

KLÁRA GELLÉN*

Comments on the expectable updates of the Digital Single Market Strategy regarding the promotional rules of the Audiovisual Media Services directive

Introduction

One of the main aims of the Digital Single Market Strategy¹ presented by the European Union in May 2015 was to update the AVMS directive.² Within this process, the directive is subject to an update targeting different aspects, such as the rules concerning commercial communications. It is doubtless that in the nearest future commercial communications – such as advertisements, product placement, sponsorship announcement – must be revised. An update is justified and unavoidable, as – thanks to smart televisions and portable devices – more and more consumers have access to downloadable content and meet with diverse range of commercial content. On the other hand, new business models are being offered by the providers. Programme providers are operating on a wider scale, online as well, which means that on the Internet there are market members who are targeting as well as competing for the same audience and offer audiovisual content (for example non linear services and video-sharing platforms).

Currently, various rules apply to television broadcasting, non linear (on-demand) services and to contents created by the users. Therefore, consumer protection may also be applied on many different levels. According to the aims of the update, the AVMS directive must be harmonised in such a way that it would consider all the undergoing changes of the

* associate professor, University of Szeged

¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Digital Single Market Strategy for Europe. European Commission, Brussels, 6.5.2015 COM (2015) 192 final

² Directive 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)

consumers', as well as the technological world, so that it could refer to all the services of the market and would provide harmonised minimalistic rules on every level and in every field.

Regarding the present state of the update, the modified AVMS directive was announced 25 May, 2016. Its main aim is to balance the competitiveness and consumer protection.³

The recommendations regarding commercial communication will be introduced below, analysing also the different misgivings related to the new legislation.

1. Expanding policy areas

Presently, the AVMS directive does not apply to user-generated contents or contents of video-sharing platforms because in case of such video-sharing platforms, essentially, the providers have no editorial responsibility for the uploaded contents and presently, this is a significant issue when discussing media services. The service which does not hold the above quality, does not qualify as media service. Therefore, the directive does not apply to it. However, in the current modification proposal, following the on-demand media services (2007), legislators wish to re-calibrate these rules of the directive, so that they would apply to these platforms as well. This way, every economic content appearing there, will be governed by the above mentioned directive.

II. The legal environment of commercial communications

The revision of the AVMS directive launched within the frames of the Digital Single Market Strategy, from various aspects, will target advertisement – like, commercial content as well. As regards the video-sharing platforms, it will mean a new interpretation of the current, existing legal environment.

As regards the present rules concerning video-sharing services, in some cases, the directive⁴ regarding e-commerce must be applied, as these are considered to be information social services. According to the directive, the broadcasting services – or the so called

³ Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities Brussels, 25.5. 2016 COM (2016) 287 final 2016/0151 (COD)

⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market („Directive on electronic commerce“)

storage services – cannot be accountable for any illegal content which they provide storage space for.⁵

A provider is regarded as a storage provider if he cannot be accounted for the given information, he does not supervise it. The provider is not liable only if he guarantees that should any illegal content be detected, he would immediately take measures to remove it or would prohibit access to it. Another main legal environment is the UCP directive⁶, which prohibits unfair commercial practice between undertakings and consumers, for example, all the misleading and violent activities appearing in ICT services.

III. The common rules of commercial communications

As regards the modified proposal that was formed as a result of the update, some rules of the commercial communications are to be simplified, made more flexible, in order to boost competitiveness but keep top quality consumer protection. Flexible regulations are of utmost importance in case of linear audiovisual services, and in case of product placement and sponsorship.

The structure of the modifying proposal – according to the Committee on Culture and Education of the European Parliament – does not emphasise strongly enough the importance of the common minimalistic rules deriving from common legislative environment. Therefore, in its statement, it recommends that the requirements regarding all commercial communications be shifted into the common regulatory framework. Regarding audiovisual commercial communications, the aim is to provide minimalistic legislative standards and thus ensure equal competitive conditions, so that it would and could be applied to any service. As a result of the complementary text, the member states certify that media broadcasters, as well as audiovisual commercial placements published by video-sharing platform providers, who are under the legislation, would meet requirements like easy recognition, prohibition against incitement to hatred, protection of human dignity, prohibition regarding special products.⁷ According to the Committee, the Member States shall ensure that video-sharing platform providers take on the same obligations as media service providers, in accordance

⁵ Directive on electronic commerce, 14. article

⁶ DIRECTIVE 2005/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive')

⁷ Committee on Culture and Education: Amendments, Draft report on the proposal for a directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities Proposal for a directive (COM(2016)0287 – C8-0193/2016 – 2016/0151(COD)) (27.10.2016.)

with the provisions laid down in Articles 9-11 for audiovisual commercial communications made available on their platform, given that – they are based on an economic model that is similar to that of audiovisual media service providers – they are involved in the sale and placement of audiovisual commercial communications – or share in the resultant operating income.⁸

The revision, in order to protect commercial communications and minors, regards it its high priority to deal with the topic of substances harmful to one's healthy development, such as food containing salt, sugar and flour. It considers the national rules of the member states insufficient, it initiates a harmonised „behavioural code”, which would apply to all EU member states. Such code would protect the minors from watching inappropriate audiovisual content, where different foods and drinks high in fat, salt or sugar are promoted or alcoholic beverages are advertised. Its aim – in order to protect minors and children – is to decrease the number of advertisements promoting such products and to reduce the exposure of minors to commercial content where alcoholic beverages are advertised/promoted. The „code” must contain rules which would not allow audiovisual commercial placements to emphasize the nutritional benefits of such foods or drinks. The directive promotes the exchange of good practices regarding self-regulatory and co-regulatory systems in all EU states. In order to implement this, the Committee must promote the elaboration of the behavioural codes of the EU states.

IV. Commercial contents

1. Sponsorship announcement

In the proposal – concerning sponsorship announcement – it is a requirement that no platform can directly promote the purchase or rental of goods or services. Informing clients about the content is still top priority. Sponsorship announcements should continue to clearly inform the viewers of the existence of a sponsorship agreement. The content of sponsored programmes should not be influenced in such a way as to affect the audiovisual media service provider's editorial independence.⁹ According to the Cultural and Educational Committee of the European Parliament, besides these minimalised regulations, in order to guarantee fair competitive conditions, sponsorship announcements, audiovisual media providers, video-sharing platform providers, programmes or videos made by users must also meet these general requirements. rules. According to the proposal, to the extent that video-sharing platform providers are involved in the sale or placement of audiovisual commercial communications. Member States shall ensure that they assume the same

⁸ Committee on Culture and Education, amendment 951.

⁹ Proposal: 14. preambulum

obligations as media service providers with regard to the requirements of Articles 9 to 11 for audiovisual commercial communications, sponsoring and product placement made available on their platform.¹⁰

2. Product placement

The construction of the AVMS Directive enabled EU's services to use product placement. But the message of the regulation is controversial. According to the rule of the directive, prohibition of the new genre is promoted. Nevertheless, the Member States were allowed to use product placement. Although the member states took the opportunity and – within the agreed frames of the directive – granted permissions for product placement, it must be stated that the liberalisation of rules regarding product placement had not been implemented as expected.

The Proposal would like to establish a wider range of use of this new form of audiovisual commercial placement. Therefore, one of the main modifications is the modification of the legislative concept itself: general prohibition would be replaced by general permission; prohibition would apply only to certain programmes. Taking all this into consideration, the recommended rule would sound as follows: Product placement shall be admissible in all audiovisual media services, except in news and current affairs programmes, consumer affairs programmes, religious programmes and programmes with a significant children's audience.¹¹ The exceptional programmes would include programmes where some higher interest would require product placement prohibition or the type of the programme itself would not allow product placement. Expert research shows that product placement and embedded advertisements influence children's behaviour, as children are often unable to recognize commercial content. Therefore, it is necessary to maintain the prohibition of product placement in such programmes, where the audience is mostly comprised of children. Programmes dealing with customer matters give advice to customers, or give them an overall information regarding the purchase of certain products or services. If such programmes contained product placement, – in the eyes of the viewers who expect honest and realistic presentation – the difference between an advertisement and edited content would disappear.¹²

According to the Proposal, product placement must meet the following, previously accepted requirements. Programmes that contain product placement shall meet the following requirements:

¹⁰ Committee on Culture and Education, amendment 952.

¹¹ Proposal: Article 11. 2

¹² OPINION of the Committee on the Internal Market and Consumer Protection for the Committee on Culture and Education on the proposal for a directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities (COM(2016)0287 – C8-0193/2016 – 2016/0151(COD)) (Amendment 15) </Amend>

- a. their content and, in the case of television broadcasting, their scheduling shall under no circumstances be influenced in such a way as to affect responsibility and editorial independence of the media service provider.
- b. they shall not directly encourage the purchase or rental of goods or services;¹³

According to the modification of the Proposal, programmes containing product placement or videos produced by the users do not have to abide by the rule of prohibition of undue prominence. Regarding product placement it is currently one of the major requirements. In practice, it is difficult to implement rules which state that a product may not receive undue prominence within a programme. It also blocks the widespread transmission of product placement. Considering the latter question, it can only form value, and fulfill its task as commercial value, if the exposition is prominent at all levels. The aim of the programmes containing product placement should be to clearly inform the viewer about product placement, and must also ensure the editorial independence of audiovisual media providers. The prohibition should be eliminated as „it is positive to see the removal of „due prominence” concerning product placement, previously the regulatory ambiguity of this term has limited the ability to use this commercial revenue stream.”¹⁴ According to the preambulum (No.17) „The rule that a product should not be given undue prominence, has proved difficult to apply in practice. It also restricts the take-up of product placement which, by definition, involves some level of prominent exposure to be able to generate value. The requirements for programs containing product placement should thus focus on clearly informing the viewers of the existence of product placement and on ensuring that the audiovisual media service provider’s editorial independence is not affected.”

The Committee on Culture and Education considers it important to emphasize that besides the minimalistic rules regarding product placement, equal competitive rights must indeed be granted, so that they could be applied to each and every provider (video-sharing platforms and videos included.). As a result, the committee hands in a proposal, according to which any form of audiovisual commercial publication is considered to be product placement, regardless of whether it appears in a programme or *in a video produced by users*. In such cases, product placement appearing in the content produced by the user, must also be regulated by the rule (the role of responsibility may be an interesting issue, if it is not eligible to publication regulations).

¹³ Article 11. 3.

¹⁴ OPINION of the Committee on the Internal Market and Consumer Protection for the Committee on Culture and Education on the proposal for a directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities (COM(2016)0287 - C8-0193/2016 - 2016/0151(COD))

3. Television programme providers and advertisements

In the EU, the requirement regarding advertising time span is as follows: the proportion of TV advertising spots and teleshopping spots within a given clock hour shall not exceed 20%.¹⁵ The proposal would alter this rule so that the 20% rule would refer to a wider time span, and the provider would be able to move within this span more freely. The daily ratio of TV advertising spots and teleshopping spots between 7:00 and 23:00 hours shall not exceed 20%. In the period between 7:00 and 23:00 hours, the directive does not increase the overall time of advertising but for programme providers flexibility is of extreme importance in order to be able to decide when to place advertisements, so as to maximise advertising demand and viewer turnover. By this, I think, media politics will shift towards a more radical direction, towards more open media services, where client selection would keep media providers on the market: if advertisements are placed well and are within the toleration limit, the client will not switch to another channel; if, however, violating the above statement, they are exaggerated and are placed in prime time, a media provider may risk his own viewer number indicators, as clients strongly oppose advertisements, and there is a great chance that in order to avoid advertisements, they would avoid the channel altogether.

According to the Committee on Culture and Education, the appropriate level of customer protection must be maintained because due to this flexibility the viewers would be exposed to exaggerated amounts of prime time advertisements. This would reduce advertising incomes, and would limit the expenditure of content-production. Therefore, stricter limitation must be introduced between 20:00 and 23:00 hours, which, in the given period, would mean a 20% advertising limit. Limiting the advertising time during prime time would not only protect the viewers, but it would also guarantee that advertising revenue would not decrease radically. This would mean eliminating a situation where there would not be financial coverage for content production. According to other opinions: „This will not increase advertising expenditure for linear broadcasting. This flexibility will lead to congested peak hours, weakening the advertising impact, creating periods of saturation to the detriment of customers. In the interest of customers, this draft opinion removes measures designed to deregulate advertising minutage.”¹⁶

Another cardinal change is the modification of rules regarding the placement of advertisements within the programmes. Due to the increasing number of services, clients meet with a wider selection, so programme providers receive a bigger flexibility to place advertising or teleshopping spots into the programmes; provided they have no harmful effects on the integrity of the programme. At the same time, in order to maintain the unique quality of the European television, it is still necessary to limit the intermissions of film-screenings in cinemas or in case of films produced for TV-screening. The same would apply to some other programme categories, which should be protected in the future.

¹⁵ Article 23. 1.

¹⁶ OPINION of the Committee on the Internal Market and Consumer Protection for the Committee on Culture and Education (COM(2016)0287 – C8-0193/2016 – 2016/0151(COD) 4.o.

Instead of the current 30 minutes intermittent time, programmes would be interrupted every 20 minutes. It must be noted that the interruption of programmes may offend the rights of others, and may also offend copyright regulations (as well as neighbouring regulations) and a more frequent intermission may raise the question of undue intermission. With regard to the frequency of intermission, there has been counter opinions as well. The new effort is to move towards a more flexible regulation/ruling, thus enabling the media providers to get a wider range for movement. According to other opinions, taking into consideration the protection of other programmes, it is not justified to widen the movement scale any further. „Underlines the importance of maintaining the 30 minutes rule between advertising interruptions for cinematic works, as it would disproportionately affect the programs integrity and does not correspond to the consumer habits, nor to an imperative need for the audiovisual media services...”¹⁷

Summary

The modification of the AVMS directive, within the frame of the Digital Single Market strategy, will undoubtedly lead to a more flexible and more liberal legislation. The choice of platforms similar to media services is widening, therefore, it is advised to include all the video-sharing platforms in the legislative environment, as-although they may have different access and control – providers give more and more similar services when clients are concerned. Video-sharing platforms move in the same competitive field as media-service providers, they target and provide service for the same customers.

It has become evident by now that in commercial media world all the income deriving from economic content serve as the basic operative means of the media, as is the case with similar services. The modifications mentioned in this study would generate advantageous economic changes, expect more competitive operation, especially in case of television programme providers. The proposal wishes to achieve balance between competitiveness and client protection by granting more flexibility for every audiovisual media service regarding product placement or sponsorship, and would enhance television media service flexibility. This will harmonize the regulations of all the different services. On the other hand, it is questionable and apprehensive how the requirements of the directive could be applied to video-platforms in reality.

¹⁷ Opinion: amendment 17

GELLÉN KLÁRA

GONDOLATOK AZ EGYSÉGES DIGITÁLIS
PIAC ÉS AZ AVMS IRÁNYELV REKLÁMJOGI
SZABÁLYAINAK VÁRHATÓ VÁLTOZÁSAIRÓL

(Összefoglalás)

Az Egységes Digitális Piaci stratégia keretében megvalósult AVMS irányelv revízió kétségtelenül a még rugalmasabb és még liberálisabb szabályozás mellett teszi le a voksát. A médiaszolgáltatásokhoz hasonló platformok köre egyre inkább szélesedik, így a javaslat indokoltnak látja az aktív fogyasztói magatartásra épülő videomegosztó platformokat is az irányelv tárgyi hatálya alá vonni. Tekintve, hogy a különböző hozzáférésű és ellenőrzöttséggel rendelkező szolgáltatók több szempontból, különösen fogyasztói nézőpontból, egyre hasonlóbb szolgáltatást nyújtanak, a gazdasági szféra egymással versenyző szolgáltatásainak minősülnek. Ma már a videomegosztó-platformok a médiaszolgáltatásokkal azonos versenytérben mozogva, azonos közönségért versenyezve nyújtják szolgáltatásaikat.

Mára egyértelművé vált, hogy a kereskedelmi alapon működő média, és a hasonló szolgáltatások meghatározó működési bázisát jelentik a gazdasági tartalmakból származó bevételek. A tanulmányban bemutatott módosításoktól kedvező gazdasági hatást, versenyképebb működést várnak, különösen a televíziós műsorszolgáltatók esetében. A javaslat a versenyképesség és a fogyasztóvédelem között azzal kívánja megteremteni az egyensúlyt, hogy a termékmegjelenítés és a szponzorálás tekintetében az összes audiovizuális médiaszolgáltatás számára nagyobb rugalmasságot biztosít, a televíziós, médiaszolgáltatás rugalmasságát pedig fokozza. Ezzel mintegy a már tárgyi hatálya alatt lévő különböző szolgáltatásokra vonatkozó szabályokat is közelíteni kívánja egymáshoz. Ugyanakkor, kérdéses és egyben aggályos, hogy a videoplatform-szolgáltatásokra miként lehet majd az irányelv fő elveit, és alapvető elvárásait megfelelő szabályozás kialakításával, majd pedig a gyakorlati alkalmazással megvalósítani. A tanulmány a fenti szempontokra figyelemmel, az AVMS irányelv revíziójának eredményeként a gazdasági tartalmak vonatkozásában lefektetett módosító javaslatait teszi vizsgálatá tárgyává.