

Regulation of the Commissariaat voor de Media providing rules on product placement by commercial media institutions 2014

18 November 2014

The Commissariaat voor de Media,

having regard to Articles 3.19b, 7.11 and 7.12 of the Dutch Media Act 2008,

has decided as follows:

Article 1 Scope of the Regulation

The rules established in this regulation cover the legislative requirements that are set out in the Annex to this Regulation.

Article 2 Definitions

- a. For the purposes of this Regulation the Act means the Dutch Media Act 2008;
- b. For the purposes of this Regulation the Decree means the Dutch Media Decree 2008.

Article 3 Definition Programme

1. «*Clearly defined*», as referred to in the definition of «*programme*» in Article 1.1, first paragraph, of the Act, means: clearly differentiated from the previous and subsequent programme in the programming.
2. «*Identifiable as such*», as referred to in the definition of «*programme*» in Article 1.1, first paragraph, of the Act, means:
 - a. Identifiable as a programme by the average audience; and
 - b. In terms of both content and format different from the previous and subsequent programme.
3. All references in this Regulation to a programme with respect to product placement, include a «*part of the media offering corresponding with a programme*».

Article 4 Definition Product placement

«*Inclusion of or reference to a product, service or trade mark within the framework of the programme*», as referred to in the definition of product placement in Article 1.1, first paragraph, of the Act, means: In exchange for a financial contribution display or mention a product, service or logo within the storyline of a programme.

Article 5 Definition Trade mark

«*Trade mark*» as referred to in the definition of product placement in Article 1.1, first paragraph, of the Act means: the name, drawing, printout, stamp, letters, numerals, the shape of goods or their packaging, and any other signs susceptible for graphic representation, which are used to differentiate the goods or services of the party who places the product.

Article 6 Definition Light entertainment programmes

1. «*Light entertainment programmes*», as referred to in Article 3.19a of the Act, are programmes of entertaining nature, not involving educating consumers, information on, and the analysis of, news, current affairs and political information.
2. «*Educating Consumers*», in the first paragraph, means: programme offering that has as its purpose the objectively and impartially informing of consumers on products and services by third parties.
3. «*News or current affairs*», in the first paragraph, means: programme offering that is broadcasted frequently, at least once a week, and that reports about events of up to seven days old.
4. «*Political information*», in the first paragraph, means: programme offering that reports about politicians, political parties and their positions and the political decision-making process.

Article 7 Medical treatment

«*Medical treatment*», as referred to in Article 3.19b, third paragraph, point A, of the Act, means: treatments that are performed on the basis of an agreement on medical treatment as defined in Article 7:446 of the Dutch Civil Code.

Article 8 Contribution of subordinate importance

«*Product placement*», as referred to in Article 1.1, first paragraph, of the Act, shall not cover: the provision of a non-financial contribution that is not or not identifiably displayed or mentioned in the programme and:

- a. Is given on loan by a third party; or,
- b. Of which the value in relation to the total cost of the production or purchase of the programme is of subordinate importance and in any case not higher than EUR 1000,- per contribution for television and EUR 200,- per contribution for radio.

Article 9 Reference of product placement to inform the audience

1. The reference, as referred to in Article 3.19b, fourth paragraph, of the Act, shall be effected by placing the notification «*This programme contains product placement*». If the party who places the product is

- also sponsor, this notification occurs at the same time as the sponsor notification.
2. The notification, referred to in the first paragraph, shall be clearly legible or clearly audible.

Article 10 Products or services in programmes containing product placement

1. The audience is considered to be stimulated directly by means of specific promotion to buy or hire of products or to purchase services, referred to in Article 3.19b, second paragraph, under a, of the Act, if by subjective positive qualifications these products or services are placed in a promotional context.
2. The products or services are in any event deemed to get excessive attention, as referred to in Article 3.19b, second paragraph, under b, of the Act, if the products or services are placed in a promotional context by highlighting the products or services for a long time or frequently.
3. The display or mentioning of products or services may not be unnaturally embedded in the plot of the programme.

Article 11 Final provision

1. This regulation will be published by notification in the Netherlands Government Gazette and on the website of the Dutch Media Authority (www.cvdm.nl).
2. This Regulation shall be referred to as Regulation product placement commercial media institutions 2014.
3. This Regulation shall enter into force two months after publication in the Netherlands Government Gazette.

COMMISSARIAAT VOOR DE MEDIA,

Madeleine De Cock Buning
Chair

Eric Eljon
Commissioner

ANNEX REGULATION PRODUCT PLACEMENT COMMERCIAL MEDIA INSTITUTIONS 2014

Article 1.1, first paragraph, of the Dutch Media Act 2008

In this Act and the provisions based thereon, the following definitions mean:

Surreptitious advertising: Other than based on this Act mentioning or showing names, trade marks, products, services or activities of individuals, companies or institutions if reasonably can be presumed that this is intended or also intended to advertise, provided that the intention is in any case present if the showing or mentioning happens in return for payment or a similar consideration;

Programme: electronic product of visual or audio content that is clearly defined and identifiable as such under a separate title and distributed via a broadcasting service;

Product placement: In return for payment or for a similar consideration, the inclusion of or reference to a product, a service or trade mark within the framework of a programme, or a part of the media-offering corresponding with a programme.

Article 3.19a of the Dutch Media Act 2008

1. Product placement in the programming, in so far as this is produced after the 19 December 2009, shall not be permitted.
2. Unless the programming is intended for children under twelve years, the first paragraph does not apply to programming consisting of:
 - a. films;
 - b. series;
 - c. sports programmes; and
 - d. light entertainment programmes.

Article 3.19b of the Dutch Media Act 2008

1. Product placement may only appear if in the Editorial Statute, as referred to in Article 3.5, second paragraph, safeguards are included for the editorial independence of the employees entrusted with the provision and composition of the programming in relation to product placement.
2. Product placement in the programming is designed in such a way that:
 - a. The public is not encouraged directly by means of specific recommendations to buy or hire products or services; and
 - b. The product concerned does not get excessive attention.
3. Product placement is not permitted for:
 - a. medical treatment; and
 - b. alcoholic beverages between 06.00 a.m. and 21.00 a.m.
4. If programming includes product placement, for information of the audience it will be clearly indicated that the programming includes product placement. The reference occurs in an appropriate manner at the beginning and at the end of the programme and also at the beginning or the end of the programme's advertisement or advertisements.
5. The Dutch Media Authority may issue more detailed rules about the application of product placement in programming. These rules need to be approved by the Minister.

Article 3.29d of the Dutch Media Act 2008

On commercial on-demand audiovisual media services, Articles 3.5, 3.5a, 3.6, 3.7, second paragraph, preamble and sub (a), 3.15 to 3.19c and 3.26 apply mutatis mutandis with the exception of Articles 3.16, fourth paragraph, and 3.19b, third paragraph, part b.

Article 7:446 of the Dutch Civil Code

1. The Agreement on medical treatment — in this Section hereinafter referred to as the treatment agreement — is an agreement whereby a natural person or a legal person, the counsellor, exercising a medical profession or company, commits himself or herself to another, the client, to execute operations in the field of medicine, directly relating to the client or to a specified third party. The person to whom the operations directly relate to is further referred to as the patient.
2. Operations in the field of medicine mean:
 - a. all operations — the examinations and counselling included — directly related to a person in order to cure him of a disease, to protect him against the development of a disease or to assess his health condition, or to provide midwife assistance;
 - b. other operations than those covered under a, directly related to a person that are carried out by a doctor or dentist in that capacity.
3. The operations, referred to in paragraph 1, shall also include, the nursing and care of the patient in this context, and the provision, directly for the benefit of the patient, of material circumstances in which such operations may be carried out.
4. No treatment agreement exists, if it concerns operations to assess the health condition or medical treatment of a person, executed on behalf of another person with the purpose of establishing claims or obligations, the admission to an insurance or facility, or the assessment of the suitability for a training, an employment relationship or to carry out certain activities.

EXPLANATION

General

1. With the entry into force of the Dutch Media Act 2008 on 1 January 2009 and the implementation of the Audiovisual Media Services Directive (hereinafter referred to as: AVMS Directive) in the Dutch Media Act 2008 with effect from 19 December 2009 product placement by commercial media services is allowed.
2. The amended legislation constitutes the rationale to establish this Regulation to give a better understanding of how the Dutch Media Authority will conduct the amended legislation in practice.

On-demand media services

3. With the implementation of the AVMS Directive, on-demand audiovisual media services fall within the scope of the Dutch Media Act 2008. These rules relate to the programming or comparable media offering. According to the structure of the Dutch Media Act the term 'programme' and therefore 'programming' is reserved for broadcasting services and thus linear media supply. 'Non-linear' media offerings, i.e. on-demand media services, do not offer 'programmes', but similar parts of the media supply. This Regulation is therefore applicable to media offerings on demand e.g. through internet. In practice these media offerings are generally comprised of video: an electronic product of moving images that forms a whole and is as such recognisably distributed under a separate title through an on-demand media service. For the question as to what constitutes an on-demand media service within the meaning of the Dutch Media Act 2008 this Regulation refers to Policy Rules on the classification of on-demand commercial media services 2011.

Relation sponsorship and product placement

4. The distinction between product placement and sponsoring requires further clarification. The Dutch Media Authority refers explicitly to recital 91 of the AVMS Directive (Directive 2010/13/EU). In this recital it is noted that 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. That is also the reason why the definition in Article 1 (m) of the AVMS Directive contains the word 'within'. For product placement, the screening or mentioning of a product or service are embedded into the plot (action) of the programme. As a result, these products or services are brought to the attention, for example by mentioning, discussing, or actively using them during the programme.
5. In contrast, products of a sponsor may shown during a programme but are not embedded into the action (plot) of a programme.
6. Another important criterion distinguishing sponsorship and product placement is the fact that the (possible) financial contribution by the sponsor is provided for the overall benefit of the programme and not a direct compensation for the reference or presentation of the product or service, as is the case for product placement. To sum up: It is product placement if two cumulative conditions are

fulfilled;

- a financial contribution in return for a reference or presentation or other use of product, service or trade mark;
- which is embedded in the plot of a programme.

Prohibition on surreptitious advertising

7. Product placement shall not occur with the purpose to advertise a product, service or trade mark. In that case, it is (unauthorised) surreptitious advertising.

This may be the case if the audience by means of making specific references is directly encouraged to buy, to rent or purchase products and services, if there is excessive attention for the concerned products or services, or if the embedding of the products or services in the plot occurs in a non-natural manner.

8. Pursuant to Article 3.19b, fifth paragraph, of the Dutch Media Act, the Commissariaat voor de Media holds the power to issue general binding provisions regarding product placement. Regarding sponsorship, the Commissariaat voor de Media only has the power to adopt policy rules. This was done through the adoption of the Policy rules sponsorship commercial media institutions 2012. Although product placement can be seen as a form of sponsorship, the Commissariaat voor de Media has chosen, on the basis of the above mentioned jurisdiction, to issue separate rules on product placement. Some overlapping in definitions and articles in the two schemes is proven to be unavoidable.

Explanation of individual articles

Article 2 (Definitions)

9. The terms used in this Regulation from the Dutch Media Act 2008 have the same meaning as defined in Article 1.1 of that Act. If in this Regulation terms are used other than those referred to in Article 1.1 of the Act, those terms are defined in Article 2 of this Regulation.

Article 3 (Definition programme)

10. Article 1.1, first paragraph, of the Act defines Programme as: a clearly defined and identifiable as such electronic product with visual or audio content. The two criteria, «*clearly defined*» and «*identifiable as such*», are fine-tuned in Article 3 of this Regulation.

11. The aim of the criterion «*clearly defined*» is that the programme at the beginning and at the end will be distinguished as such from the rest of the programming, regardless of the authorised advertisement interruptions as set out in Articles 3.10 and 3.11 of the Act. As regards to the interruption of the report of an event or show that conclusion also follows from Article 3.13 of the Act.

12. The criterion «*identifiable as such*» refers to the content and format of the programme. One could think of the subject of the programme and how it is presented.

13. When broadcasting sports events, the preview, the report of the match and the debriefing are regarded as different programmes.

14. The rules for product placement apply, according to the definition of «*product placement*» in Article 1.1, first paragraph, of the Act, also to a «*part of the media offering corresponding with a programme*». See also marginal 3 of this explanation.

Article 4 (Definition product placement)

15. As already stated in the general explanation, the distinction between the displaying or mentioning of a service, product or trade mark in the context of sponsorship, as was already possible before the implementation of the AVMS Directive, and in the context of product placement is that for product placement the product, service or trade mark is embedded into the action or plot or narrative of the programme. This can be understood from recital 91 of the AVMS Directive (Directive 2010/13/EU). In the context of product placement the products or services are interwoven with the plot of the programme, which also means that, as a general rule, they get a more prominent place in the programme, compared with products displayed or mentioned in the context of sponsorship. As an example, in the context of product placement products or services are usually mentioned, discussed or actively used. The decision to embed the product or service into the plot by display or mentioning lies with the media institution, who may decide in full editorial independence of the party who places the product and other commercial third parties.

16. To prevent surreptitious advertising, the embedding of the product or service into the plot (action) of the programme needs to be done in a natural way. To assess this, the context of the expression and the formula and structure of the programme will be taken note of.

17. The recitals of the AVMS Directive make absolutely clear that product placement is not permitted if the content of a programme is influenced in such a way that the responsibility and editorial independence of the provider of the media service is affected. An example of this is the so-called theme placement. Theme placement is the payment by a third party to produce a plot as a platform for products, services or the trade mark of that third party. For theme placement a programme or series of episodes are fully put into service of a product, a product category, a company or sector and the responsibility and editorial independence of the media service provider is no longer assured.

Article 6 (Light entertainment)

18. The concept of light entertainment programmes has a wide scope and includes many types of programmes. Programmes that contain consumer education are not considered to be light entertainment programmes and thus are not to contain product placement. Objective and independent information to the consumers on products, services, companies, etc. is central and any risk of

commercial influencing must be avoided. Entertainment programmes may also pay attention to news, current affairs or political information. Such programmes can belong to the category of light entertainment programmes and are allowed to contain product placement provided that the main objective is to entertain. One could think of a quiz show, in which the questions focus on current affairs. Whenever there is information about and analysis of news, current affairs or political information, and therefore the opinion of the viewer can be influenced, product placement shall not be permitted. The second, third and fourth paragraph of this Article define the concept of consumer education, news or current affairs, and political information. News also includes for example theme programmes that are broadcasted because of a natural disaster.

19. The aim of the second, third and fourth paragraph of this Article is to rule out any risk of commercial influence of such programming by product placement.

20. It does not seem logical that current reports on sports and culture are to be influenced. Programmes that solely report on sports or culture may contain contain product placement.

Article 7 (Medical treatment)

21. The Dutch Media Authority refers for the term medical treatment to the definition of the agreement on medical treatment in Article 7:446 of the Dutch Civil Code. An agreement on medical treatment, pursuant to that article, is an agreement to which a natural person or a legal person, the counsellor, exercising a medical profession or company, commits himself or herself to another, the client, to execute operations in the field of medicine, directly relating to the client or to a specified third party.

Article 8 (Contribution of subordinate importance)

22. The Authority considers unidentifiable contributions that are of subordinate importance in relation to the total cost of the programme or series of programmes, or given on loan, not as product placement. Unidentifiable contributions are contributions which are neither displayed nor mentioned in the programme or are displayed or mentioned in such a way that it is not traceable in the programme to the contributor.

23. Examples of unidentifiable contributions which are of subordinate importance in relation to the total cost of the programme or series of programmes usually, are items such as the garments of presenters, catering, bouquets and other small decorations/props. To specify the subordination of the contribution a maximum amount of EUR 1000,- per contribution is included in the Article. For radio programmes one fifth of this sum applies, which is EUR 200,- per contribution. The contribution counts per product and per (episode of the) programme. For example, if prizes in a programme represent a significant value, then it is considered to be product placement.

24. Financial contributions, regardless of their amount, are in any event not of subordinate importance.

25. There is no maximum amount for the value of products or other contributions that are given to a programme on loan. But again the contribution to the programme may not be identifiable to the audience, otherwise it could still be considered to be product placement.

26. Reference is made to Article 7, second paragraph, of the Policy rules sponsorship commercial media institutions 2012, on how the name of the party who gives a contribution of subordinate importance may be mentioned.

Article 9 (Reference of product placement to inform the audience)

27. Pursuant to Article 3.19b, paragraph 4, of the Dutch Media Act a reference shall be made that the programming contains product placement. The reference shall take place in an appropriate manner at the beginning and the end of the programme and also at the beginning and the end of the advertisement or advertising messages included in the programme.

28. The reference shall be neutral and shall contain nothing more than the wording «This programme contains product placement». If the party who places the product is also sponsor of the programme, the reference of product placement occurs at the same time as the sponsor notification.

29. The second paragraph is included to prevent that the reference is displayed in such a short time or in such a layout that it is not clearly visible for the audience or that the reference is not clearly audible. The audience should be well informed about the nature of the display or the notification of products at all times. If this is not the case, then it is surreptitious advertising.

Article 10 (products or services in programmes containing product placement)

30. When displaying or mentioning products or services in the context of product placement, the audience may not be directly stimulated to buy, hire or purchase products and services through making special promotional references. That would be unauthorised surreptitious advertising. The prohibition to make special promotional references, that directly stimulate the audience to buy, rent or purchase products or services, is without prejudice to mentioning the positive characteristics of a product or a service. A DIY programme claiming that a particular type of parquet floor has lifespan of at least 30 years, is in principle allowed. The observation that the floor thus lasts considerably long is also permitted in this context. The addition by the presenter that you would fail yourself if you did not buy this floor, or that the floor has a discount this week, are not permitted, as these are specific promotional references which stimulate viewers to buy the parquet floor.

31. Products and services, that are displayed or mentioned in the programme in the context of product placement, shall not get excessive attention, as that would also be unauthorised surreptitious advertising. This is certainly the case in the following situations:

1. *the provision of commercial information*,
indicated inter alia by showing or mentioning:
 - prices of products/services;

- points of sale, etc.;
- 2. *a call,*
- 3. *a too explicit or too broad reference*

this is the case if:

- too explicit display or mentioning of products, services or trade marks are being broadcasted;
 - long or frequent descriptions/notifications/ screenings of products or services are being broadcasted;
 - a product or service is excessively being zoomed in or zoomed out;
 - products or services are displayed in full screen;
 - there is insufficient distinction made between the programme and a (authorised) advertisement;
4. *The use of promotional materials from the party who places the product.*

32. It follows from the above that mentioning positive product characteristics is permitted as long as the mentioning is not too long or too frequent. A quantitative cap is difficult to determine, but will be assessed on the basis of the specific circumstances of the case, including the context of the expression, the formula and the structure of the programme.

33. It is equally inadmissible to show or mention in the programme who has disposed the products or services (e.g. prizes). This involves notifications such as «this prize is offered by...». It is allowed to show the trade mark of a disposed prize in a neutral manner, e.g. «you win a Philips television». If instead of a product a service, such as a journey, is given as prize, the name of the company that provides the service may be mentioned or displayed, as long as it occurs in a neutral manner, e.g. «you win a Neckermann journey to Aruba».

34. Finally, and as referred to above, there may also be surreptitious advertising if the product or service is embedded in the plot (action) of the programme in an unnatural way. To assess if this is the case, the context of the expression and the formula and structure of the programme will be taken into account.