



FOCUS GROUP 2

LEVEL OF DETAIL IN THE REGULATION OF TELEVISION ADVERTISING

As it announced in its Communication on the Future of European Regulatory Audiovisual Policy¹, the Commission, having clarified the interpretation of certain provisions of the “Television without Frontiers” Directive concerning advertising², now wishes to tackle in greater depth the issue of the development of rules on the duration and insertion of advertising in order to take into account the viewer’s degree of control and the range of programmes on offer. The mandate of group 2 is to look at the possible amending of the rules on television advertising.

1. REGULATION OF ADVERTISING

Directive 84/450/EEC on misleading advertising, as amended by Directive 1997/55/EC in respect of comparative advertising, applies to all media.

In 2003 the Commission also adopted a proposal for a Directive designed to fully harmonise the regulation of unfair commercial practices which can distort consumers’ economic behaviour³. The relationship between the two texts is governed by the “*specialia generalibus derogant*” principle. Accordingly, as a sectoral directive, the Television without Frontiers Directive generally regulates television advertising, except for commercial practices covered by the new proposal for a Directive but not referred to in the Television without Frontiers Directive.

If this proposal is adopted, it will be necessary to take account of it by considering in which areas specific rules on television advertising remain justified.

¹ 15 December 2003, COM(2003) 784 final

² C (2004) 1450 - 23.04.2004 Communication on certain aspects of the provisions on televised advertising in the "Television without Frontiers" Directive.

³ This proposal is based on a general clause and specific provisions applicable to misleading or aggressive commercial practices, especially advertising. Matters relating to health, good taste or decency are outside the scope of the proposal. There are specific provisions covering vulnerable consumers, e.g. children. The Council reached political agreement on a common position in May, and the second reading is expected to take place in the autumn.

In particular, it will be necessary to ensure consistency between the principles established by the provisions relating to all media and those which apply specifically to television.

2. TERMS DEFINED IN THE DIRECTIVE

Chapter IV of the Television Without Frontiers Directive contains rules relating to television advertising, teleshopping, sponsorship and all other forms of televised commercial communication. The aim of these rules is to guarantee a minimum standard of protection for certain objectives of general interest: protecting the integrity of works, protecting the consumer-viewer, protecting human dignity and public health and protecting minors. They also guarantee a homogeneous competitive framework in the Internal Market.

First of all, the **definitions** of “television advertising”, “surreptitious advertising”, “sponsorship” and “teleshopping” in Article 1 of the Directive and the concept of “self-promotion” in Article 19a need to be reviewed.

- Are these definitions still appropriate with regard to the objectives of the Directive?
- Should the definitions of, in particular, self-promotion and other new advertising techniques be amended?

3. MAIN OBJECTIVES OF THE REGULATION OF TELEVISION ADVERTISING

3.1. Protection of viewers and rights holders

3.1.1. Presentation of advertising (Article 10)

Article 10(1) presents the principle of being able to recognise and distinguish advertising from editorial content. The aim of this rule is to make sure that viewers do not confuse commercial and editorial content. Last year's public consultation showed that this objective remains valid and that the principle may be applied to both linear programmes and non-linear services. This principle is also included in the proposal for a framework directive on unfair commercial practices.

Article 10(2) states that teleshopping spots shall remain the exception. This rule is based on the principle that advertising should be broadcast on screens rendering it clearly distinguishable from editorial content.

- This rule needs to be reviewed in the light of the development of split screens.
- Is this rule sufficient to achieve the intended result, particularly in the light of the vagueness of the term “exception”?

The ban on subliminal techniques in **Article 10(3)** is a clear provision in response to a clear general interest objective which is still relevant and could also apply to non-linear services.

Article 10(4) is related to the definition of surreptitious advertising in Article 1(d). The aim is to prohibit non-identifiable advertising that is broadcast within programmes, a violation of the principles of recognisability and separation in paragraph 1. As shown by

the interpretative communication on advertising, applying this provision is tricky, as it is sometimes difficult in practice to distinguish between surreptitious advertising and a simple, harmless reference to a product or brand.

- Should this provision be maintained or clarified in the light of the principle of the recognisability and separation of advertising?

3.1.2. Sponsorship (Article 17)

Article 17(1) relates to sponsored programmes, with a view to protecting the rights of viewers: no influence on the editorial content, identification of sponsored programmes, and no specific advertising references. These principles are relevant to both linear programmes and non-linear services. Last year's public consultation revealed certain difficulties with the application of this principle, particularly when it came to distinguishing an illicit advertising reference from the simple presentation of a logo, brand or product in order to identify the sponsor. The above-mentioned interpretative communication lays down rules in this area.

- Does the interpretative communication resolve all the difficulties in applying this provision?

3.1.3. Insertion of advertising (Article 11)

These provisions are closely linked to the linear nature of programmes. Article 11(1) states the principle of inserting advertising and teleshopping spots between programmes. However, subject to the conditions of paragraphs 2 to 5, they can also be inserted during programmes as long as they do not harm certain specific interests (integrity and value of the programme, taking into account natural breaks in and the duration and nature of the programme).

- Are the provisions concerning advertising and teleshopping breaks between programmes (principle) and during programmes (defined derogation) still appropriate with regard to the objectives pursued?
- Must they evolve to take into account the viewer's degree of control and range of choices?

This should be examined in particular with regard to the following provisions:

With regard to insertion between programmes and, under certain conditions, during programmes "in such a way that the integrity and value of the programme are not prejudiced", last year's public consultation showed that this principle is not contested. However, problems of interpretation do arise with regard to **paragraph 2** and the concept of autonomous parts and natural breaks.

Paragraph 3 relating to insertions during audiovisual works, **paragraph 4** on the 20-minute rule between each break and **paragraph 5** on certain specific programmes aim to protect rights holders and viewers against excessive interruptions. Last year's public consultation showed that this objective is still valid, even if certain contributors were in favour of simplifying the rules.

3.1.4. Duration of advertising (Articles 18 to 19a)

These provisions are closely linked to the linear nature of programmes. In order to maintain a balance between certain broadcasting organisations' need for advertising revenue, and in particular respect for their independence, the integrity of programmes and, more generally, the viewer, Articles 18 to 19a define the broadcasting time that may be devoted to teleshopping and advertising spots and other forms of television advertising. It is time to look at whether these provisions should be amended, taking into account users' degree of choice and control.

- As the aim of these provisions is to ensure that the duration of the various forms of advertising is neither excessive nor harmful to the main objective of television broadcasting, are they still appropriate with regard to the primary aims⁴?
- Should these aims evolve in order to take into account, in particular, viewers' degree of choice and control?

This should be examined in particular with regard to the following provisions:

- **Article 19**: daily limits on advertising for channels devoted exclusively to teleshopping;
- **Article 19a**: provisions applicable to channels devoted exclusively to self-promotion.

3.2. Public health protection

For public health reasons, the Directive includes rules on advertising for tobacco (Article 13), medicinal products (Article 14) and alcohol (Article 15). Moreover, Article 17(2) and (3) establishes rules governing sponsorship by undertakings active in the tobacco and medicinal products sectors. Given the public health objectives pursued, these provisions could apply equally to linear programmes and non-linear services.

The 2003 public consultation showed that these provisions are generally considered to be satisfactory.

3.3. Protection of minors and human dignity

The Directive includes general standards (Article 12) and rules protecting minors in the context of advertising (Article 16). Given the objectives pursued, these provisions could apply equally to linear programmes and non-linear services.

The 2003 public consultation showed that these provisions are generally considered to be satisfactory. However, according to certain contributions from consumer and family associations, not everyone agrees that the rules on the general standards and the protection of minors are being applied satisfactorily. It may be that these need to be reinforced. In this respect the provisions of the Directive on unfair commercial practices need to be taken into account.

⁴ Information, education, social and cultural development and entertainment.

4. WHAT REGULATION AT COMMUNITY-LEVEL?

4.1.1. *Co-regulation mechanisms at Community level*

There is a certain complementarity between the Directive and the additional rules necessary for its implementation. This means that, if the rules relating to insertions and duration were made more flexible, there could be certain associated consequences.

It is important that any greater flexibility should not be to the detriment of the homogeneous competition framework that currently exists at Community level. The adoption of more general, less precise rules at Community level could create greater scope for interpretation and therefore the application of different practices, which could jeopardise this framework.

In order to avoid any negative effects of this kind, it may be appropriate for any flexibilisation of the rules to be accompanied by the adoption of codes of conduct and **co-regulation mechanisms at Community level**.

Furthermore, other considerations should be taken on board, particularly the issue of access by other media to advertising resources.

4.1.2. *Regulatory criteria*

Several criteria are relevant with regard to the introduction of a progressive approach to the regulation of audiovisual content.

Linear or non-linear services: focus group 1 is working on the scope of the Directive. It is clear that the provisions of the Directive on insertions and their duration are meaningful for linear programmes but meaningless for non-linear services.

Users' degree of choice and control: the growing number of services offers viewers greater choice and control.

- To what extent should this be taken into account in the rules, also with regard to the rules on the insertion and duration of advertising?

Audience: certain provisions in the Directive refer to the composition of audiences in order to determine the applicable rules: broadcasts intended only for a national audience (Article 20) and those intended for a local audience (Article 9).

- Is the objective of these provisions still justified? Are these provisions still an appropriate tool? As a general rule, should the audience criterion be taken into account in the regulatory context?