. On the occasion of the 22nd EPRA meeting in Budapest in October 2005, one working group debated as to whether it was necessary to recognise an already existing practice and seek to regulate it; whether a relaxation of the rules was desirable in order to promote the European industry and whether indeed a move towards de-regulation would in this way dramatically impact upon the nature of media and encourage an even greater commercialisation of output. Along with the progress of the early draft of the AVMS Directive, the focus of the discussion within EPRA shifted from debating on the pros and cons of allowing this new practice to exploring the issues which may arise by the practical implementation of the provisions dealing with product placement in the AVMS new Directive².

Up to recently however, the discussion had remained somewhat theoretical as the AVMS Directive was still to be transposed in national law. Almost five months after the expiration of the deadline for transposing the AVMS Directive, the situation looks significantly clearer - even though many EU countries still have to complete the final stages of the transposition.

This background document is based on the responses to a brief survey prepared and circulated by the EPRA Secretariat. It compiles answers from 30 regulatory authorities: KommAustria (AT), the Communications Regulatory Agency (BA), the Flemish Regulator for the Media (VRM) and the CSA of the French Community of Belgium (BE), the Council for Electronic Media (BG), the OFCOM (CH), the Council for Radio and TV Broadcasting (CZ), The Director's Conference of the Länder Media Authorities (DE), the Catalan Audiovisual Council and the Audiovisual Council of Andalusia (ES), the Conseil supérieur de l'audiovisuel - CSA (FR), the Ofcom (GB), the National Radio and Television Council (GR), the National Radio and Television Commission - ORTT (HU), The Broadcasting Authority of Ireland (IE), the AGCOM (IT), the Radio and Television Commission of Lithuania (LT), the Service des Médias et des Communications - SMC (LU), the Broadcasting Council of Latvia (LV), the Broadcasting Agency (ME), The Broadcasting Authority (MT), the Commissariaat voor de Media (NL), the Norwegian Media Authority (NO), the National Broadcasting Council - KRRiT (PL), the Entidade Reguladora para a Comunicação Social - ERC (PT), the National Audiovisual Council (RO), The Swedish Broadcasting Commission (SE), the Post and Electronic Communication Agency of the Republic of Slovenia - APEK (SI), the Council for Broadcasting and Retransmission (SK), and the Radio and Television Supreme Council - RTÜK (TR).

¹ See:

http://www.epra.org/content/english/members/working_papers/Budapest/WG1_product_placement_update.doc
and also the comparative study on product placement in Israel, Canada, the US, Hong-Kong and Australia carried out by the CCSB, available under:
http://www.epra.org/content/english/members/working_papers/Budapest/product%20placement_epra_Israel_update.pdf

² See the discussion papers for the EPRA meetings in Sofia (Oct. 2007), Riga (May 2008) and Tallinn (May 2009):
http://www.epra.org/content/english/press/papers/WG1_product_placement_final.pdf
, http://www.epra.org/content/english/members/working_papers/Riga/prohibited_advertising.pdf,
http://www.epra.org/content/english/members/working_papers/Tallinn/Commercial_Communication_EPRA_2009_Q2_final.pdf,
http://www.epra.org/content/english/members/working_papers/Tallinn/product_placement_greece.pdf

Further research has also been conducted by the EPRA Secretariat to fill out some gaps. Country reports submitted for the Barcelona meeting have been used as an additional source of information. Other organisations³ have also been providing updates where information was lacking.

Last but not least, an important caveat. This document, though carefully researched is by no means to be considered as an exhaustive official reference document, but merely aims at presenting a snapshot of the rapidly evolving situation as of the beginning of May 2010.

I – AVMS Transposition status & further Regulation of Product Placement (PP) ***(Has your country implemented the provisions dealing with product placement into national law?)***

1.1 Transposition status in EU Member States

From the results of the questionnaire, it appears that the provisions on product placement of the AVMS Directive have only been **transposed in twelve EU countries** so far: Belgium (the three linguistic Communities), Bulgaria, the Czech Republic⁴, Denmark, France, Finland⁵, Germany, Italy, the Netherlands, Romania, Slovakia and Spain. An overview table providing the links to legal provisions is available in the ZOOM section of the IRIS Plus on Product placement⁶.

In some countries, as in UK or Ireland, the transposition will be achieved through changes in the codes of the regulatory authorities. In the UK, the recent regulations, which have been laid before Parliament, will come into force on 16 April 2010. However, UK broadcasters will not be able to transmit programmes containing permitted product placement until Ofcom has its new Code in place which is expected by November 2010.

In Ireland, rules for television have been agreed and will be implemented via the Broadcasting Authority of Ireland's Advertising Codes in 2010⁷. The specific date has yet to be finalised. Rules for on-demand are being dealt with by a legal statutory instrument that is currently making its way through the statutory system.

Transposition appears to be pending in Sweden. A bill with a proposal for a new Radio and TV Act, in which the AVMS directive is implemented, was handed to the parliament on March 23rd. The Act is expected to enter into force on August 1st, 2010.

It is unfortunately not possible to provide any precise schedule on further pending transposition processes as the results gathered from other countries do not point to any envisaged date. The European Commission has already initiated the first steps of legal proceedings against several Member States for non-transposition on the Directive in the prescribed time. It should also be reminded at this point that the Member States, not the regulatory authorities, are responsible for the transposition in national law.

1.2. Situation of non EU-countries

The specific situation of non EU-countries also needs mentioning, whereby an important distinction needs to be made between candidate countries of the EU, EEA countries, Stabilisation and Association countries and other countries⁸.

³ The Secretary would like to thank the EMR and the IVIR and their correspondents for the additional information especially concerning Cyprus, Greece and Finland. Many thanks also to Dirk Peereman, from the VRM (BE) for his active contribution as the content producer of this session and his useful comments on a draft version of this paper.

⁴ 132/2010 Sb. ZÁKON ze dne 13. dubna 2010 o audiovizuálních mediálních službách na vyžádání a o změně některých zákonů (zákon o audiovizuálních mediálních službách na vyžádání), <http://www.rrtv.cz/cz/static/zakony/pdf/132-2010.pdf>, entering in force on 1 June 2010.

⁵ The Acts No. 306/2010 and No. 307/2010 (concerning the amendments of the Television and Radio Broadcasting Act (744/1998) and the Copyright Act (404/1961) with regard to - inter alia - PP) have entered into force on 1 May 2010 (an overview on the legislative procedure is available at:

<http://www.eduskunta.fi/valtiopaivaasiat/he+87/2009>).

Both documents are available at: <http://www.finlex.fi/fi/laki/kokoelma/2010/20100050.pdf>

⁶ http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus2010-3.html The ZOOM section was the result of a cross-fertilization exercise between the European Audiovisual Observatory and the EPRA secretariat.

⁷ Note of the Secretary: the codes were issued on 19 May, entering in force on June 10th: see www.bai.ie

⁸ Many thanks to Marisa Fernandez Esteban, from the DG Information Society and Media of the European Commission for providing very useful information on the legal obligations applicable to candidate, EEA and stabilisation and Association countries.

Candidate countries include Croatia, Turkey, the former Yugoslav Republic of Macedonia and Iceland even though accession negotiations have only been opened with Croatia and Turkey (as of 13 April 2010). The accession negotiations to the EU focus on the conditions and timing of the candidate's adoption, implementation and enforcement of all the EU rules already in force, including the AVMSD. Croatia has already aligned its legislation with the AVMSD as the Croatian government passed the new Electronic Media Act on 11th December, 2009⁹. In Turkey, product placement is not allowed under the current legal framework. Work on the amendment of the RTÜK law is however underway. For candidates, it is essentially a matter of agreeing on how and when to adopt and implement EU rules and procedures, including the AVMSD.

The situation of the *EEA countries*, i.e. Norway, Liechtenstein and Iceland is different as the legal obligation of these countries is regulated in Protocol X to the EEA agreement which, as of mid April 2010, has not been amended to refer to the AVMSD but only to the TVwF Directive. Thus their legal obligation regards only the implementation of the TWFD.

In contrast, *Stabilisation and Association countries (the western Balkan countries)* have a legal obligation to incorporate the AVMSD irrespectively of being candidate countries to the EU (Croatia, the former Yugoslav Republic of Macedonia) or potential candidate countries to the EU (Albania, Bosnia and Herzegovina, Montenegro and Serbia including Kosovo (under UN resolution 1244)). In every stabilisation and association agreement with each of these countries there is a clause on audiovisual policy indicating that ('country X will align its policies on the regulation of content aspects of cross-border broadcasting (...) and will harmonise its legislation with the Community acquis'). In Montenegro, the Electronic Media Law, which is currently being revised, will include provisions on product placement.

In other countries, such as Switzerland, the AVMS Directive is not applicable. However, the ongoing review of the Council of Europe's European Convention on Transfrontier Television (though appearing to be stalled for the moment) foresees similar provisions governing product placement. In Switzerland, product placement is currently allowed and regulated by the Ordinance of 9 March 2007¹⁰.

1. 3. Public Consultations

Public consultations on product placement have been conducted in many countries, as in Germany, Estonia, The Czech Republic or Ireland.

Consultations may be crucial and can have an impact on the government policy as testified by the British case. In the UK, consultation ran between November 2009 and January 2010¹¹. As a result, the Government concluded that it would be able to allow television product placement in a way which would provide meaningful commercial benefits to commercial television companies and programme makers while taking account of the legitimate concerns that have been expressed. The Government therefore decided to legislate to allow UK television companies to include product placement in programmes which they make or commission to appear in their schedules.

In many countries, as in Austria or Lithuania, the draft legislative texts have been made public so that interested parties could submit their proposals and comments but this did not involve a fully-fledged public consultation.

Some regulators have played a leading role in the consultation process. In Poland, two years ago, the National Broadcasting Council carried out broad-scope public consultations on the key issues relating to the implementation of the AVMS Directive, also including product placement. A summary report was produced and delivered to the Ministry of Culture and National Heritage, the main national authorities and stakeholders¹².

⁹ The law was published in the national gazette at 21st December and came into force on 28th December 2009. It is available in English at the following link:

http://www.epra.org/content/english/news/AVMS_transposition_HR_electronic_media_act_11_12_09.pdf

¹⁰ http://www.admin.ch/ch/e/rs/784_401/a21.html

¹¹ See the consultation: http://www.culture.gov.uk/reference_library/consultations/6421.aspx/ and the ministerial statement: http://www.culture.gov.uk/reference_library/minister_speeches/6624.aspx.

¹² http://www.krrit.gov.pl/bip/Portals/0/komunikaty/Raport_z_konsultacji_dyrektywa2007_65_ec.pdf

In Latvia, the draft law on electronic Media was a joint effort involving all stakeholders. It was published on the RA's website with an invitation for the public to comment.

In the UK, in addition to the consultation conducted by the government, Ofcom will shortly launch a full public consultation process to determine the rules for implementing the regulations through their Broadcasting Code. This will include looking at matters such as the form signaling will take.

Instead of fully-fledged public consultations, *hearings* took place in Denmark (before the amendment of the Broadcasting Act and before the executive order was laid down) or in France. In France, the CSA made 23 auditions for 55 stakeholders, such as product placement agencies, television and radio services, advertising agencies, authors etc.

1.4. *Guidance from regulatory authorities in addition to the legislation*

Further guidance on product placement by the RAs has so far only been provided in Belgium, France, and Germany.

In French speaking Belgium, the CSA issued specific guidance in the form of the *Recommandation du CSA relative au placement de produit du 17 déc. 2009*¹³.

In France, on 16 Feb. 2010, the CSA adopted a deliberation setting the conditions applicable to product placement¹⁴. In Germany, the DLM has recently updated its advertising directive, including issues of product placement¹⁵.

In the Netherlands, the CvdM is planning to establish policy guidelines on issues such as the signaling, conditions for displaying or mentioning products and services and the concept of significant value. In Ireland, pending guidance notes of the BAI will detail the meaning of '*significant value*', specific audience notification requirements and guidance regarding the meaning of '*undue prominence*'.

In Italy, stakeholders will adopt specific Codes of conduct pursuant to the provisions contained in the decree implementing the AVMSD. The AGCOM will be requested to verify the Codes adopted by stakeholders, with the possibility of suggesting amendments if they are considered to be not in compliance with the decree, and monitor their implementation.

II – Admissibility of Product Placement & Exceptions

(Will your country follow the Directive's approach of prohibiting PRODUCT PLACEMENT while allowing under certain circumstances?)

The structure of Art. 11 AVMSD is based on rule, exception to the rule and exception to the exception.

- The rule is the prohibition of product placement (Art. 11 (2) AVMSD).

- Exceptionally, product placement is admissible in cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes (Art. 11 (3) a AVMSD) or in case where there is no payment but only provision of certain goods and services, such as provision props and prizes (Art. 11 (3) b AVMSD). This element has to be interpreted in the light of Rec. 91 AVMSD which points out 'the provision of goods or services for free, such as production props and prizes, should only be considered to be product placement if the goods or services involved are of significant value'.

- By exception to this exception, the derogation provided for in Art. 11 (3)a AVMSD shall not apply to children's programmes.

2.1. *Admissibility of product placement*

From the answers to the questionnaire, it appears that almost all EU countries have chosen to follow the Directive and allow product placement under certain conditions. It means that, strictly speaking, most Member States will generally NOT allow product placement, BUT introduce the same or similar derogations as the Directive, and with some specific limitations.

¹³ <http://www.csa.be/documents/show/1143>

¹⁴ http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=EF370E11465D2F97FCCF1AC9786217CF.tpdjo11v_2?cidTexte=JORFTEXT000021920619&dateTexte=&oldAction=rechJO&categorieLien=id

¹⁵ http://www.alm.de/fileadmin/Download/WerbeRL_FERNSEHEN.pdf (please note however that the formal adoption process is not yet completed as).

Only two countries so far appear to have chosen a stricter different approach by opting out of the derogations of Art. 11(3) and prohibiting paid placement.

In *Denmark*, product placement meant as the inclusion of a product, service or trademark for payment or other consideration is prohibited for programmes which have been produced or commissioned in Denmark. Prop and prize placement with no significant value and where no media service provider or associated person has received payment or other consideration is allowed but the latter only under strict conditions mirroring the Directive provisions applicable to paid product placement.

In *Ireland*, paid placement will be prohibited. Placement of significant value but without payment (Free Placement) will be permitted in all programming. Guidance will advise broadcasters to take particular care when including free placement in news and current affairs.

As mentioned previously, the UK government, which was still considering last year to maintain the status quo so that product placement would continue to be prohibited in television programmes made by and for UK television broadcasters, revised its position in the meantime.

The issue is still in consideration in *Norway*, where a public consultation has been conducted by the Ministry of Culture, but remained inconclusive as to whether product placement should be allowed or not. A new consultation will be conducted shortly. Though information concerning the situation in Greece and Cyprus remain very scarce and must therefore be subject to caution, it seems to point at allowing product placement under certain conditions.

2.2 *Prohibited programme genres*

Due to the complex structure of Art. 11 of the Directive, programmes genres subject to a prohibition of product placement have to be deduced from the combination of a positive list (Art. 11 (3) a AVMSD) and a general exception.

Further to the Directive, product placement is allowed (by way of derogation to the general prohibition) in cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes. Not listed among these categories are notably news programmes and documentaries, it is therefore to be assumed that product placement is banned in these programmes. In addition, product placement is prohibited in children programmes, even if these programmes qualify as cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes.

Countries having transposed the Directive have incorporated these prohibitions in their national provisions, they have also occasionally chosen to be more specific by adding a "negative" list of programmes in which product placement is prohibited including current affairs, religious and advice and consumer programmes (as in the UK or Germany), but also cultural or education programmes (as in the French Community of Belgium).

France has chosen to partially opt out of the derogations of Art. 11(3) as product placement is only allowed on cinema films, audiovisual fictions and music videos, which de facto excludes entertainment programmes and sports programmes.

2.3 *Further prohibitions applicable to public service broadcasting*

Public service broadcasters are sometimes subject to stricter provisions, be it a full prohibition for in-house and commissioned programmes as in Bulgaria, the Netherlands, Germany or in the current draft in Slovenia or only to restrictions with regard to free-of-charge prop placement as in Austria or Belgium (Flemish Community).

2.4. *Prohibited products and/or services*

Art. 11 (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.

Several countries have opted to extend (or specify) the prohibition for tobacco products and prescription medicines to include all kind of smoking accessories as in the UK or to all kinds of medicines, such as in the UK and France. In addition to tobacco products and prescription medicines, many countries have introduced further restrictions concerning specific products and/or services. These restrictions usually apply indistinctively to all kinds of commercial communications and reflect national health and safety concerns.

This often includes a prohibition of *alcoholic beverages*, as in France, UK or Sweden. In the Netherlands, programmes are not allowed to carry product placement for alcoholic beverages between 6.00 a.m. and 21.00 p.m.

Product placement for *gambling services* may also be prohibited as in the UK or Belgium (French Community).

Weapons and munitions are also often subject to prohibitions or restrictions as in Belgium or France. With regard to food products, product placement for *infant formula* is prohibited in France and the UK. In addition, product placement for *foods high in fat, salt and sugar* (HFSS) is prohibited in the UK.

Product placement for political parties or trade unions and sexual services is also expressly prohibited in the French speaking Community of Belgium.

2.5. *The specific issue of acquired programmes*

While Member States have the leeway to waive the *identification requirements* for programmes that have neither been produced nor commissioned by the broadcaster or a affiliated company, the Directive does not refer to the applicability of other requirements (i.e. the exclusion of undue influence, undue promotional effect or undue prominence, prohibited genres, and prohibition of placement of tobacco or prescription medicines products) for independently produced or bought-in programmes. It is therefore to be assumed that these requirements of the Directive also apply to independently produced or acquired foreign programmes under EU jurisdiction, say an episode of *Sex in the City* broadcast on a British channel. In this regard, the AVMS Directive has been described as stricter than its predecessor the TVWF Directive¹⁶.

Many of the respondents from countries having transposed the Directive (such as France, UK, Germany, or Belgium) state that independently produced or acquired foreign programmes will have to comply with the Directive requirements. However, this does not seem the case in the Netherlands as Art. 3. 19 c of the Mediawet stipulates that some Directive requirements do not apply to programmes which have been acquired abroad and have already been broadcast before.

Another interesting question is whether requirements which go *further* than the Directive (e.g. prohibition of product placement for infant formula or HFSS foods) will be applicable to acquired programmes. In the UK, only the prohibitions and restrictions set out in the AVMS will be applied to bought-in programmes while the UK specific prohibitions and restrictions will not apply to acquired programmes.

IV – Props & Prize Placement & Issue of Significant value

(Will the provision of goods & services free of charge for the inclusion in a programme be considered as Product Placement and regulated as such?)

Product placement is admissible in case where there is no payment but only provision of certain goods and services, such as provision props and prizes (Art. 11 (3) b AVMSD).

This element has to be interpreted in the light of Rec. 91 AVMSD which points out that *'the provision of goods or services for free, such as production props and prizes, should only be considered to be product placement if the goods or services involved are of significant value'*.

¹⁶ See for instance, *Product placement A brief summary of the current and future legal position under the Audiovisual Media Services Directive*, Oliver Castendyk in IRIS Special 2009, *Ready, Set ... Go? The Audiovisual Media Services Directive*, European Audiovisual Observatory 2009.

The majority of respondents stated that their national provisions would follow Recital 91 and that the provision of goods or services for free, such as production props and prizes, should only be considered to be product placement if the goods or services involved are of significant value. This means that if the value of the goods or services is not significant, the restrictions set by Art. 11 (3) par. 3 (a) (b) (c) (d), i.e. the prohibition of undue influence, undue promotional effect, undue prominence and identification requirement do not apply.

So far, the notion of significant value has only been defined in a few countries, such as Bulgaria, UK, Denmark, Germany and Switzerland.

In Bulgaria, significant value is defined as *what exceeds 5 times the average value of the advertising communications included in the programme according to the tariff of the media service provider*. In Germany, the maximum limit of goods and services of insignificant value for both public and commercial television has been set to *1% of the production costs with a minimum value of 1.000 EUR (for each product; no addition)*. In the UK, significant value is not defined in terms of a quantifiable amount. The legislation defines it as meaning that a product has significant value if it has *'a residual value that is more than trivial'*. Similarly, in Denmark, significant value is defined as the residual value of no subordinate cha

racter. Residual value means monetary or other economic value for the relevant media service provider other than the value of the cost saved by including or referring to the goods or services in a programme. In Switzerland, all goods and services with a value of more than 5,000 Swiss Francs are defined as 'significant value'. In Portugal, still at an early stage of the transposition process, it is envisaged that 'significant value' will correspond to 5% of the production budget.

In France, an early draft of the CSA deliberation envisaged a monetary threshold of 1000 EUR as the significant value. The CSA eventually excluded all free of charge prop and prize placement from the scope of the deliberation. Prop placement will still remain subject to provisions of the Directive on surreptitious advertising or sponsorship.

Several respondents have indicated that the notion of significant value will need to be addressed by the regulator either in policy guidelines or a case by case basis. In Ireland, a definition will be included by way of binding guidance in respect of the RA Advertising Codes. It will be defined by a monetary value. By contrast, in the Netherlands, it is envisaged that the CvDM, in its future policy guidelines, will opt for a certain percentage of total programme costs, so a relative instead of an absolute amount.

Belgium, Denmark and Germany appear to have the strictest rules on prop and prize placement. It is interesting to note that Belgian authorities (from Flemish and French Community) 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.

In addition, prop placement, regardless of value, is prohibited in news and children programmes in the French Community. Similarly, in the Flemish Community of Belgium, prop placement, regardless of value, is not allowed for the children's programmes of the public broadcaster VRT. The Flemish Government may extend this prohibition to children's programmes of the other broadcasters.

In Denmark, prop and prize placement with significant value is only allowed in cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes except if they target children.

In Germany, prop placement is prohibited in news and current affairs programmes, consumer and advice programmes, children programmes and religious programmes.

In Austria, prop and prize placement, even without significant value, is excluded from news and current affairs programmes for the programmes of the ORF, the Austrian public broadcaster.

III – Identification issues

(Have specific rules on the identification of product placement been introduced?)

Has a common identification logo/screen display for PP been already decided on?

Are there specific provisions on the duration of the identification requirement?)

Art. 3g (2) d) AVMSD (...)

"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 confusion on the part of the viewer".

Another crucial point is how to signal product placement to ensure that viewers are properly informed about its existence but without any promotional character. France and Belgium appear to have the most detailed provisions at this point.

3.1. *Examples of identification logo/screen display to identify product placement*

In the *Flemish Community of Belgium*, a special logo has been approved for identification matters. The logo was created by the Flemish broadcaster 'NV Vlaamse Media Maatschappij (VMMa)' for the common use of all service providers in Dutch speaking Belgium and was adapted following the remarks of the regulator. The logo must be shown at least 5 seconds at the beginning and at the end of the programme, or after an ad break. The VRM has urged all Flemish television service providers to distribute press releases on this subject and to clarify on their websites what is the meaning of the logo and when it will be used.

In the *French Community of Belgium*, the CSA Recommendation¹⁷ of December 2009 encourages broadcasters to adopt a two-tier approach. During the first 3-months "familiarization period", broadcasters are advised to signal product placement by showing a full screen announcement during at least 10 seconds before the broadcast - stating: "The following broadcast contains commercial placement of products, trademarks or services" accompanied by the logo "PP". The pictogramme appears at the bottom of the screen during at least 10 seconds at the end of the programme and after any advertising break. This phase will start for each channel on the day they will first show a programme with product placement.

During the 2nd phase, the logo will appear on its own - at least during at least 10 seconds - at the beginning and at the end of the broadcasts and following advertising breaks. The CSA recommends the use of a pictogramme developed for the intention of Flemish broadcasters.

The recommendation is not binding (except for PSB RTBF) but the CSA met all broadcasters who reacted positively it is therefore expected that the system is adopted by all broadcasters.



Identification Pictogramme used in Belgium



Screen display used during familiarization period

In *France*, the CSA has introduced provisions relating to the identification of product placement, through a logo, shown during one minute at the beginning of the programme, one minute after each advertising break and at the end of the programme (during the credits). For music videos, the logo appears throughout the duration of the broadcast. Similarly to his Belgian counterpart, the CSA foresees a first two-month phase in order to familiarize viewers with the new visual device. During the first phase, the logo will appear during five seconds at the beginning of the programme in a screen announcement stating: *"this programme contains product placement"*. After the broadcast of this screen announcement, the logo will appear in the conditions described above.

¹⁷ <http://www.csa.be/documents/show/1143>, http://www.csa.fr/infos/controle/controle_placement_picto.php



Identification pictogramme developed by French CSA

In *Germany*, further to the advertising directive, which was set up in co-ordination with private and public broadcasters, all broadcasters (PSB and commercial alike) will have to indicate product placement (be it unpaid or against payment) at the beginning of a programme, after advertising breaks and at the end of a programme by showing a "P" for 3 seconds; also a announcement/banner with the wording "this programme contains product placement" has to be shown.

In *Switzerland*, programmes with product placement must be identified accordingly at the start of the programme. In particular, reference must be made during the mention of the sponsor to the products which the sponsor is providing. Prop placement (below significant value) may be signaled as a "simple sponsor at the beginning or end of the programme"¹⁸.

Several regulatory authorities are also currently preparing guidelines relating to identification rules.

In *Ireland*, rules have been agreed but not introduced at this stage. As in France and Belgium, they will introduce a 6 month familiarization process with stronger requirements regarding notification followed by a requirement to use an agreed logo at the beginning and end of programmes and during breaks. The specific logo will be decided by the broadcaster. However, the logo must incorporate the letters 'PP'.

In *Romania*, it is envisaged to modify Art 112 of the Decision no. 187/2006 concerning the Regulation of the Content of Audiovisual Programme Services, so that product placement will be signaled at the beginning of each programme, to resume after a commercial break and at its end, by the words "*this programme contains / contained product placement*", legibly displayed for a period of not less than 5 seconds.

In the *UK*, Ofcom is to clarify and expand upon this identification requirement as part of their forthcoming consultation, with the intention of issuing a rule or rules in their revised Broadcasting Code whose publication is expected in November 2010.

In the *Netherlands*, rules on the identification will be laid down in policy guidelines of the CvdM to be established in early spring.

In *Slovenia*, according to the draft media law, the APEK will have the mandate to prepare guidelines on product placement, including the provisions on identification.

3.2. Identification of product placement by a list of trademarks/products

A list of trademarks or products placed in the programme may, on the one hand, allow a greater transparency for viewers; on the other hand, it bears the risk to be used as an additional possibility to promote the goods. The deliberation adopted by the French CSA explicitly prohibits the inclusion of a list of the placed trademarks and products in the programme credits. In contrast, the Belgian CSA does not forbid it, even though the recommendation state that products can only be mentioned for the sake of information, not promotion (no use of logo or other distinctive signs). Similarly, in Ireland product placement will be identified by a list of trademarks/products in the programme credits at the end of the programme.

In *Germany*, a reference to the 'product placer' at the beginning and/or at the end of the programme (as well as via teletext or on the Internet) is allowed. The use of a trademark logo is also allowed.

¹⁸ www.admin.ch/ch/e/rs/784_401/a21.html

3.3. Identification requirement for acquired programmes

Art. 11 (3) 3 AVMSD:

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.

Independently produced and especially acquired programming from third countries may make it more difficult for regulators to trace back production deals, hence the possibility left for Member States in the text of the Directive to waive the identification requirements.

Not surprisingly, the vast majority of countries has chosen to use this possibility and thus to waive the identification requirement for programmes that have neither been produced nor commissioned by the media provider or by an affiliated company. There are however a few exceptions as in France, or in or Lithuania (still at the drafting stage) where countries appear to have chosen not to make use of this possibility.

In Germany, further to the advertising guidelines of the Landesmedienanstalten, the identification requirement can be waived if 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 - provided it is not to be found out by *a reasonable effort* whether the programme contains product placement. If this is not possible to find out whether a programme contains product placement, viewers have to be informed accordingly by the broadcaster in connection with the programme or through announcements on other media such as videotext or the internet. The requirement by the media service provider, through contractual means or otherwise, of a declaration from the vendor of the programme, as to whether the programme contains product placement can be construed as a reasonable effort.

V – Interpretation of Concepts & Distinction with Sponsoring & Surreptitious Advertising

5. 1. Guidance from RAs on how to implement the concept of Undue Prominence

Art. 11 (3) 2 c) AVMSD:

*"Programmes that contain product placement shall meet at least all of the following requirements:
(...)
(c) they shall not give undue prominence to the product in question;"*

Several authorities have already provided guidance on the concept of **undue prominence**, which was mentioned by the European Commission in the context of its Interpretative Communication on advertising¹⁹ as a criterion in order to distinguish surreptitious advertising from a lawful reference to goods, services, brands or names of economic operators. It is likely that most of the requirements developed by regulators will be applied as well to product placement.

The Belgian CSA has however already provided guidance on undue prominence in its recommendation on product placement of December 2009. Undue prominence is to be construed as the presentation of products or trademarks easily identifiable by an average viewer which is not editorially justified. The CSA's appreciation will be based on some indicators such as :

- blatant complacency towards a product, a service or a trademark ;
- absence of pluralism in the presentation of goods, services or trademarks ;
- frequent quotation and/or showing of product or trademarks;
- giving contact details (address, tel. or URL) of advertiser;
- absence of any critical distance.

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

¹⁹ Commission interpretative communication on certain aspects of the provisions on televised advertising in the 'Television without frontiers' Directive: http://www.ebu.ch/CMSimages/en/leg_ref_ec_communic_advert_tvwfd_280404_tcm6-11951.pdf

In Germany, the recently revised advertising guidelines also 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.

In Ireland, guidance on undue prominence is currently being developed. The factors that will be considered when the RA assesses whether there is undue prominence is:

- Whether the inclusion of the product/service is editorially justified,
- The manner in which the presence of products, services or facilities is presented in the programme, including, among other things, via the movements of the camera and the shots taken.
- Explicit mention of the virtues or positive effects of products,
- The evocation or reproduction of advertising content or slogans,
- The accumulated presence of the product and service across the scheduled duration of the programme, taking also into account the presence of the product or service in ad breaks.

In the UK, currently, the Ofcom Broadcasting Code requires that no undue prominence is given to a product or service²⁰. Ofcom has also published detailed guidance to assist broadcasters with their compliance with the Code, and this sets out further relevant information on undue prominence²¹. Ofcom anticipates amending this in relation to product placement as part of their forthcoming consultation.

In the Netherlands, guidance concerning undue prominence for sponsoring has been developed and it is likely that most of these requirements will be applied as well to product placement. Not allowed is the mentioning or displaying of specific sales information; the specific encouragement to buy or specific recommendation; any emphasized or exaggerated reference to or display of the product; any exclusive/subjective/positive references to the product; long or frequent descriptions, references, displays of the product; zooming in or out on product; full-screen displays of product; unclear distinction between programme and commercial or advertising campaign.

5.2 Guidance from RAs on how to determine what constitutes thematic placement

Recital (93) AVMSD

"Furthermore, sponsorship and product placement should be prohibited where they influence the content of programmes in such a way as to affect the responsibility and the editorial independence of the media service provider. This is the case with regard to thematic placement".

In contrast with the concept of undue influence, only a couple of regulators have developed guidance on what constitutes thematic placement.

In Germany, guidance on what constitutes thematic placement can be found under section 1, para. 3 of the advertising guidelines. It is described as the integration in the programmes of promotional statements concerning certain types of products or services in return for payment or similar consideration with the aim of making a profit. The thematic placement in particular of economic, political religious or ideological kind is prohibited.

In Ireland, guidance will be provided but has not been finalised. It will be broadly described as the placement of storylines, beliefs, policies, aims and objectives of the placer, generally in return for payment.

5.3 Guidance from RAs on the distinction in practice between product placement, sponsoring & surreptitious advertising

Recital (91) AVMSD

....

²⁰ See Rule 10.4: <http://www.ofcom.org.uk/tv/ifi/codes/bcode/bcode.pdf>

²¹ http://www.ofcom.org.uk/tv/ifi/guidance/bguidance/section10_2009.pdf

"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.

The French CSA has been dwelling on the distinction between product placement, sponsoring and surreptitious advertising when drafting its recent deliberation. As a result, the combination of sponsoring and product placement for the same brand/product in the same programme is expressly prohibited by the deliberation.

In the Netherlands, future guidelines on the distinction between sponsoring and product placement will have to be elaborated more into detail but as far as mentioning or displaying products are concerned, the approach will not differ a lot. Also in the case of product placement there should be no surreptitious advertising for products.

In Switzerland, product placement is considered as a form of sponsoring. Product placement is allowed whenever the product is integrated in the dramaturgic course of a programme without being accentuated conspicuously (i.e. zooms or frequency).

5.4. Combination of sponsoring and product placement for the same brand/product in the same programme

An interesting issue to examine is whether it is possible to combine sponsoring and product placement for the same brand or product in the same programme. One could imagine that the combination of these two practices may have an impact on the overall prominence of the products in question. There is however no indication in the AVMS Directive which could point to a prohibition of the combination of the two practices.

Many countries (at this sometimes still provisional stage) appear to accept the combination of the two techniques in the same programme.

In Belgium (CSA), it will be possible to combine sponsoring and product placement for the same brand/product in the same programme - provided of course that the rules for each type of commercial communication are complied with. In France and the Netherlands, this is expressly not allowed. This probably will not be allowed in Ireland either²².

In the UK, the issue remains undecided at this point.

VI – First Experiences with Implementation & Best Practices

(Have you dealt with any cases concerning product placement since the transposition?)

6.1. First cases dealing with product placement

So far only the CSA and the VRM in Belgium have (or are currently) dealing with cases relating to product placement.

In the French Community of Belgium, the RTBF (PSB) recently broadcast a short daily cookery programme containing product placement. The case is currently examined as to its compliance with the recommendation.

In the Flemish Community of Belgium, SBS Belgium (VT4) was imposed a fine of 10.000 EUR on 18 January 2010 because the product placement in the programme encouraged the viewers to purchase goods, specifically by recommending these products²³. T-VGAS (Gunk TV) was also imposed a fine of 1.500 EUR because the product placement in the programmes encouraged the viewers to purchase goods, specifically by recommending these products and because the products in question did benefit from undue prominence.

²² Note of the Secretary: see Point 7 (4) of the General Commercial Communications Code http://www.bai.ie/pdfs/general_commercial_communications_code.pdf and guidances notes: http://www.bai.ie/pdfs/general_commercial_communications_code_guidance_notes.pdf

²³ Decision 2010/005 of 18 Jan. 2010 concerning NV SBS Belgium, for more details, see the country report submitted by the VRM for the Barcelona meeting and <http://merlin.obs.coe.int/iris/2010/4/article8.en.html>.

6.2. *Best Practices developed by RAs*

It is still too early in the implementation process for the regulatory authorities to have developed a real compendium of best practices on product placement. However, the recommendation of the Belgian CSA, as a non-binding document (except for the PSB), may be considered a compilation of good practices for broadcasters.

Worth highlighting are also the CSA suggestions with regard to *contractual policy issues*. Broadcasters are encouraged to make three-party contracts with advertisers and producers to guarantee their editorial responsibility and ensure the legality of the product placement in their programmes. The CSA also encourages them to insert in the contract a clause of non interference of the advertiser in practical arrangements of product placement as the editorial responsibility of broadcasters could be jeopardised when the requirements of the advertisers go beyond the visibility of the product²⁴.

VII. Structure of Session & Questions for Debate

During the plenary session, a panel will kick off the discussion by addressing key concerns relating to the implementation of product placement. Under the guidance of EPRA Vice-Chair Jean-François Furnémont, the panel will be composed of:

- *Marc Janssen*, CSA, French Community of Belgium,
- *Dirk Peereeman*, VRM, Flemish Community of Belgium
- *Chris Banatvala*, Ofcom, UK
- *Wolfgang Thaenert*, DLM, Germany
- *Michael O’Keeffe*, BAI, Ireland.

The panel discussion will be followed by a debate with the audience during which some of the issues highlighted by this comparative paper may be addressed (see next page).

²⁴ See point 3.1 of the Recommendation of the Belgian CSA.

- **Provision free of charge: prop and prize placement & the issue of significant value**
Interpreted in the light of Rec. 91, product placement within the meaning of the Directive only involves production props and prizes of significant value. However, at national level, the great variety of approaches can be remarked upon. While some countries, such as Belgium, have decided to always consider prop and prize placement as product placement (independently of value), others will not incorporate the exception in favour of prop placement into their own legislation (as seems to be the case in France, where the rules on sponsorship will apply). While the majority of countries will closely follow the Directive, only a few have defined the notion of "significant value". *How to assess the value of a service: absolute value vs. relative calculation? What happens if the notion of significant value is not defined at the national level?*
- **Identification Issues:** *for the RAs who have not yet done so, is it envisaged that they play a role in the adoption of a logo/pictogramme/screen display in order to identify product placement or will it be up to the broadcasters to decide? If the latter course of action is chosen, how to ensure the neutrality of the identification logo and a consistency of identification devices for all audiovisual media service providers at the national level? Considering the cross-border character of broadcasting, would it be a good idea for regulators, especially in neighbouring countries where the same broadcasters compete for audience, to adopt a common or similar identification system, so that viewers are not confused?*
- **Acquired Programming:** While Member States have the leeway to waive the *identification requirements* for programmes that have neither been produced nor commissioned by the broadcaster or an affiliated company, the Directive does not refer to the applicability of other requirements (i.e. the exclusion of undue influence, promotional effect or prominence, prohibited genres and products) for bought-in programmes. Some countries seem to have drawn opposite conclusions. *What are the requirements of the Directive with regard to acquired programming? Are national requirements which go further than the Directive applicable to acquired programmes? To what extent do broadcasters have to investigate whether or not product placement exist in acquired programmes?*
- **Guidance from RAs on thematic placement:** In contrast to the concept of undue influence, only a couple of RAs have developed guidance on what constitutes thematic placement. *What are the issues at stake? Have best practices been developed?*
- **Impact of terminology/translation issues:** The concept of 'light entertainment' in Art. 11 (3) has puzzled many a regulator: *should a distinction be made between "entertainment" and "light entertainment"?* The French version however only mentions 'divertissement' (not 'léger divertissement'). This might be only a minor translation issue, but as a result, the notion of light entertainment has now appeared in a few countries. *And what about the concept of "serial" which is not mentioned in connection with "series" in Art. 11(3) (a), but is under Art. 20 TVwF? Will this "terminological fuzziness" have an impact in practice?*
- **Economic and contractual arrangements:** *Will RAs collect information to assess the legality of product placement? If so, how? Are broadcasters obliged to disclose contractual arrangements?*
- **Specific issue of on-demand Services:** Provisions on product placement are also applicable to on-demand audiovisual media services. *Do RAs foresee any specific implementation problems? Have regulators already given some thought on arrangements to accommodate the specific nature of on-demand services, e.g. with regard to identification issues?*