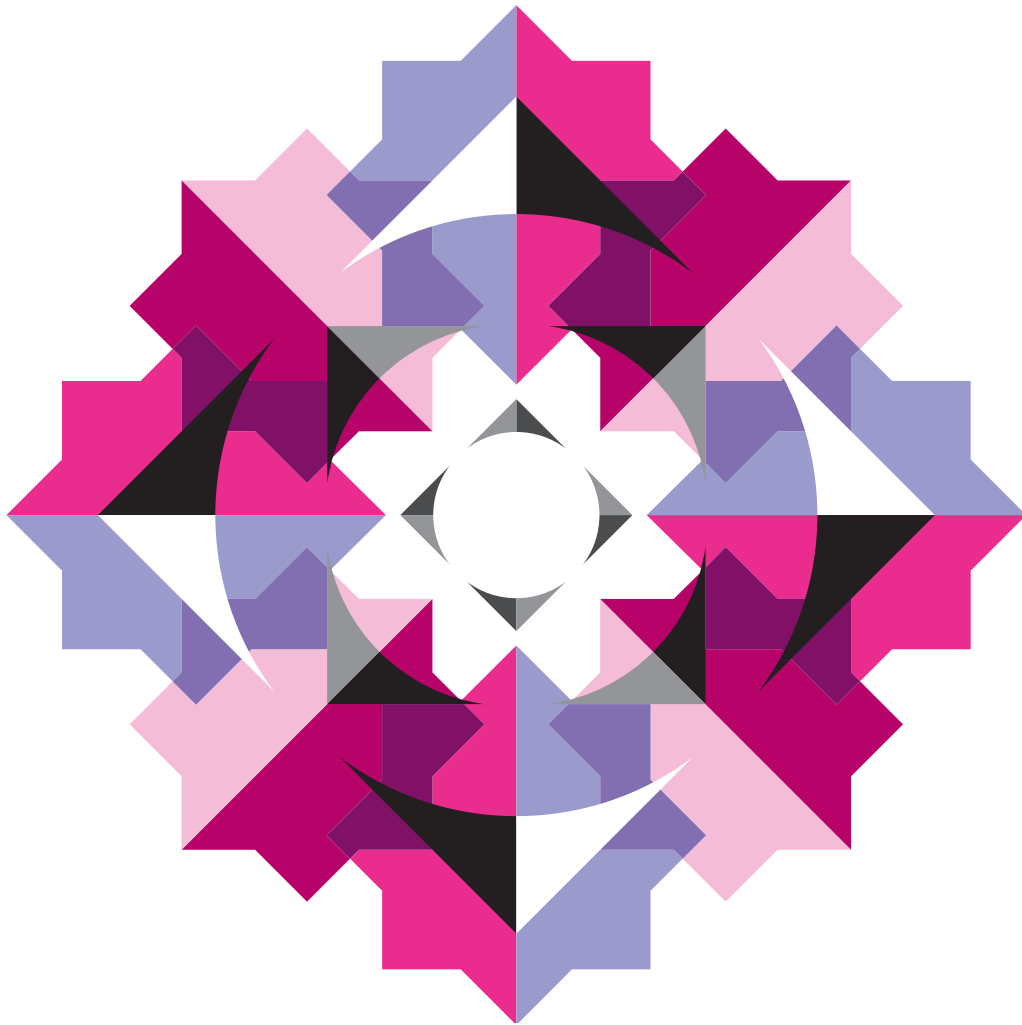


Product Placement and the AVMS Directive



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Introduction

The rules relating to product placement in EU television programming are undergoing significant reform. Under the Audiovisual Media Services (“AVMS”) Directive, adopted on 11th December 2007, Member States are expressly permitted to allow product placement in respect of certain broad categories of programme for the first time.

But Member States are not obliged to permit product placement, and the government here has expressed strong doubts as to the wisdom of implementing these provisions in the UK.

The AVMS Directive, a much revised version of the so-called Television Without Frontiers (TVWF) Directive, must be implemented in Member States by 19th December 2009. The Department of Culture, Media & Sport (DCMS) is consulting on a number of issues relating to UK implementation, including the question of whether product placement should be permitted. In this InBrief, we look at the potential impact of the new regime in the UK, and also the implications should the government decide not to give product placement the green light.

The existing UK law

Product placement has been defined by Ofcom as “the inclusion of, or reference to, a product or service within a [TV] programme in return for payment or other valuable consideration to the programme maker or broadcaster (or any representative or associate of them).”

Although some other EU Member States have taken a more relaxed view, the UK approach to product placement in domestic programming has been that it is clearly prohibited as a result of the requirement that editorial and advertising material should be kept strictly segregated. This principle, which originates in the TVWF Directive, is reflected in Section 10 of the Ofcom Broadcast Code, which states that “product placement is prohibited”.

In practice, this ban on product placement is qualified in two important respects. First, “product placement” has become acceptable practice in the UK (i.e. the inclusion of products or services within programmes where they are provided for no charge, or at less than cost) provided that it is editorially justified.

Secondly, product placement is permitted within films and programmes produced outside the UK, provided that no UK broadcaster benefits from such placement.

In both of these cases, however, there is still an over-riding obligation on the UK broadcaster to ensure that the relevant products or services are not given undue prominence. This can mean that product references in imported programmes have to be edited before they can legitimately be broadcast in the UK.

What does the AVMS Directive say?

The product placement provisions are set out in Article 3g of the Directive, and apply to all “audiovisual media services” (i.e. both traditional TV broadcasting and video-on-demand services).

The structure of Article 3g is somewhat counter-intuitive, reflecting the politics of the negotiating process. While paragraph 1 baldly states that “Product placement shall be prohibited,” paragraph 2 then goes on to lay out a fairly sweeping derogation from that basic position. The derogation allows Member States to permit product placement in certain types of programming, the details of which are set out in the next section.

As mentioned above, however, the derogation from paragraph 1 is applicable “unless a Member State decides otherwise”. So it is open to each of the 27 Member States of the EU to decide whether or not to take advantage of the relaxation in rules, and the extent to which they wish to do so.

What types of programme might use product placement?

The Directive allows Member States to permit product placement in the following types of programming:

- Cinematographic works (i.e. feature films)
- Films and series made for TV or video-on-demand
- Sports programmes
- Light entertainment programmes.

However, even if a programme falls into one of the above categories it cannot include product placement:

- In programmes made for children
- For tobacco products or tobacco companies
- For medical products or treatments only available on prescription.

What other rules would apply to product placement?

Even when product placement is allowed for a particular product and programme, the Directive then imposes four additional safeguards before the placement can legitimately take place:

- a) the content (and for TV, the scheduling) of the programme must not be influenced so as to affect the responsibility and editorial independence of the media service provider;
- b) the programme must not directly encourage the purchase or rental of the goods or services, and in particular must not include promotional references to them;
- c) the programme must not give undue prominence to the product;
- d) programmes containing product placement must inform viewers of its inclusion at the start and end of the programme and whenever it resumes after an advertising break; but Member States can choose to waive this obligation in respect of programmes not produced or commissioned by the media service provider or an affiliated company.

What are the general requirements applying to all commercial communications?

In addition to the specific rules relating to product placement, Article 3e of the AVMS Directive also sets out a number of more general requirements that apply to all “audiovisual commercial communications.” These are defined as “images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity,” and specifically include TV advertisements, sponsorship, teleshopping and product placement.

Audio visual commercial communications – and thus product placements – are prohibited, amongst other things, if they:

- promote discrimination or are prejudicial to human dignity, health or safety, or protection of the environment;
- encourage the immoderate consumption of alcoholic beverages, or target children in

respect of such beverages;

- cause physical or moral detriment to minors.

The DCMS Consultation on UK implementation

The DCMS published its consultation document on how the AVMS Directive should be implemented in the UK on 25th July, and is looking for responses from stakeholders by 31st October. The issue of product placement is one of four main questions addressed by the consultation.

As indicated by Andy Burnham – the Secretary of State at the DCMS – in advance of the consultation exercise, the UK government’s “initial view” is that it will continue to prohibit product placement in this country (both in TV and video-on-demand), i.e. it will not take advantage of the derogation in the AVMS Directive. Its principal reason for taking this line appears to be a fear that allowing product placement would “risk damaging viewer and consumer confidence in the integrity of UK-produced programming.” It feels that any economic benefits that might arise from its introduction would be modest in comparison, and that the existing rules give sufficient editorial lee-way for the use of branded products to provide realism. However, the government says that it “nevertheless remains open to other options if there are strong arguments that the concerns can be met.”

If the UK does decide not to take advantage of the derogation, the net result of the implementation of the AVMS Directive in the UK may actually be to further entrench the existing prohibition on product placement. This is because the government believes that to implement properly it is bound to reflect the Directive’s “direct and express prohibition of product placement” in legislation, rather than being able to rely upon the existing prohibition in the Ofcom Broadcasting Code.

What about “prop placement”?

Recital 61 of the Directive states that “The provision of goods or services free of charge, such as production props or prizes, should only be considered to be product placement if the goods or services involved are of significant value.” Thus the free placement of items of less than “significant value” will fall outside the product placement regime. (It would usually still have to comply with the general requirements of audiovisual commercial communications, however, for example not to be unduly prominent.)

On the other hand, where the goods or services provided free are deemed to be of significant value, they will constitute a form of “product placement”. The Directive specifically allows (but does not oblige) Member States to permit product placement “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,” and such placement can be any type of programme (including in children’s programmes). All of the other safeguards mentioned above would still apply, however.

The DCMS has indicated that it is happy to preserve the existing UK approach as far as possible in respect of allowing prop placement, and it seems from the consultation document that this would be the case whether or not the prop placement was of “significant value”. Prop placement falling below such a value can continue as now, but that which is above the threshold value would have to comply with the full range of requirements for product placement under the Directive as to permissible programme types, notification of viewers, etc, as discussed above.

The level at which “significant value” should be set will thus be of some considerable importance. The government is consulting on this issue, suggesting the possibility either of an absolute figure (Austria has a benchmark of 1,000 Euros) or a fixed proportion of the total production budget.

Ironically, even if the UK allows no other product placement, this high value prop placement will therefore require the UK (through Ofcom) to address the requirements of the Directive, such as how the placement should be signalled before, during and after the programme.

What about films and non-UK

sourced television programming?

As with prop placement, the government has indicated that it wishes to preserve the existing position permitting product placement in feature films and in programming bought in from outside the UK. However, it must implement the requirements of the Directive as to the genres of programme in which product placement is permitted. So product placement will be prohibited, even in programmes made outside the UK, if they fall outside the categories of "cinematographic works, films and series made for audiovisual services, sports programmes and light entertainment programmes" or are deemed to be children's programmes.

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Product placement in video-on-demand

The government is also consulting on the best regulatory structure for the regulation of video-on-demand, for both editorial content and audiovisual commercial communications. It favours a co-regulatory approach, with Ofcom as the backstop regulator, but industry-based bodies having hands-on responsibility for day to day running of the system. It is suggested that the ASA would continue to having hands-on responsibility for commercial communications (including product placement) but under a new code developed specifically for video-on-demand, rather than under the CAP Code as now.

The government proposes to take an identical approach to video-on-demand as to TV broadcasting, i.e. permitting prop placement and product placement in films and non-UK programmes (subject to the points discussed above) but prohibiting all other product placement.