[BG] Court practice on the prohibition of surreptitious commercial communication

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By Penalty Decree No. РД-10-2-15.01.2019 *Съвет за електронни медии* (the Council for Electronic Media - CEM) has imposed a sanction of the amount of BGN 3 000 on *Българско национално радио* (the Bulgarian National Radio – BNR) for violation of Article 75, paragraph 1, second sentence of the *Закон за радиото и телевизията* (the Radio and Television Act - RTA) for broadcasting a surreptitious commercial communication.

The reason for this was a song performed by children within a children programme on the radio channel *Радио София* (Radio Sofia). What triggered the events is that the text of the song included repetitively the brand name of one of the most famous soft drinks worldwide. The media regulator found that the song emphasized the positive qualities of the product while the melody and the words were catchy and easy to remember, thus actually advertising the soft drink in violation of the law and without any indications that this is a commercial communication.

The CEM has established that there has been no announcement of a commercial communication prior to the song. In light of this the media regulator finds it was a surreptitious commercial communication as there is clearly a representation in words and sound of a trademark which is intended to serve as advertising and might mislead the public (in the current case the fragile children auditory) as to its nature.

In its defense the BNR pleads that the representation shall not be considered as intentional as it is not done in return for payment or for similar consideration. This argument has, however, not been taken into account by the CEM, as the existence of a payment is not a mandatory part for committing a surreptitious commercial communication. The second argument of the BNR is that the brand of the soft drink was used as a generic term for a soft drink considering its worldwide popularity. It also argued that the song is an old recording from the 90s and it represented the spirit of the 90s pop culture. None of these, however, were accepted as valid and reasonable arguments.

The penalty decree has been appealed by the BNR before *Софийски районен съд* (the Sofia Regional Court – SRC). The court upheld the decree of the CEM. It

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firmly clarified in its motives that the four prerequisites for establishing a surreptitious commercial communication are all present in the case, namely:

1) existence of a representation in words or pictures of goods, services, the name, the trademark or the activities of a producer of goods or a provider of services;

2) the representation is broadcasted in a channel;

3) the representation is intended to serve as advertising;

4) the representation is misleading the public as to its nature.

The court found that the first two elements are obviously present since the text of the child song is repeatedly referring to the brand name and there is no prior signal for the existence of a commercial communication. The third element has also been found present because the song clearly emphasizes the qualities of the product by referring directly or indirectly to: 1) the consumer qualities of the goods, including the taste of the product; and 2) description of the form and visual qualities of the product. Thus, despite the objections that there have been no specific qualities of the product (respectively that there are no specific qualities of the product and therefore no advertising), the court has found the third element present.

The final element has also been established. The court emphasizes phrases from the lyrics which state that the brand is “magically good” and through its consumption “children will grow”. According to SRC these phrases could easily mislead children that the drink is healthy and by consuming it they will grow happy and healthy. The court goes on to add that the song is performed by children which makes the message conveyed more perceptible for children. As the representation has been in the form of a children song, the court found that it could form a subconscious positive reaction to the specific soft drink. It finally stated that the content has been obviously directed to children.

Based on this interpretation, the decision of the media regulator and its findings that there is indeed a surreptitious commercial communication was upheld by the SRC.

The decision of the court entered into force in 2020, but it was just recently published on the webpage of the CEM and so was not public until now. However, it is worth mentioning that the decision was not appealed before the last instance where the administrative court could have eventually established a somewhat different approach.

Nevertheless, the decision shows that the CEM and the courts will apply a strict and conservative approach where the physical, mental or moral development of

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minors may be impaired. Although this specific case law is not considered source of law in Bulgaria, it has strong practical value. The penalty decree of the CEM and the subsequent interpretation by the SRC can be used as guidance and shall be considered by players in the market (moreover in the context of the latest amendments placing higher standards for protection of minors).

Наказателно постановление № РД-10-2-15.01.2019 г. на СЕМ

https://www.cem.bg/controlbg/1223

Penalty Decree № RD-10-2-15.01.2019 of the CEM

Решение на Софийски Районен съд от 04.02.2020 г.

https://www.cem.bg/controlbg/1358

Decision of the Sofia District Court of 4 February 2020

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