



## Surreptitious Advertising

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### Definition

According to European media regulation, the term surreptitious advertising means such an audiovisual commercial communication which serves the aim of advertising and is not separated from programming. Such type of communication is included in the editorial content and broadcast outside commercial breaks. Any regulation – be it European or Georgian – requires from broadcasters to ensure that editorial content is distinct from advertising. Hence, the beginning and the end of an advertisement (or a commercial break) shall be clearly separated from programmes or news items by means of clear audio and/or visual signs. Otherwise, the audience may be misled about its nature. European regulation prohibits surreptitious advertising.

By a more detailed definition, surreptitious advertising is the representation of or reference to commercial products in programmes for the aim of promoting these products, and in such a form that may mislead consumers (audience) since it may not be recognizable as advertising. The term “product” means goods, services, the name, the trade mark, the logo or the activities of a producer of goods or a provider of services. Such representation is considered intentional if broadcaster does it in return for payment or for similar consideration. However, in its judgment delivered on a complaint concerning surreptitious advertising in June 2011, the Court of Justice of the European Union stated that the fact that a broadcaster has not received any payment in return of representation, does not mean that the intentional nature of surreptitious advertising can be ruled out (Court of Justice of the European Union; Judgment in Case C-52/10; June 2011).

### Regulations

Advertising in Georgia is regulated by the Law of Georgia on Advertising. Moreover, the advertising in broadcast media is also governed by the Law on Broadcasting and the Code of Conduct for Broadcasters adopted by the Georgian National Communications Commission (GNCC) pursuant to the Law on Broadcasting.

The Law on Broadcasting defines advertising as follows: *“Advertisement – commercial, social or election advertising distributed (broadcast) by a broadcaster, except statements made by a broadcaster concerning its own or independent programmes, which is the information, promoted through any means and in whatever form, about a natural and legal person, goods, service, activity, idea and undertaking that targets an unlimited circle of people and is designated to generate and perpetuate interest towards natural and legal persons, product,*

*idea and undertaking as well as promotes sales of the product, service, activity, idea and undertaking” (Article 2. Definition of Terms).*

Paragraph 4, article 63 of Chapter VIII in the Law on Broadcasting stipulates the key principle of running advertisements in broadcast media: *“Advertisement.... shall be clearly identified and distinguished from programs.”*

The term surreptitious advertising is unfamiliar for the Georgian legislation; however, the Code of Conduct contains several provisions that convey the essence of surreptitious advertising. The Code of Conduct is a normative act which consists of principles, rules and guidelines for the production and broadcast of programmes. The principles define professional standards and are binding on broadcasters; rules define requirements of the Code to be observed to achieve objectives set forth in the Code, while guidelines are recommendations on ways and means that broadcasters can use to observe the principles and rules set forth in the Code. Chapter 15 of the Code of Conduct for Broadcasters deals with advertising. Below we provide only those provisions of the Chapter, which relate to surreptitious advertising.

## ***Chapter XV. Advertising***

### ***Article 57. Principle of advertising***

*Not to mislead audience, broadcasters shall maintain the editorial independence and control over programming and shall not distort programmes for commercial purposes. Advertisements shall be clearly separated from programme elements.*

### ***Article 58. Rules of airing advertisements***

*2. No product or service shall be advertised in news programmes. Reporting on the appearance of a new product or service on a market shall not be considered as advertising.*

*5. Broadcasters shall not promote or endorse any product, organisation or service. Any reference to a product, organisation or service in programmes shall be editorially justified. References to a brand name, logo or price must be kept to minimum. Broadcasters or their employees shall not accept any payment or similar consideration in return for the promotion of a product or service.*

*6. Broadcasters shall not promote any products or services in a misleading way.*

### ***Article 59. Guidelines for advertising***

*1. A clear separation of advertisement and editorial content is necessary to ensure editorial independence and accountability to audience.*

*2. Broadcasters should not promote products and services in a misleading way and should not refer to them in programmes in such a manner that creates an impression of endorsement.*

*3. Commercial advertisement should be broadcast in return for payment or other economic benefit to broadcasters, at established rates, and be designated to generate and perpetuate*

*interest towards entrepreneur, product, service, activity, commercial idea and undertaking as well as promotes sales of the product, service, activity, idea and undertaking.*

Thus, the Georgian regulation requires that advertisement be *clearly identified and distinguished from programs* (article 63.4, Chapter VIII of the Law on Broadcasting; article 57 of Code of Conduct); prohibits advertisement of any product or service in news programmes (article 58.2, Code of Conduct) as well as promotion or endorsement of any product, organisation or service and acceptance of any payment or similar consideration in return for the promotion of a product or service (article 58.5, Code of Conduct); considers the promotion of any product or service in a misleading way as unacceptable (article 58.6, Code of Conduct).

### **Prohibition of surreptitious advertising**

The principle on which the prohibition of surreptitious advertising rests is defined in article 57 of the Code of Conduct: to maintain editorial independence and control over programming (editorial independence); to avoid distortion of programmes for commercial purposes (impartiality); not to mislead audience (consumer protection).

This principle serves the following aims:

1) A broadcaster must maintain editorial control over its programmes (a program implies any material produced by a broadcaster – be it an entire programme or components within a programme) and protect them from undue economic influence. Media and especially, broadcast media experience constant pressure on the part of entities it covers. People and economic or commercial entities always want to be shown in a positive light and therefore, try to influence editorial content in a number of ways. Such influence, generally, results in distorted and biased reports.

2) Broadcaster's impartiality in an economic competition of third parties is essential for ensuring fair competition. Media must be neutral toward companies operating on a market and must evaluate them on the basis of objective information alone. Broadcaster must put rivals in equal conditions and not favour any of them for whatever the reason, including because it receives payment or similar consideration from an economic entity.

3) Broadcaster must protect consumers from surreptitious advertising, hidden commercial messages and associated financial risks. When the distinction between advertising and programming is blurred, a viewer becomes influenced by surreptitious advertising without being aware of that and cannot evaluate promoted product critically.

If media does not serve the above listed aims, it willy-nilly contributes to unfair competition; becomes obliged to an economic entity and is therefore vulnerable; and manipulates with consumers for its own economic interests.

### **Identifying surreptitious advertising**

To identify surreptitious advertising is not an easy task. An identifying criterion of such advertising is the intention of a broadcaster to promote a commercial product or service in return for payment or similar consideration. However, it is quite difficult to establish the

intention. This will require questioning of a broadcaster, producers, journalists, checking the records, etc., in short, to conduct the investigation.

There are some general indicators that help establish surreptitious advertising. These indicators include: focusing on brand and lingering on the product for a long time; showing the brand name, logo in close-ups; presenting or referring to the product, service and trademark when it is not editorially justified; referring to the product in a manner that contains expression of praise; releasing information about one product alone; focusing on the type and quality of product.

Media must reflect the real world and this involves featuring or referring to commercial products in programmes. Naturally, not every instance of featuring or referring to a product is regarded to be a surreptitious advertising. According to article 58.2 of the Code of Conduct, *“Reporting on the appearance of a new product or service on a market shall not be considered as advertising”*. Or, for example, showing billboards during a sports game is not surreptitious advertising. This is the situation when a broadcaster cannot simply avoid billboards. Moreover, it is not misleading as the audience is fully aware of their commercial nature. The audience knows that billboards displayed around a playing field are aimed at promoting products, services or companies. However, if during the broadcast of a sports game camera lingers on billboard and does this frequently, one may assume that a broadcaster intentionally promotes a product.

To avoid surreptitious advertising, the Georgian regulation specifies that *“Any reference to a product, organisation or service in programmes shall be editorially justified. References to a brand name, logo or price must be kept to minimum”* (article 58.5 of the Code of Conduct); and that broadcasters *“should not promote products and services in a misleading way and should not refer to them in programmes in such a manner that creates an impression of endorsement,”* (article 59.2 of the Code of Conduct).

## Overview of study

The aim of this study was to detect instances of surreptitious advertising in TV media. As one of the most common forms of surreptitious advertising is to promote products in the form of news, the monitoring was focused on news programmes of TV channels. Objects of monitoring were news programs of five TV companies - 1<sup>st</sup> Channel, Imedi, Rustavi 2, Maestro and Kavkasia, broadcast in prime time. The survey was conducted during one month – from 12 September through 12 October.

The monitoring has detected eleven reports containing elements of surreptitious advertising. Of these eleven, five reports were aired by Imedi and Rustavi 2 each, while the remaining one was broadcast by 1<sup>st</sup> Channel. No such reports were detected in news programmes of Kavkasia and Maestro, which may be explained by several reasons, including a) by the compliance with regulations concerning the coverage of commercial products; and b) by the nature of news programmes of these TV companies, which mainly focus on political events. Not all the eleven reports can be qualified as pure surreptitious advertising, but they allow to outline those common features which make reports on commercial products or services look like promotional materials. These common features are:

1. Coverage of new points of sale or new services of already well-established companies. According to the Code of Conduct for broadcasters, reports introducing the audience with new entrants at the market are not regarded as advertising (article 58.2), however, release of information about new points of sale, products or services of well-established companies is, inter alia, *“designated to generate and perpetuate interest towards natural and legal persons, product, idea and undertaking as well as promotes sales of the product, service, activity, idea and undertaking”* (Article 2. Definition of Terms, Law on Broadcasting). Moreover, considering the manner of presentation of such products or services by broadcaster, these reports can be easily qualified as surreptitious advertising. To communicate new developments in their business, economic entities must use commercial advertisements and such *“commercial advertisement should be broadcast in exchange for payment or other economic benefit to broadcasters, at established rates...”* (article 59.3, Law on Broadcasting).

For example, on 5 October, news programme of Rustavi 2 TV company carried a report about new arrivals of Dior and Guerlain beauty products at Voules-Vous network of stores. The report also informed the audience about training of Georgian visagistes by consultants from those world-known brands. This report was the advertisement and endorsement of the products as well as the network of stores and promoted sales of these products, thus breaching article 58.5 of the Code of Conduct, which states that *“Broadcasters shall not promote or endorse any product, organisation or service.”*

2. Use of celebrities in reports covering commercial products. Featuring the consumption of this or that product or service by celebrities and providing their comments of praise about a product or service, generate interest toward the product and positively affects consumers' perception of that product (which, eventually, promotes sales of that product).

For example, on 15 September, two TV companies - Rustavi 2 and 1<sup>st</sup> Channel, carried almost identical reports about the opening of two new filling stations of the Gulf company. Among customers of Gulf, featured in the report, were popular people who commended the product for its high quality. It should be noted that the Gulf company is not a newcomer to the market and reports on new points of sale could only serve the aim of attracting more customers and promoting sales.

3. Reports on cultural products (“product” implies a performer, film, album, book, etcetera), which look more like an urge to the audience to buy a product (movie ticket, album, other) rather than communication of worthy information enabling the audience to take an informed decision on whether or not to buy an offered product. Naturally, news about such cultural events as the release of a new movie, album or book, an upcoming concert, etcetera should be communicated to the public. However, when watching the coverage of such events, one often gets an impression that a broadcaster is more concerned about revenues of a bookstore, performer or movie theatre than about providing comprehensive information to its viewers and protecting them from associated financial risks.

The monitoring period saw the release of two movies in Tbilisi. Both of them were filmed by world renowned directors – Pedro Almodovar and Woody Allen. Both events were covered and both reports left the impression described above. Authors of the reports could have avoided such an impression had they approached movie critics for comments about pros and cons of these movies and not limited themselves to featuring movie theatres with couple of celebrities saying nothing worthy or useful for the TV audience. In their comments these celebrities only

informed the audience about which actor/actress or film director they liked or disliked (without explaining why, of course).

On 22 October, Imedi TV company's news programme had a report about the premiere of Almodovar's film in Tbilisi. A reporter covering the story provided the audience with a short summary of the movie and two comments – one by the marketing manager of the movie theatre and another by an anchor of one of Imedi TV programmes (i.e. a popular person). The latter just commented that she likes some of Almadovar's movies and dislikes others, nothing else. Information provided in the report was barely sufficient for a viewer to take an informed decision on buying or not buying the product (movie ticket). Moreover, the reporter listed those movie theatres where that film was screened, which can be viewed as the encouragement to purchase the product. (Some western TV companies, for instance, BBC, which highly values its impartiality and credibility, never advises its audience where and how to purchase a product or service). One more thing worth noting about that report was that a comment of the marketing manager was filmed against a background of billboard featuring a product of the wine company Teliani Valley; this can also be qualified as a surreptitiously advertising of that product.

Rustavi 2 TV company produced two reports about Woody Allen's new film. The first one was aired on 3 October (creating expectation), the second report was aired on 6 October, the day of the film premiere in Tbilisi. It should be mentioned that the 3 October report was, at first blush, more informative featuring some bits of the movie trailer, providing comments of the film director and some actors/actresses, showing some scenes from the Cannes Film Festival (all these taken from reports of foreign broadcasters). The reporter even told the audience (in one sentence) that critics view this lyrical comedy as a romantic and superficial work. At the end of the day, however, the report proved to be more about Carla Bruni (performing a small role) and her husband, Nicolas Sarkozy, rather than about strengths and weaknesses of the movie. The Bruni-Sarkozy couple is more familiar to the Georgian public than actors starring in that movie and therefore, with this marketing maneuver, the broadcaster generated increased interest among the audience towards this movie. Similarly to Imedi's report on Almodovar's movie, this report also listed movie theatres where the film was screened. As regards another report, aired on 6 October, it was identical to that of Imedi report described above.

4. Broadcast of several reports on one and the same product within a short time span (say, one week). Such coverage has a potential cumulative effect which contributes to the promotion of a product or service.

5. Coverage of a concrete product or service in a positive light alone and without mentioning other rival products, services or commercial entities in a corresponding segment. Such a manner of reporting creates an impression of endorsement and support of a product by a broadcaster.

Illustrative of the number 4 and number 5 features are two reports of Imedi TV news programme (the transcripts of these reports are provided at the end of this report). Out of eleven reports identified during the monitoring period, these two news items can be undoubtedly qualified as intentional surreptitious advertising (regardless of whether they were or were not produced in return for payment or other consideration). Both reports were exclusively about the mobile service provider Magti and broadcast with a two-day interval.

The first of the two reports, aired on 20 September, was dedicated to a mobile number portability service of Magti, namely, porting to Bani network. The report was 2 minute 25 second long and seemed to be prepared by a marketing professional rather than a journalist<sup>1</sup>.

This report contains almost all elements needed for the promotion of a concrete service: commercial messages (for example, 92,000 ported customers; Bani's attractive/low/zero rate tariff; Magti – the most successful company due to porting, etc.); praise of service and focus on its quality and tariff; reference to and representation of brand name; lingering on and close-ups of logo (with visual effects); office interiors and exteriors; bits from Magti TV commercial; carefully selected target audience - the youth. Two young cool-looking males, clad in modern clothes, with modern haircuts and sporting cool accessories are 'main heroes' of the report, a sort of vox-pop respondents in the street are also young people. The message of this report is that Magti is a successful mobile service provider of future generation. With all these, the broadcaster expressed its support and endorsement of this company in a conspicuous manner.

The supposition that the above report is an intentional advertisement of Magti is supported by another report about the same company aired two days later (cumulative effect) by the broadcaster. The length of the second report was 3 minutes and 43 seconds. With its visual side, hidden messages or target audience, this item was similar to the report broadcast on 20 September<sup>2</sup>.

To sum up, all the above listed five characteristic features, nolens volens, create the impression of product endorsement and hence, serve the aim of promotion. TV companies do not observe the guideline in article 59.2 of the Code of Conduct for Broadcaster, not to refer to a product or service in programmes in such a manner that creates an impression of endorsement.

### **Possible motives and results of producing surreptitious advertising**

Why do TV channels, especially, commercial channels which depend on advertising revenues, produce such reports?

Motives could be many and diverse. One of them might be escaping the infringement of the law. The rules for broadcasting ads, restrictions on the duration of and interruptions by commercial breaks of programmes are set forth in Chapter VIII of the Law on Broadcasting. Pursuant to paragraph 5, article 64 of this Law ("Commercial Advertisement and Teleshopping"), *"A program with the duration of more than 30 minutes, may be interrupted with advertisements and teleshopping no more than 3 times."* Paragraph 6 of the same article specifies that *"Duration of the breaks assigned for advertisement and/or teleshopping shall be no less than 15 minutes,"* while paragraph 11 states that *"The duration of advertisements or teleshopping during programs, except for special advertisements and teleshopping channels, shall account for no more than 20% of the entire broadcasting time per day."* The aim of this study was not to check the compliance of TV ads with the Law and therefore we will not dwell on that, but we can speculate about reasons:

Main news programmes of the day are broadcast during the best, so-called prime time when TV channels have the largest audience. Advertisers, naturally, want to place their ads during the prime time in order to reach as many people as possible. The above cited legal requirements might prevent a broadcaster from airing all the advertisements during that time. Production of promotional material in the form of news for a news programme might be a means to avoid a

breach of Law on Broadcasting, on the one hand, and not to lose revenues, on the other. If this supposition were true and such reports were produced in return for payment or similar consideration, then Code of Conduct for Broadcasters is violated, namely, article 58.5 which prohibits broadcasters or their employees to accept any payment or similar consideration in exchange for the promotion of a product or service. Rumor has it (and print media reported about it) that some private TV channels even have tariffs for the production of such reports.

Commercial entities might also be interested in having such a report aired instead of placing ads. This may be explained by several factors: 1. Viewers are prone to switch from one channel to another during commercial breaks and skip ads, but they are less likely to do so when watching a news item and therefore, commercial messages hidden in news reach much more people; 2. It might cost a company less to pay for one report than for the placement of one-off ad (which makes no sense), even more so, for repeated commercials over a period of time; 3. A company might be willing to increase a cumulative effect on the audience by promoting its product or service in a news programme, along with repeated commercials.

Reasons for producing promotional reports might be “trivial” such as doing favour to friends and acquaintances or proving loyalty to someone. One of the reasons may also be the lack of professionalism of journalists – the ignorance of professional standards and legal requirements. Moreover, journalists may not understand how such reporting harms TV companies, their viewers, society at large and commercial entities (or, in the worst case scenario, they understand but do not care about it).

Regardless of motives of producing promotional reports, consequences are dire and may badly damage both media outlets and society:

First, it may become a source of corruption. Separate employees – producers, journalists or any other, may develop a habit of receiving extra revenues in return for such reports and to that end strike corrupt deals with commercial entities. Reports produced through corrupt deals can never be objective. This, in turn, will seriously harm a broadcaster, first, and then, individual journalists. Credibility of a TV company will be damaged and consequently, its audience will decrease. No advertiser will place an ad in a TV company with little audience and the TV company will go bankrupt.

Moreover, a broadcaster emerges as a dishonest player on the market, contributing to unfair competition among economic entities. More importantly, by acting in such a way, broadcaster instead of protecting customers manipulates with them and for personal benefit, exposes them to various, including, the financial risks.

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<sup>1</sup> 20 September 2011; Imedi TV company; news programme Qronika

Title: Attractive Bani Tariff and 92,000 Ported Customers

News presenter: Who has benefited the most as a result of mobile number portability service? 92,000 customers already enjoy Bani service thanks to internal or external porting. Magti representatives say that acquisition of new customers speaks about the attractiveness of Bani rates. Learn how a new system has changed the communications market from our report:

(Report starts with a scene featuring two young males entering a Magti office)



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Giorgi Shukhoshvili (one of the males): Hello, I would like to switch to a zero-rate tariff.

Reporter's voice-over: Giorgi Shukhoshvili visits the Magti office for the mobile number portability and submits his ID. In a matter of hours, Giorgi will become a Magticom customer. Upon switching to a new network, the customer, without changing his phone number, will enjoy corresponding tariff rules and terms.

Giorgi Shukhoshvili: My friend recommended me to switch to Bani. I used another network for years and was reluctant to change my phone number. Now I have ported and hope will enjoy low rates of this porting.

Reporter's voice-over: 92,000 customers have already switched to Bani through internal or external porting. The communications company says, new customers serve as a proof of the attractiveness of Bani tariff. A customer of Magti's new brand, Bani, can speak with users of other networks at the rate of 16 tetri. That's why the customer [Giorgi Shukhoshvili] switched from 899 and 895 indexes to a low-rate Bani tariff.

Irakli Lobzhanidze (Marketing Director of Magti): The highest number of customers has switched to Bani via internal and external porting. 92,000 customers switched from various brands to Bani, which is a significantly higher number compared to other brands.

(Report features fragments from Magti TV commercial)

Reporter's voice-over: A new system caused changes in the communications market. Competition increased and companies started offering advantageous proposals to customers in the form of portability service. The company Magti has proved to benefit the most. Outflow of customers from this network is now minimal.

Tatuli Ghviniashvili (PR Manager of Magti): Bani customers have increased by 92,000, through internal and external porting. Portability is a well-tested system across the world and it has been introduced in Georgia as well, making the mobile communications market very mobile.

Reporter's voice-over: If customers decide to become users of another telephone network, they will need to visit a network's office. Mobile number portability allows customers to retain their phone number. In the process of porting no phone will be switched off. Nor will any other problem emerge.

<sup>2</sup> 22 September 2011; Imedi TV company; news programme Qronika

Title: Magti's Anniversary

News presenter: It is Magti's anniversary. The company has operated on the market for 14 years now. Magti covers 98% of Georgia's territory. This network was first used for communication in February 1996. The cell-phone company is also credited for its contribution to the country's economy. The company has contributed more than 1 million Lari to the economy. Ketil Iluridze has the story:

(Report starts with the first TV commercial of Magti aired in the past)

Reporter's voice-over: The history of Magti began with this very TV commercial. It was precisely through this ad that Georgia learned about a new cell communications company in the 1990s. This ad became a calling card of the mobile phone operator. Customers of Magti network first reached each other in February 1996.

David Lee (CEO of Magti): It is 14 years now since we have operated in Georgia. I am delighted that I represent the largest phone company – Magti. I would like to extend my thanks to our 2 million customers. It's a great honour for me to serve you.

Reporter's voice-over: Magticom covers 98% of Georgia's territory. At present, there are four brands of the mobile operator on the market – Magti, Bali, Bani and Magti Fix. Beginning from the new year, Magti will offer a new service to its loyal customers – satellite TV service Magtisat. The company has paid to the central budget more than one million Lari since it started operation.

(Fragments of other Magti TV commercial)

Irakli Lobzhanidze (Marketing Manager of Magti): Our service involves such tariff schemes that any customer, regardless of how much can he/she pay and what types of service he/she needs, can select a suitable tariff scheme and enjoy very advantageous terms.

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Reporter's voice-over: Magti was congratulated on its 14<sup>th</sup> anniversary by its loyal customers.

Three young females, in one voice: Happy birthday Magti. [One female continues] I have been Magti's customer for eight years now and am very happy. I like it, it works everywhere.

A passer-by, young female: I congratulate Magti on its birthday. It turned 14 today. I like Magti very much and am happy that I am Magti's customer. Hope, it will offer many pleasant surprises.

Reporter's voice-over: The programme "Dghis Show" also celebrated Magti's birthday and held a small contest for loyal customers of Magti. Those willing to receive a gift from Magti had to answer questions about the company in an interactive live contest.

On September 25, Imedi will start a contest for Magti customers. Three days before the start of the show special fliers were distributed in street of Tbilisi to inform the population. The contest will be led by Naniko Khazaradze, anchor of Dghis Show. Anyone who dials three digits – 1, 2, and 3 from their mobile phones will automatically become participants in the contest. The luckiest customer will receive a super prize of 100,000 Lari.

Naniko Khazaradze: I would like to inform each and every Magticom customer, that at 10 p.m. on 25 September, Imedi TV company will broadcast a competition. I am excited that I will make one and two and three persons lucky.

Reporter's voice-over: The world of constant connection – the slogan of Magti first communicated more than a decade ago has not lost its popularity. Years ago, the company had only 200 customers, today it has 10,000 times more, nearly 2 million.