

RECOMMENDATION of the MEDIA COUNCIL

of the National Media and Infocommunications Authority on the Application of the Rules of Product Placement

Directive 2010/13/EU on Audiovisual Media Services¹ (hereinafter referred to as **the Directive**) implemented large-scale liberalisation in the field of commercial communications. On the one hand, the liberalisation eased the regulation of the traditional forms of commercial communications, while, on the other hand, it paved the way for the emergence of novel forms of commercial communications in the audiovisual media services market. Underlying the emergence of such new solutions are the effects of digitalisation on the audiovisual market (e.g. advertisement avoidance), which inspire media service providers to seek new forms of commercial communications that are tied more closely with or are integrated into programme content. A prominent example of such new forms of commercial communications is product placement, which brought about a breakthrough in the European regulatory model, which is based on the strict distinction between editorial and advertising content.

The new media legislation has resulted in a massive liberalisation of those advertising rules effective in unchanged form between 1996 and 2011, which had become obsolete in today's media market. An important achievement of Act CLXXXV of 2010 on Media Services and Mass Media (hereinafter referred to as the **Media Act**), effective as of 1st January 2011, is that, in respect of the rules governing commercial communications, it adopted the provisions of the Directive, whereby, *inter alia*, it created the possibility for media enterprises to draw upon new financial sources to promote the production of domestic programmes.

The institution of product placement permitted by the new legal framework of advertising has made it necessary to issue the present Recommendation, the purpose of which is to describe the relevant provisions and thereby to provide legal subjects with a unified, transparent and predictable overview of the legal practice of the Media Council in respect of product placement.

International legal literature, as well as the relevant regulatory principles and methods of the European Union, also recognise and emphasise that the supreme bodies of national sectoral public administration (e.g. energy, telecommunications, media) need to be provided with general regulatory tools that are normative in nature. A characteristic feature of these is that, although general in scope, they do not qualify as legal provisions; instead, they only contain those normative requirements of the given sector, the regulation of which by law would be impossible or extremely complicated. In respect of these *soft law* type sectoral normative acts, both the legal literature and the case law of the Hungarian Constitutional Court (on the basis of Constitutional Court Decision No. 60/1992) make it clear that these are not legal acts and have no mandatory effect; however, during the application of the law, the authority takes into consideration and applies such recommendations without explicitly referring to them as the grounds for its decisions. It should be noted that the recommendation is not binding upon the authority within its regulatory procedures; however, it does play a role in orienting the authority's legal practice as well as the voluntary observance of the law.

Taking into account the results of the public hearing on the subject of product placement, which was organised in order to understand the professional position of the media service providers, as well as with regard to the subsequent professional consultations, in respect of the legal compliance of product placement and the announcement thereof, the Media Council

¹Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive, codified version).

hereby publishes the following recommendation on the basis of the authorisation conferred upon it by Paragraph (4) of Article 31 and Point c) of Paragraph (1) of Article 183 of the Media Act:

I. Product placement

The institution of product placement implemented within the Hungarian legal system on the basis of the Community Directive on Audiovisual Media Services is a new type of commercial communication in the Hungarian regulatory system.

Product placement is any form of commercial communication that contains a product, a service, a trademark of or a reference to the former (hereinafter collectively referred to as "product") which appears within a programme against payment or similar consideration.

According to the provisions of the Media Act, payment or similar consideration is pivotal to product placement in programmes.

Taking into account the definitions of the Directive and the Media Act and the detailed provisions on their implementation, product placement and the related consideration may take the following forms:

1. Product placement against financial (monetary) consideration.

2. Product placement for "similar consideration" other than payment.

Within this, two distinct types of "similar consideration" may be discerned:

2.1 The value of the similar consideration is in excess of the free provision of the goods or services presented in the programme (the entity placing the product provides "in kind" consideration for the appearance of the product, service or whatever the subject of the agreement is, but such consideration is different from, or more than, just the product or service itself that appears in the programme).

2.2 Similar consideration is restricted to the provision of the product or the right to use the product which appears in the programme.

The above distinction does not preclude the combination of case 1 and case 2.1, i.e. the promoter of the product may provide both "in kind" and monetary consideration on the basis of the agreement concluded with the media service provider.

This classification makes it evident that truly free product placement, i.e. product placement without any consideration, is a contradiction in terms; that is, product placement may only be disseminated against payment or similar consideration. In practice, case 2.2 above (when the consideration is limited to the product/service itself) is often called "free" product placement, but in actual fact this is not free either: the presentation of the product/service represents an asset, as does the provision of the product/service in consideration for the aforementioned. That is, this scheme is only "free" in the sense that no movement of funds is involved.

In respect of the concept of similar consideration, neither the definition of product placement nor the operative text offers guidance as to the extent of such similar consideration. Accordingly, we may speak of similar consideration even if its value is less than the value of the product placement as commercial communication. This is why the term "barter", often used in practice to denote such transactions, is somewhat misleading: according to civil law, classic barter (swap) transactions are only considered to be effectively consummated if the values of the services exchanged are in balance with each other. Product placement is not conditional upon this and, in practice, this is not always achieved. That is, product placement is not an instance of bartering, nor does it involve gratuity, although imbalanced (*asynallagmatic*) contracts are, of course, permissible.

1. The possible areas of application of product placement

1.1. The media services affected by product placement

The present Recommendation concerns product placement in linear and on-demand audiovisual and radio media services.

1.2. The programme types affected by product placement

In respect of the permissible application of product placement, Paragraph (2) of Article 30 of the Media Act classifies the various programme types into two groups.

Article 30 of the Media Act

(2) Product placement in programmes shall be permitted

(a) in cinematographic works intended for showing in movie theatres; cinematographic works or film series intended for showing in media services; sports programmes and entertainment programmes;

(b) in programmes other than those stipulated in Point (a), provided that the manufacturer or distributor of the product concerned, or the provider or intermediary of the service concerned, does not provide the media service provider or the producer of the given programme with any financial reward, neither directly nor indirectly, beyond making the product or service available free of charge for product placement purposes.

In the case of the types of programmes under Point a) of Paragraph (2) of Article 30 product placement is permissible against any kind of consideration (payment, in-kind contribution or the provision of just the product itself).

According to Article 30 (2) Point b), in programmes other than those stipulated in Point a), the act precludes publication against payment, and, since it provides that the only permissible consideration for product placement is the provision of the product or service free of charge (i.e. the last case - subsection 2.2 - from the three instances of product placement listed in section I. of the recommendation); any other consideration in kind over and above the provision of the actual product/service is therefore precluded as well.

In the types of programmes listed below, any form of product placement is permissible on condition that the given programme does not specifically target minors under the age of fourteen:

- a) cinematographic works intended for showing in movie theatres,
- b) cinematographic works or film series intended for showing in media services,
- c) sports programmes, and
- d) entertainment programmes.

The Media Act provides clear guidance as to the concept of the programme types listed under Points a)-c) (Media Act, Article 203, Points 11 and 61).

In keeping with the Directive and on the basis that an exact and comprehensive definition is not possible, the Media Act does not define the concept of "entertainment programme" as mentioned in Point d). In respect of the application of product placement, the Media Council regards as entertainment programmes those non-fiction programmes whose primary purpose is the entertainment of the audience. Such programmes include, *inter alia*, talk shows, music shows, reality shows, variety shows, comedy, radio cabaret shows, game shows, magazine (lifestyle, hobby, travel, tabloid, cuisine) programmes and programmes dealing with sport that do not qualify as sports programmes, with the exception of sports news.

With respect to the definition of the concept of "sports programme" provided by the Media Act and the above considerations related to entertainment programmes, the Media Council differentiates between sports programmes and entertainment programmes on the basis of the following criteria:

- if the given programme contains coverage of a sports event, it qualifies as a sports programme,
- if the topic of the given programme is sport, but it does not contain coverage of a sports event, it qualifies as an entertainment programme,
- sport-related interviews, (studio) conversations aired prior to, after or during the natural breaks in a sports broadcast related to its topic qualify as sports programmes if taken together with the sports broadcast; however, such programmes may qualify as composite programmes [sports and entertainment on the basis of Point 54 of Article 203 of the Media Act], since product placement is permissible in both types of programmes.

In programmes other than the above, product placement is only permissible if the manufacturer or distributor of the product does not provide the media service provider or the producer of the given programme with any financial reward, either directly or indirectly, beyond making available the product or service free of charge for product placement purposes. Such programmes may be, for example, those intended specifically for minors under the age of fourteen

1.3. Programmes barred from product placement

No product placement may be used

- in news programmes and political information programmes,
- in programmes intended specifically for minors under the age of fourteen against consideration over and above the free of charge provision of the product to be presented,
- in programmes reporting on the official events of national holidays, and
- in programmes with religious or ecclesiastical content.

The concept of news and political information programmes is defined in Points 17 and 56 of Article 203 of the Media Act, while the latter three programme types are self-evident.

Taking into account the definitions of the Directive and the Media Act and the detailed provisions on their implementation, product placement and the related consideration may take the following forms:

1. Product placement against financial (monetary) consideration.

2. Product placement for "similar consideration" other than payment.

2.1 The value of the similar consideration is in excess of the free provision of the goods or services presented in the programme.

2.2 Similar consideration is restricted to the provision of the product presented in the programme.

The table below summarises the possible instances of product placement:

PROGRAMME TYPE	PRODUCT PLACEMENT AGAINST PAYMENT OR CONSIDERATION IN EXCESS OF THE PROVISION OF THE PRODUCT TO BE PRESENTED (cases 1. and 2.1)	PRODUCT PLACEMENT AGAINST THE PROVISION OF THE PRODUCT ITSELF FREE OF CHARGE (case 2.2)
News programmes	no	no
Political information programmes	no	no
Programmes reporting on the official events of national holidays	no	no
Programmes with religious or ecclesiastical content	no	no
Programmes intended specifically for minors under the age of fourteen	no	yes
Cinematographic works (cinema and TV)	yes	yes
Film series (TV)	yes	yes
Sports programmes	yes	yes
Entertainment programmes	yes	yes
Other programmes (with the exception of Paragraph (3) of Article 30 of the Media Act)	no	yes

1.4. Products barred from product placement

Irrespective of the type and nature of the programme, product placement is prohibited with regard to the following products:

- tobacco products, cigarettes or other products originating from undertakings whose primary activity is the manufacture or sale of cigarettes or other tobacco products [Media Act 30 (4) a)],
- medicines, medicinal products, or therapeutic procedures, which may only be used upon medical prescription [Media Act 30 (4) c)],
- weapons, ammunition, explosives [Paragraph (7) of Article 20 of Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules of Media Content (hereinafter referred to as the **Press Freedom Act**)],
- those products barred from commercial advertising by Act XLVIII of 2008 on the essential conditions and certain limitations of business advertising activity (hereinafter: the Advertising Act): sexual services, products intended to arouse sexual interest, dogs considered dangerous, animal fights, human organs or tissues, abortions, institutions carrying out abortions or means and procedures for performing such (Advertising Act Article 9, Articles 14-17).

1.5. The conditions of use of product placement

Product placement qualifies as commercial communication; it is therefore required to conform to the general rules of commercial communication as provided for by the Press Freedom Act and the Media Act.

Accordingly, product placement appearing in the programme as commercial communication

- must be distinguishable from other media content [Press Freedom Act, Article 20 Paragraph (1)],
- may not use techniques that cannot be perceived by the conscious mind [Press Freedom Act, Article 20 Paragraph (4)],
- may not offend religious or ideological convictions [Press Freedom Act, Article 20 Paragraph (5) and Media Act, Article 24 Paragraph (1) Point h)],
- may not encourage conduct that could be harmful to health, safety or the environment [Press Freedom Act, Article 20 Paragraph (6)],
- may not violate human dignity [Media Act, Article 24 Paragraph (1) Point a)],
- may not contain and shall not support discrimination on the grounds of gender, racial or ethnic origin, nationality, religion or ideological conviction, physical or mental disability, age or sexual orientation [Media Act, Article 24 Paragraph (1) Point b)],
- may not directly call upon minors to purchase or rent products or to use services [Media Act, Article 24 Paragraph (1) Point c)],
- may not directly call upon minors to persuade their parents or others to purchase the advertised products or to use the advertised services [Media Act, Article 24 Paragraph (1) Point d)],
- may not exploit the special trust of minors placed in their parents, teachers or other persons or the inexperience and credulity of minors [Media Act, Article 24 Paragraph (1) Point e)],
- may not show minors in dangerous situations, if this is not justified [Media Act, Article 24 Paragraph (1) Point f)],
- may not express religious, conscientious or ideological convictions except for commercial communications broadcasted in thematic media services with religious topics [Media Act, Article 24 Paragraph (1) Point g)],
- if the purpose of the commercial communication is to promote alcoholic beverages, it may not be aimed specifically at minors [Media Act, Article 24 Paragraph (2) Point a)],
- it may not show minors consuming alcohol [Media Act, Article 24 Paragraph (2) Point b)],
- it may not encourage the immoderate consumption of such beverages [Media Act, Article 24 (2) c)],
- it may not depict immoderate alcohol consumption in a positive light and refraining from alcohol consumption in a negative light [Media Act, Article 24 Paragraph (2) Point d)],
- it may not show exceptional physical performance or the driving of vehicles as a result of the consumption of alcoholic beverages [Media Act, Article 24 Paragraph (2) Point e)],
- it may not create the impression that the consumption of alcoholic beverages contributes to social or sexual success [Media Act, Article 24 Paragraph (2) Point f)],
- it not claim that the consumption of alcoholic beverages has stimulating, sedative or any other positive health effects or that alcoholic beverages are a means of resolving personal problems [Media Act, Article 24 Paragraph (2) Point g)],
- it may not create the impression that immoderate alcohol consumption may be avoided by consuming beverages with low alcohol content or that high alcohol content is a positive attribute of the beverage [Media Act, Article 24 Paragraph (2) Point h)].

1.6. Content requirements regarding programmes containing product placement

1.6.1 According to Article 3 of the Media Act, the media service provider can freely determine the content of the media service published by it, within the scope of its editorial independence, however, it shall have editorial responsibility for the legal compliance of the content published.

The content of programmes containing product placement – the programme schedule in the case of linear media services – may not be influenced in such a manner as to affect the editorial independence and responsibility of the media service provider and to create new or distorted editorial content as a result of the product placement.

1.6.2 Programmes containing product placement may not call for the purchase or rental of a product or the use of a service in a direct manner. Such a "direct call" is any – verbal or visual – intentional and clear appeal to purchase, promote or use the product or service that is the subject of product placement, especially the communication of the following information in the programme:

- the publication of the commercial availability and price of the product/service,
- the communication of the properties/advantages of the product/service,
- the publication of the slogan of the product/service,
- the mentioning of statements from the product/service's advertisement.

At the same time, the presentation of the product or service in relation to the subject matter of the programme in the interest of information, educational, cultural, critical or consumer protection purposes does not constitute such a direct call.

1.6.3 Programmes containing product placement may not give any unjustified emphasis to the product so displayed which does not otherwise stem from the content of the programme flow.

The appearance of the product in the programme is given unjustified emphasis in particular in instances when the goods and services, or their trademarks or any reference thereto, appear in the programme or programme flow in a way that is dramaturgically alien from the sequence of actions.

The intensity of appearance may only be assessed on a case-by-case basis, taking into account the type and nature of the given programme. The question whether the appearance of a product in a programme is dramaturgically justified and fits the content of the programme may only be decided on the basis of the contents of the specific programme.

The following factors in particular may lead to an assessment of unjustified emphasis:

- the frequency of the appearance of the product/service,
- the number of appearances relative to the length and nature of the given programme.

1.7. The manner of informing the viewers/listeners about the fact of product placement

Besides advising the audience of the fact of product placement, the duty of informing the viewers and listeners, as provided for by Paragraph (2) of Article 31 of the Media Act, has a consumer protection function as well. Taking into account this function of the provision of information, the Media Council formulates the following recommendation for marking programmes containing product placement:

- In television, the viewers may be informed about the fact of product placement with the following single-row highlighted subtitle covering 5% of the screen-height, the graphic attributes (colour and font) of which are adapted to the image of the channel:
THE PROGRAMME CONTAINS PRODUCT PLACEMENT.
The subtitle appears on screen at the beginning of the programme and after

advertisement breaks, directly after the main title, and at the end of the programme, at the beginning of the credits, for 5 seconds.

- On the radio, the audience may be informed about the fact of product placement at the start of the programme, following advertisement breaks after the programme signal and immediately before the signal at the end of the programme with the following clearly audible warning:
THE PROGRAMME CONTAINS PRODUCT PLACEMENT.

In the present Recommendation, the Media Council wishes to establish that, on the basis of the agreement by the actors of the media market concerned, the audience may be informed of the fact of product placement in a manner different from the above, e.g. in the case of television channels, by the use of uniform pictograms. The Media Council attaches special importance to the consultation process with the actors of the sector prior to the introduction of the consensus-based marking system and the information campaign aimed at familiarising the audience with the marking regime to be introduced.

1.8. The relationship between product placement and sponsorship

On the basis of the provisions of the Media Act on commercial communications and programme sponsorship, the joint use of product placement and the display of the sponsor in a single programme is not precluded if it does not result in a violation of editorial independence. With regard to topical programmes such as automobile programmes, for example, the presentation of products related to the content of the programmes in conformance to the relevant provisions may be regarded as permissible product placement.

The presentation of such, however, does not qualify as product placement if the media service provider or the programme producer has not acquired the vehicle from its producer, distributor or a provider of services related to the vehicle (i.e. it is not the former who provides the vehicle to the producers of the programme free of charge in the interest of the production of the programme), nor did the former pay (or provide contribution in kind) for the publication, as in such cases the element of a business or commercial link between the media service provider/programme producer and the manufacturer/distributor of the product that is integral to the concept of product placement is missing. (Nevertheless, depending on the manner of presentation, such a case may constitute surreptitious commercial communication as defined in Paragraph 3 of Article 20 of the Press Freedom Act.)

The decisive difference between sponsorship and product placement is that, in the case of the latter, the reference to the product is integrated into the programme, while the sponsor may be mentioned during the programme, but separately from its content.

Budapest, 19th July 2011

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