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Consumer Protection in Media Law¹

Introduction

The media services in Hungary have the following regulatory framework: the Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules on Media Content (Media Constitution) and The Act CLXXXV of 2010 on Media Services and Mass Media (Media Act). These sources of law following the Media Act in 1996 responded to the amended infocommunicative technological environment and anomalies in the practice of the law application during the last years and they implemented the standard public source of law. The latter is the directive 2010/13 EU of the European Parliament and of the Council concerning Audiovisual Media Services² where the liberalized non-rigid competition and market centric media policy of the EU appears. It was generated by the challenges of infocommunicative technologies, the goal of creating a compatible European media industry, and by the desire of an increased protection of the consumer groups. Since the objectives of the Member States were harmonized with this directive the new approach can be found in the whole borderless area.

1. Differentiation of media service on the basis of consumer access

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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)

Instead of the programmes broadcast exclusively on TV in earlier times the directive (and taking it into consideration our national regulation as well) covered all the media services. It makes difference on the basis of consumer access as a definite manifestation of the consumer approach. The two basic types are the linear and the on-demand media service.

The first one corresponds with the classical provision of programmes: the consumer can watch the programme selected from the offers at the time provided by the media service, while in the latter case the consumer has more freedom of choice, he or she can watch the chosen programme at any time. The uniform regulation of services can be approached from the consumer protection mentality, as well. According to the preamble conception of the directive: since the services compete for the same spectators it makes no difference if they are linear or on-demand because they are for the same media consumers.

One of the basic reasons of state interference is the value all along the regulation providing efficient protection of the consumer, which is both in the European and the national media policy an important and public goal: consumers can pretend to be protected due to the rules of the directive starting from the character of the service, that is the effective protection of the way of access must be provided in all types of media services, whatever.³

2. Media regulation and market competition

Studying the main characteristics of the media regulation in the EU we can see that one of the cardinal points is providing the proper legal security of the consumer protection and on the other side the creation and maintenance of compatibility in European media industry. In order to obtain this the Member State regulation can't lead to exaggerated and unjustified limitation of the media services with commercial character, so it is a basic expectation to respect the demand for necessity and proportionality. As the creation of a competitive industrial branch is a secondary objective it is not justified to overregulate the media market sector without any reason.

Implementing the directive had a decisive role in the delivery of the efficient national media law. The preamble of the Media Constitution

³ Directive (24)

declares according to the directive that besides the provision of freedom of speech and press the underlining of the outstanding cultural, economic and social importance of media services, the media market competition is considered to be its main task.⁴ The goal is to deliver a media market where the market factors stay in competition in the multiperson service sector according to the consumer section. This creates an advantageous situation from the consumer's point of view because the media market competition has a positive effect on the provision of wide information: the public service and the cultural media should satisfy the extended information and entertaining of the consumer in a plural media market in a multicoloured and varied way. The media service as a market factor has a serious interest in increasing the rating: the places offered for advertisement are made more marketable for the economic factors by the ratings of our programmes. If the advertiser can't have proper ratings for his programme, he doesn't want to broadcast his economic news by the media service in the lack of consumers aimed at by the advertising content, therefore he loses his income sources absolutely necessary for his activity. Probably it will be more difficult to provide and maintain the consumer basis necessary for existence in the larger service circle by the disappearance of the frequency shortage.

The role of the public is more and more important in this context, it appears as a media consumer, a factor of service market. The role of the public in the altered media law setting is changing continuously and it is considered more the consumer of market services than a citizen. Consequently, the regulations must follow the changes according to the increasing market competition and has to pay special attention to the public both as a consumer and a citizen. The changing visual experience may have an influence on the public as well: they become active citizens, then progressively active, sophisticated consumers. But this needs a public that has the information according to which makes the decisions for the choice. This approach doesn't take into consideration the needs of the more disadvantageous and defective public like children, elderly or mentally injured people or those who find the new technologies embarrassing, who are poor to purchase digital appliance or too busy to use the obtainable new technology or service.⁵ To be a

⁴ The preamble of Media Constitution and Media Act

⁵ Jackie Harrison -Lorna Woods:European Broadcasting Law and Policy.Cambridge.Cambridge University Press,2007.57.

media consumer the subject has to suit some criteria, e.g. he must have consumer access. In other things it is important to provide the access to the contents offering the rights to information.⁶ On the other hand anybody can be a consumer not only those who have such properties because the internet is accessible anywhere and it makes the respective person a consumer.

In conclusion there is a stronger and stronger market approach in this domain due to which the role of the public is more and more important. The consumer becomes a decisive factor of the media market and can make its choice more and more actively, critically and consciously as a manifestation of the outer media pluralism in the media market fragmented thanks to the technological development.

3 The consumer and the media content

The media service is not only an economic but a cultural service, as well. It influences large strata of the public opinion, so that providing the constitutional values, the protection of cultural variety, the right for information, media consciousness, the protection of consumers and minors from regulation and control is a basic expectation.⁷ The legislator interferes in the contents of the items of the programme considering several values to be protected to serve the media consumer's interest. The services don't have total freedom in establishing the programme, they always have to take into consideration the basic constitutional rights, personal rights, the interests of teenagers and consumers.

The wide information and entertaining of the consumer is the main goal as a cultural means of mass media destined for public opinion. The consumer's interest is twofold. It requires protection from the state against the false, confusing, unfair advertisements, on the other side it demands the access to wide information.⁸ Taking into consideration the relationship of the public to the media content they rightfully pretend to have their right for knowledge fulfilled, to get the information necessary for this, on the other side to be properly protected getting all this. The new rules contain less

⁶ See: Polyák Gábor: A médiarendszer kialakítása, HvgOrac, Bp.2008.69-71.

⁷ Directive (5)

⁸ Koltay András: A szólásszabadság alapvonalai-magyar, amerikai, és európai összehasonlításban. Századvég Kiadó, Bp.2009.663.

limitations and restrictions for the services (mostly in commercial communication) but they put a special emphasis on the producer's protection.

There are specially protected subjects among the media consumers like minors whose protection is considered such a public domain with high priority that can't be dealt with by the Member States individually and a maximum harmonization of the common and Member State level is absolutely necessary. In this case children are subjects having right for the protection and care necessary for proper physical, spiritual and moral development in the Fundamental Law.⁹ This constitutional value considering harmful contents presents a special interest in the case of media services, as well. Due to the amendment in directive 552/89 EGK for the transfrontier TV service all the member states did the implementation considering the classification of TV programmes for the protection of minors. (The classification of programmes according to the degree of endangering minors and the rules for proper broadcasting). These expectations were transferred into media law by act XX of 2002 in our country. With regards to the protection of minors the prevailing directive professes in the items of preamble 59-60: rules protecting the physical, mental and moral development of minors as well as human dignity in all audio-visual media services including audiovisual commercial communications are necessary. Since the availability of harmful content on new platforms is an increased danger, the member states must take measures so that the on demand services seriously endangering the physical, mental or moral development of minors should be available in a way that the minors couldn't get to them in normal conditions. The directive in its preamble establishes the technically possible measures (Pin codes, filtering systems, labelling) with regard to on-demand media services which being applied the protection of minors from the contents is possible.¹⁰ Our national law sources pay an increasing attention to the protection offered for minors against commercial communications and harmful contents and the Media Council made detailed rules in its offers.¹¹ The creation and development of media literacy is an important preventive method of

⁹ The Fundamental Law of Hungary, Article XVI. (1)

¹⁰ Directive (60)

¹¹ See: The recommendation of considering the effective technical solutions of the Media Council. www.nmhh.hu

consumer protection.¹² It refers to skills, knowledge and understanding that allow consumers to use media effectively and safely. Regarding to the future in the relation of certain members of the society and services the most effective means of consumer protection might be the creation of a well prepared and informed consumer behaviour dealing with information in the right way. Though the delivery and teaching of it is a national jurisdiction, the European Committee pays increased attention to the development of consumer consciousness in the Member States.

The measure taken regarding the media consume instead of the earlier solutions based on communication limits and prohibitions, that is as their complement by strengthening the consumer dexterities, tries to make the public use the possibilities of digital media and decrease their risks.¹³

4 The strengthening of consumer protection view in media advertisement

The provision of income sources necessary for the activity of commercial services has a big role in the development of the plural European media market. This can be supported by the creation of a more liberalized, more flexible advertisement law in the law regulation. It is a basic task of the state to protect the consumer efficiently so that the interests of services should not be harmed without any reason, and the freedom of the economic competition should be provided. The necessary and proportionate intervention is a basic point of view in the case of these secondary instructions of the advertisement appearing in media law. The regulation of commercial communication appearing in media service contain the minimum rules to be followed by media services at a public level, compared to which the national ruling didn't increase severity or do an unjustified regulation.

Regarding the commercial contents in media service, the so called commercial announcements, the media directions fixed for advertisement distributors are essentially provided with consumer protection guarantees. It should be noted that in this respect the media consumer as the subject of commercial practice and communication is present as a consumer under the ruling of act

¹² Directive (47)

¹³ Polyák,71.

XLVIII from 2008 about basic conditions of economic advertisement activity and certain limitations of it and of act XLVII from 2008 about the prohibition of unfair commercial practice versus the consumers. Constitutional judge Kukorelli István in his parallel justification connected to decision 1270/B/1997 deals with the consumer's special relationship to advertisements. According to him the consumer has a subjective right for proper information thanks to the constitutional law of freedom of contract. The information is proper if it helps the consumer to be able to choose from the goods and products relying on a solid decision.

The directive provided the term audiovisual commercial communication which is a category containing a wider circle of objects than advertisements, and all the direct or indirect commercial transmission done in return for all the countervalues.¹⁴ According to the Act the advertisement, the transmission of the name, trademark, face, or product of the sponsor, TV shopping or product placement belong to the forms of commercial communication. According to our national law sources the forms of commercial communication are among others the advertisement, the presentation of the supporter's name, trademark or his product, TV shopping and the product placement.¹⁵ Considering the advertisement contents there still exist the limits and advertisement prohibitions regarding to general (e.g. the hidden commercial communication) and special objects (e.g. the interdiction of advertising tobacco products) referring to all commercial communication. The main reason for amending the advertisement rules was the danger of avoiding advertisements by consumers on the new platforms. It became necessary to create a more flexible law regulation at both national and European level with a view to the media service as a market person parallel to the harmonization with consumer protection guarantee.

The directive is supporting the new advertisement techniques (divided screen, virtual advertisement, etc.) which lessens the burden on TV advertising and on subsidy, and it makes possible applying such new commercial communication forms as the product placement.

¹⁴ 'audiovisual commercial communication' means 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. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement; Directive, article 1.(h)

¹⁵ Media Constitution 1.§9

The contradictory classification of the latter (permission besides forbidding)¹⁶ shows that there is aversion against the well proved techniques applied overseas, but if we want to make the European industry globally compatible, we can't deprive the producers of European (national) programmes, products from good income sources.

Some underlined liberal rules:

- a) The new argument for the whole of commercial communications is the possibility of building in the programmes saying that the commercial communications appearing in the media content must be easily recognisable and separable from other media contents.¹⁷
- b) The possibility of applying new advertisement techniques (divided screen, virtual advertisement, etc.) and methods (e.g. product placement)
- c) The regulating burden on classical advertisement has weakened. The new rules have less limitations and restrictions for the services.
- d) Besides the classical advertisements the charge on backing has decreased, as well.

Besides increasing the compatibility of media industry as an important interest there is always the efficient protection of consumers as a value to be protected being a fundamental limit.

This appears in the informational obligation specification, as well : the provision of consumer information is obligatory when applying commercial communication means. The consumer must be informed about the existence and application of all the commercial communication in order to be aware of the presentation of commercial communication.

When using new techniques and methods of placing it in the programme, it is an important aspect to place the advertisement so that it shouldn't spoil the value of enjoyment. The presentation of the product as a new method is applicable only if it fits the programme dramaturgically and the product doesn't get unjustified emphasis. The advertisement can be built in the programme but they must be recognisable, distinguishable and separable from it.

¹⁶ Directive, article 11.

¹⁷ Media Constitution 20.§(1)(2)

For example the divided screen advertisement must occupy only a certain part of the screen.

The time for advertisement has been shortened and the rules for interrupting the programme have changed as well.¹⁸

Referring back to the financial dependency of the media service coming from advertising it is important even from consumer protection point of view that the economic factor shouldn't apply economic pressure on the content and edition of programmes. The editor's freedom shouldn't be influenced by economic factors and the freedom of choice for the consumer (if he doesn't want advertisements) but if we want to make European industry compatible we can't deploy the European producers from such a good income source.

Conclusions

The observance of the legal guarantees mentioned before is controlled at supervising level by the Media Council working in the domain of the National Media and News Infocommunications Authority, while paying special attention to the provision of consumer protection. It does this in its recommendations made in the interpretation of the law. Besides this the media consumer can turn to the media ombudsman with its complaint. It turned out during the last few years that the ex ante regulation, the supervising measures being applied even consequently can't lead to final solution. The protection of the media consumer is a much more complicated question.

It became clear for the service that in order to have a behaviour following the law some pretensions must be created inside and outside. The media services must be included in the regulation, it should be possible for them to have self-regulating mechanisms, proceedings. The media authority makes administrative contracts with the self regulating organs in the domain of co-regulation according to the media law.¹⁹ Several consumer protection guarantees developing the dispositions of laws are included in the behaviour codex. Another means is the development of media consciousness with significance beyond the regulation. The aim is to develop the culture of conscious consumer decision making. The

¹⁸ Media Act 33-35.§

¹⁹ Media Act 190-202.§

consumer should be made more critical to the content. The spectators can make announcements directly on the hot wire started by the Media Council.

In the future in the relation of certain members of the society versus services the development of the behaviour of the well prepared, informed consumer who takes the information rightly can be the most effective consumer protection means. The consumer collaborating with the self-regulating organ and the authority can have an active role in forcing back the market of harmful contents and the services transmitting them.