

TAIEX WORKSHOP
THE NEW MEDIA LANDSCAPE:
Audiovisual Media Services Without Frontiers
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**THE LIBERALISATION OF
ADVERTISING RULES**

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Advertising Rules in the TWFD

- **TWFD existing text – Chapter IV**
 1. Rules on recognition and separation (art. 10)
 2. Rules on insertions and interruptions (art. 11)
 3. Rules for particular products and the protection of minors (artt. 13-16)
 4. Rules on sponsorship (art. 17)
 5. Rules on the amount of advertising and teleshopping (artt. 18-19a)

Purposes of advertising rules in the Television Without Frontiers Directive

A - In the Directive Preamble (n. 27): Focus on viewers (basic principle for interpretation)

“Whereas in order to ensure that the *interests of consumers* as television viewers are fully and properly protected, it is essential for television advertising to be subject to a certain number of minimum rules and standards”

Purposes of advertising rules in the Television Without Frontiers Directive

B - In the ECTT Explanatory Report
(recalled by the ECJ in its judgments, e.g. RTI 1997)

- Art. 14 (insertions) - This article aims to establish a reasonable balance between the financial interests of the broadcaster and advertiser, on the one hand, and the interests of viewers, authors and creators, on the other hand.

Purposes of advertising rules in the Television Without Frontiers Directive

C - In the ECJ case-law

- *ARD judgment* (1999): in case of ambiguity provisions which impose restrictions must be given a strict interpretation
- *RTL judgment* (2001): in case of ambiguity interests must be balanced and circumvention of rules must be avoided
- *KommAustria judgment* (2007): interpretation in the light of the objective of protecting viewers from excessive advertising

D - In Commission practice

Interpretative Communication (April 2004): *in dubio pro libertate*

Problems in the Interpretation of Existing Provisions: some examples

- Is Product placement allowed in the light of the principles of separation and surreptitious advertising? (art. 10, par. 1,4)
- Isolated spots (art. 10, par. 2). When exceptional?
- Programs consisting of autonomous parts or comprising intervals (art. 11, par. 2). Notions of “program” and “interval”.
- Sport events including intervals: minispots in football matches (art. 11, par. 2)
- Number of interruptions in the transmission of audiovisual works and “Matrioska” programs (art. 11, par. 3)
- Calculation of program’s duration: gross or net (art. 11, paras 3 and 5)

New forms of advertising:

a) Split-screen

- Simultaneous and parallel transmission of advertising and editorial content. Advantage of avoiding full interruption of for example motor or cycle races
- Doubts on conformity with TWFD - Art. 10 (principle of separation) and 11 ("interruption" is required for any insertion during programmes)
- Council of Europe Standing Committee Opinion: covered by the European Convention but submitted to rules on separation, insertion and duration of advertising
- Interpretative Communication (April 2004): compatible with the Directive ("spatial" separation is sufficient). All the qualitative and quantitative rules are applicable in full.

b) Telepromotions

Interpretative Communication: “Telepromotions” are a form of television advertising based on the interruption of studio programmes (especially game shows) by slots devoted to the presentation of one or more products or services, where the programme presenters momentarily swap their role in the games in progress for one as ‘promoters’ of the goods or services which are the object of the advertising presentation.

- Separation: Commission considers telepromotions compatible with Article 10 of the Directive, provided they are kept quite separate from other parts of the programme service by optical and/or acoustic means enabling viewers to readily recognise their commercial nature.
- Duration: fall under daily limits while hourly limits do not apply (RTI judgment: equivalent to offers to the public since both are “more time consuming”).

c) Virtual advertising

- Virtual advertising
 - Use of virtual techniques for inserting advertising during broadcasts of sporting events, by replacing existing advertising boards on the field or by superimposing new images. The advantage is that it can be used to adapt advertising messages to different markets.
 - Interpretative Communication:
 - compatible with the Directive if viewers are informed and with the permission of the organizers of the event
 - Only on sites normally assigned for advertising messages

The Revision Procedure

- I Revision (1997):
 - Only few changes in Chapter I V (teleshopping, quantitative limitations)
- Current Revision Procedure
 - Rules on advertising discussed at the Commission's initiative (focus group 2 – Issue paper n. 4) and partially anticipated by the Interpretative communications of April 2004 (e.g. product placement, new advertising techniques).
 - Common Position of October 2007

Definitions (art. 1)

- "on-demand audiovisual media service" (i.e. a non-linear audiovisual media service) means an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider;
- "television broadcasting" or "television broadcast" (i.e. a linear audiovisual media service) means an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule;

Provisions applicable to all audiovisual media services

Basic rules extended to on-demand services.

Media providers shall:

- Respect the principle of identification;
- Not use subliminal techniques;
- Respect human dignity, and not include or promote any kind of discrimination;
- Not promote tobacco products;
- Respect basic rules in case of promotion of alcoholic beverages and medicinal products;
- Not cause physical or mental detriment to minors.

Product placement - Definition

- "product placement" means any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within a programme, in return for payment or for similar consideration (Art. 1m)
- Commission Communication 2004: allowed if no undue prominence is given to the product in question

Product placement: Rules (art. 3g)

- PP is prohibited in principle but allowed (if MS do not expressly decide otherwise) in cinematographic works, films and series, light entertainment programmes, sports broadcasts ("positive list"). No derogations for children programmes.
- Requirements: at least
 - No influence on the audiovisual media services content and scheduling
 - Must not directly encourage purchase or rental of products and services
 - Viewers must be informed of the existence of PP (identification) – may be waived
 - No PP of tobacco products (also indirect)

RULES FOR LINEAR SERVICES

- Deep revision of advertising and teleshopping provisions
- No specific rules for public broadcasters
- MS still may adopt deeper or stricter rules for domestic broadcasters (Article. 3, para. 1)
- MS may apply more favourable rules than those laid down in Articles 11, para. 2 and 18 for local channels.

The new framework: “traditional” broadcasting (Linear audiovisual services)

- Basic question: do qualitative and quantitative rules for the “linear” transmission of advertising need amending?
 - Which interests are involved? (broadcasters’ access to sufficient resources, fair distribution of revenues in the television market and with the press, integrity of programs, protection of viewers)
 - Call for new, restrictive rules for children’s programs and food advertising (Consumers’ associations)

The new framework: "traditional" broadcasting (Linear audiovisual services)

- Reasons given in favor of more flexibility (Preamble – Recitals 54-59):
 1. New opportunities for commercial communications in traditional broadcasting created by new advertising techniques - afford competition with on-demand innovations
 2. Increased choice and control in the hands of viewers thanks to commercial and technological developments and to the increase in number of new services -flexibility in applying the principle of separation - No more need of detailed insertion rules for the protection of viewers (this is not easily comprehensible: the choice often does not concern the same content): question of real "substitutability"

The new framework: “traditional” broadcasting (Linear audiovisual services)

3. The increasing use of personal video recorders enable viewers to skip advertising, therefore the industry needs contemporary appearance of editorial and commercial materials, which become unavoidable to the viewer
4. Only some categories of programs require specific protection against excessive interruptions
5. Product placement is a reality in cinematographic and audiovisual works. Allowing it (at specific circumstances) in Europe would secure new revenues to the audiovisual industry.

The new framework:

A - Separation and identification of advertising and teleshopping (new art. 10)

- Separation and recognition principles remain unchanged (Art. 10, para. 1). The principle of separation does not apply to legitimate product placement (not included in the definition of “advertising”)
- The separation requirements are without prejudice to the use of new advertising techniques.
- Isolated advertising and teleshopping spots shall remain the exception (art. 10, para. 2). Not applicable to sport events. Mini-spots in football matches fully accepted if the integrity of the program is not prejudiced

The new framework:

B - Insertion of advertising (new art. 11)

- Repealing of the general rule on the insertion between programs (par. 1, first part). Respect of the integrity of programmes and of the rights of the right holders.
- Repealing of the autonomous parts and intervals rule (para. 2). Also musical and screen plays may be interrupted
- Repealing of the 20 minutes rule (para. 4): total discretion of broadcasters on the moment when to insert advertising and teleshopping
- Interruption of films made for television, cinematographic works and news programs once for each period of 30 minutes; same rule for children's programs. No insertions for religious services (new para. 2).

The new framework

C - Hourly and daily advertising limits for linear services (new Art. 18)

- Abolition of the daily limits. Commission: largely theoretical
- Maintaining hourly limits (20%) only for "advertising spots and teleshopping spots".
Definition of television advertising spot in the Preamble: "should be understood as television advertising in the sense of Article 1(i) having a duration of not more than twelve minutes" (Recital n. 59).

The new framework

C - Hourly and daily advertising limits for linear services
(new Art. 18)

- Other forms of advertising (longer messages) as well as teleshopping windows shall meet no temporal limitations.
- Remaining limits do not apply to product placement (art. 18, para. 2)

EP Amendments not accepted

General rules on commercial communications (Linear and non-linear services)

- Call for specific restrictions for advertising of foods and drinks high in fat, sugar and salt, and of alcoholic beverages. No binding rules, *renvoi* to service providers' codes of conduct encouraged by MS or the Commission (new Art. 3e para. 2)
- Control of the sound volume of advertisements

Monitoring and sanctioning

- Necessity of strict observance of the rules in the MS (negative impact on the functioning of the internal market). Commission's Annual Reports and especially practice in various MS report examples of directive rules' violations.
- Effective system of monitoring and sanctioning at the national level. Necessity of more detailed rules on sanctions. These penalties must be effective, proportionate and dissuasive.
- The only intervention in the Proposal goes on the opposite direction: Art. 3, par. 3 reference to the right of access for "third parties directly affected" to competent authorities is deleted.

MY FAVOURITE SLIDE

- Thanks for your attention!
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