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**Working Group 2:**  
**Audiovisual Commercial Communication: Trends and Challenges**  
**Focus on Advertising**  
**Background Document<sup>1</sup>**

By WG-Coordinator Kerstin Lange, LFK (Germany)

## Introduction

As highlighted in the [EPRA Annual Work Programme for 2015](#), the issue of the regulation of advertising has been a long-time favourite at EPRA as it is particularly suited for the practical exchange of experiences and best practices between members' organisations. Yet, as the announced new Commission's Interpretative Communication on advertising failed to materialise, the subject disappeared from the EPRA radar for a while. It has been already over two years<sup>2</sup> that EPRA discussed issues of Audiovisual Commercial Communication.

With the discussions around the review of Audiovisual Commercial Communications provisions in the AVMS Directive picking up, it was deemed timely to launch a yearly Working group within EPRA to discuss issues of application of the current rules and look at new advertising strategies and techniques such as profiling of users and multi-screen strategies and their impact on regulation. In terms of structure of the work, it was decided that the spring session would focus on pure advertising issues, while the autumn meeting of the working group - scheduled for 29 October 2015 - would be devoted to commercial communication in an editorial environment with a particular focus on product placement.

The first session of the Working Group will thus focus on advertising, and more particularly, on the trends and challenges media authorities face in this context. The "core business" of advertising regulation, namely advertising in broadcasting programmes, will be one of the focal points of the background document (Section 1). Yet, the group will also broaden its scope to examine whether commercial communication on non-linear audiovisual media services raises challenges for regulators (section 2) and to highlight emerging and future trends (section 3).

The present paper is based on the responses to the questionnaire provided by 33 regulatory authorities<sup>3</sup>: Audiovisual Media Authority (AL); Communications Regulatory Agency (BA); Conseil

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<sup>1</sup> Disclaimer: This document has been produced by EPRA, an informal network of 52 regulatory authorities in the field of broadcasting. It is not a fully comprehensive overview of the issues, nor does it purport to represent the views or the official position of EPRA or of any member within the EPRA network.

<sup>2</sup> EPRA Plenary session in May 2012 in Portoroz: <http://www.epra.org/attachments/portoroz-plenary-2-the-future-of-commercial-communications-introduction>

<sup>3</sup> For further information, please check the full survey results on the EPRA-website: <http://www.epra.org/surveys/wg2-berne-audiovisual-commercial-communications-trends-challenges-focus-on-advertising/results>

supérieur de l'audiovisuel (CSA - BE); Flemish Regulatory Authority for the Media (VRM - BE); Council for Electronic Media (BG); Federal Office for Communications (CH); Cyprus Radio Television Authority (CY); Council for Radio and TV Broadcasting (CZ); Directors' Conference of the Länder Media Authorities (DE); Technical Surveillance Authority (EE); National Authority for Markets and Competition (CNMC - ES); Audiovisual Council of Catalonia (CAC - ES); The Finnish Communications Regulatory Authority (FI); Conseil Supérieur de l'Audiovisuel (FR); Ofcom (GB); National Council for Radio and Television (GR); Gibraltar Regulatory Authority (GI); National Media and Infocommunications Authority (HU); Agency for Electronic Media (HR); Broadcasting Authority of Ireland (IE); Agcom (IT); Radio and Television Commission of Lithuania (LT); Council for Coordination on the audiovisual activity in Moldova (MD); Agency for Audio and Audiovisual Media Services (MK); Broadcasting Authority (MT); Commissariaat voor de Media (NL); Norwegian Media Authority (NO); National Broadcasting Council (PL); National Audiovisual Council (RO); Regulatory Authority of Electronic Media (RS); Swedish Broadcasting Authority (SE) and the Council for Broadcasting and Retransmission of the Slovak Republic (SK).

The aim of this summary of the answers to the questionnaire is to provide some structure and background information as a starting point for the presentations and discussions during the working group session. With the help of video examples, and under the guidance of WG Content Producer **Kerstin Lange** (LFK-DE) and WG Chair **Helena Mandić** (EPRA Chairperson) three panelists will reflect some of the issues covered by this paper:

- **Anthony Szykaruk**, Ofcom (UK) will report on various practical examples from the field of the scheduling of TV advertising to illustrate whether the rules as they stand are clear and enforceable and if not, what specific changes should be made to ensure that they serve the strategic objective more effectively;
- **Marcel Betzel**, CvdM (NL) will focus on the specific concepts of self- and cross-promotion and through selected examples highlight the variety of forms that they may take in practice and the challenges that regulators face in the implementation.
- **Geneviève de Bueger**, CSA (BE) will report on some of the challenges raised by commercial communication on non-linear audiovisual media services, based on the preliminary findings of an ongoing public consultation on ACC on new Platforms<sup>4</sup> conducted by the CSA.

## I. Advertising on Television

### 1.1. Legal framework

The first two questions concerned the scope of the **legal framework of Television advertising** by asking which forms of advertising are covered by national legislation.

The answers showed that in most countries self-promotion (32 answers), block advertising (31), single spots (31), teleshopping (30), split screen ads (24) as well as virtual advertising (20) are

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<sup>4</sup> <http://www.csa.be/consultations/27>

regulated by law. Moving splits (16 answers), cross-promotion (16), business TV (13), infomercials (12) and advertorials (8) also play a relevant role and are statutorily regulated in several countries.

Other forms of advertising that were named as covered by national regulation were:

- *interactive advertising* (Serbia, Switzerland),
- *sponsorship* (Croatia, Cyprus, Czech Republic, Germany, Italy, Malta, Moldova, Slovakia),
- *surreptitious advertising* (Cyprus, Serbia, Slovakia),
- channels exclusively devoted to advertising and teleshopping (Cyprus, Slovakia),
- *product placement* (Croatia, Czech Republic, Italy, Malta, Moldova, Norway, Slovakia),
- *telepromotion*<sup>5</sup> (Croatia, Bosnia-Herzegovina, Serbia),
- *social appeals and prize games* (Germany),
- *advertising scroll and logo bugs* (Bulgaria),
- *advertising crawls* (Serbia),
- *mirror advertising* (Croatia),
- *verbal advertising by TV commentators for instance during sportscasts* (Spain-CAC),
- *electoral advertising* (Moldova).

### 1.2. Advertising forms actually used in practice

According to the respondents, all **forms of advertising** covered by the national regulation are **actually used by broadcasters**, although the “classic” types of advertising such as block advertising, single spots, teleshopping, infomercials and sponsoring still seem to play a predominant role. Self- and cross-promotion seem to be also very common in a large number of countries.

As far as “newer” forms of advertising - such as split screen, moving ads, virtual advertising or advertorials - are concerned the picture is far from being consistent. In some countries, such as Bulgaria, Croatia, Bosnia-Herzegovina, Germany, Hungary, Italy, Greece, Macedonia, Malta, Spain, Switzerland and United Kingdom, (some) newer forms of advertising are present. In other countries they have not played much of an active role yet.

### 1.3. Challenges for regulators

The responses to the question on **challenges and problems in applying advertising rules** presented a mixed picture of the situation in EPRA Member States.

Rather surprisingly, several regulatory authorities do not report any particular problems, or at least no acute challenges, when it comes to the application of advertising rules in practice. This is the case in Albania, Belgium, France, Gibraltar, Hungary, Poland, Romania and Switzerland.

The majority of respondents, however, report some challenges in the application as mentioned by Bulgaria, Bosnia-Herzegovina, Cyprus, Denmark, Estonia, Germany, Greece, Hungary, Italy, Finland, Ireland, Lithuania, Macedonia, Malta, Netherlands, Slovakia, Spain.

The challenges include:

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<sup>5</sup> Telepromotion = form of advertising which interrupts the editorial content whereby the programme presenter temporarily assumes the role of a promoter for goods/services presented.

- the separation of advertising and programme content,
- the recognizability of advertising,
- the differentiation between sponsorship and advertising,
- the interpretation/definition of self- and cross-promotion,
- surreptitious advertising,
- excesses of the proportion of advertising within the given hour,
- domestic legislation which does not cover specific forms of advertising,
- the impairment of editorial content by advertising<sup>6</sup>.

The same heterogeneous picture emerges when it comes to the **definition of programme genres**. While programme genres, such as religious programmes, current affairs or children programmes, are defined by legislation for instance in Belgium, Bulgaria, Czech, Germany, Great Britain, Greece, Macedonia, Norway, Poland, Serbia, Slovakia, there are not specifically defined in other jurisdictions such as Ireland, Finland, France and Sweden. No particular challenges were reported around the application of advertising rules to programme genres.

As a rule, and somewhat surprisingly, most of the respondents report receiving **relatively few complaints**. Complaints usually concern:

- the content of ads<sup>7</sup> (Belgium, Bulgaria, Cyprus, Great Britain, Hungary, Ireland, Italy, Norway, Romania, Switzerland),
- the recognizability of advertising (Czech Republic, Great Britain<sup>8</sup>, Finland, Spain),
- the promotion of products or services during programmes (Cyprus, Finland),
- surreptitious advertising (Cyprus, Denmark, Finland, Greece, Netherlands, Spain),
- the duration of advertising/excess of proportion of advertising within the given hour (Belgium, Bulgaria, Cyprus, Finland, Lithuania, Serbia, Slovakia, Spain),
- sponsorship (Czech Republic, Finland, Netherlands, Norway),
- product placement (Belgium, Czech Republic, Netherlands, Norway),
- the loudness of ads (Czech Republic),
- the interruption of the editorial content (movies) by advertising (Estonia, Lithuania).

The perception of a **need for further legal regulation at the national and/or the EU-level** is viewed very differently. Several respondents clearly wish for additional guidance from the EU level, either generally (Czech Republic, Netherlands, Greece, Gibraltar Serbia) through a new directive or a new Interpretative Communication from the Commission to adapt or replace the 2004 Interpretative Communication on advertising, or for specific areas (clarification of self-promotion - France).

In the UK, Ofcom has taken the view that regulation of commercial communications should be based on high-level principles derived from EU legislation, ideally developed together with Member States, regulatory authorities and other interesting stakeholders. Taking a detailed approach to qualitative

<sup>6</sup> For example split screens covering subtitles.

<sup>7</sup> For example political and sexist advertising, honesty of advertising, advertising for gambling, discrimination, violence, content harmful to minors.

<sup>8</sup> An example of a case in which Ofcom considered the recognisability of advertising can be found at:

<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb216/obb216.pdf> (see Prometheus Decision).

rules at the EU level, for example by closely describing or proscribing very specific advertising techniques, could in their view unduly restrict the flexibility of operators and the potential for market innovation.

## II. Commercial Communication on VoD-platforms

### 2.1. Legal basis

The second part of the questionnaire covered **commercial communication on VoD-platforms**. The first question in this section referred to the **legal provisions** and asked whether **specific rules regulating commercial communication on VoD-platforms** exist or if the general (broadcasting) rules apply.

The answers show that the majority of the countries (for instance in Bosnia and Herzegovina, Cyprus, Czech Republic, Denmark, Estonia, Finland, Greece, Ireland, Lithuania, Norway, Romania, Serbia, Spain, Sweden) have transposed the rules of the AVMS Directive quite literally in their national legal order by introducing a graduated system characterized by a more flexible regime for on-demand audiovisual media services. This means that **qualitative** rules, e.g. relating to the recognition and content of ACC apply to on-demand audiovisual media services (Articles 9 to 11 AVMSD), while **quantitative** rules, e.g. on scheduling and duration (Articles 19 to 26 AVMSD) apply to broadcasting services only.

While the advertising provisions applicable to on-demand audiovisual media services are as a rule included in the main media law transposing the AVMSD, in some countries as in France<sup>9</sup> however there are specific bylaws or decrees applicable to on-demand audiovisual media services.

In the Netherlands, policy guidelines developed by the CvdM contain some rules regarding new advertising techniques in linear and/or non-linear services. General advertising rules apply for VOD-services of commercial/private media services. For public service media (PSM), however, rules are in some case more detailed and stricter. Further to Section 2.98 of the Media Act 2008, the rules regarding advertising (including quantitative restrictions) on TV and radio are applicable as much as possible to the other media offerings of PSB, i.e. internet websites and video on demand services. The CvdM guidelines state that advertising of PSB should be restricted in duration and amount and should not be dominating. This general principle has been elaborated into more detailed requirements<sup>10</sup>.

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<sup>9</sup> Décret n° 2010-1379 du 12 novembre 2010 relatif aux services de médias audiovisuels à la demande : <http://www.csa.fr/Espace-juridique/Decrets-et-arretes/Decrets-relatifs-aux-services-de-medias-audiovisuels-a-la-demande-SMAD/Decret-relatif-aux-services-de-medias-audiovisuels-a-la-demande/Decret-n-2010-1379-du-12-novembre-2010-relatif-aux-services-de-medias-audiovisuels-a-la-demande>

<sup>10</sup> On PSM internet pages advertising (like banners) may never exceed 10% of the space of a browser page. A clear (written) reference should inform the audience of the commercial nature of the banner. It should be clearly separated from the editorial content for instance by a clear frame. Written advertorials and techniques like 'pop ups', 'pop unders' or 'hover ads' are not allowed. For VOD services (usually catch up TV services): it is allowed to show pre-roll advertisements. The guidelines prescribe a maximum duration of 15 seconds (now even extended to 30 sec.) which is also in line with the current situation in practice.

In the French speaking Community of Belgium, further to Art. 20§2 of the Décret SMA<sup>11</sup>, a quantitative limitation of 20% applies to on-demand media services, and is interpreted to mean that the maximal amount of advertising and teleshopping inserted in a programme shall not exceed 20%.

In Albania, the normative act that will include specific rules for VoD has not yet been approved. In Germany, VoD-platforms are not specifically regulated as such but covered as telemedia services by telemedia law. In Switzerland, while specific advertising rules for non-linear audiovisual media services do not exist, penal, administrative and civil law provisions may apply to VoD operators, such as the ban of advertising for drugs on prescription.

## 2.2. Role played commercial content on VOD platforms

According to the answers received on the question as to whether **commercial content** already plays a relevant **role on VoD-platforms**, the market seems to be contrasted. Commercial content is already playing a role in most Northern and Western European countries, whereas it is still irrelevant in most Southern and Eastern European countries. One reason for the latter is that VoD-platforms are at the very beginning of their development in some countries or do not even exist yet (e.g. in Bosnia and Herzegovina, Bulgaria, Estonia, Gibraltar, Greece, FYR Macedonia, Malta, Moldova and Romania). In the cases when VoD-platforms exist and commercial communication plays a role, existing formats of commercial content include:

- pre-, mid- and post-rolls<sup>12</sup>,
- block advertising and or single spots<sup>13</sup>,
- split screen and overlay advertising<sup>14</sup>,
- product placement<sup>15</sup>,
- sponsorship<sup>16</sup>,
- pop-ups<sup>17</sup>,
- banners<sup>18</sup>,
- self-promotion<sup>19</sup>,
- telepromotions<sup>20</sup> and
- interstitial advertising<sup>21</sup>.

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<sup>11</sup> <http://www.csa.be/documents/1440>

<sup>12</sup> One/all of these forms of advertising were named by BE, HR, FR, DE, IT, LT, NL, ES, CH.

<sup>13</sup> These forms of advertising were named by BG, CZ, GB, IE, FI, NO, PL, ES.

<sup>14</sup> This form of advertising was named by BE, IT, FI.

<sup>15</sup> This form of advertising was named by CZ, FI, GB, IT, NO.

<sup>16</sup> This form of advertising was named by CZ, FI, IT, GB, NO.

<sup>17</sup> This form of advertising was named by NO and ES.

<sup>18</sup> This form of advertising was named by BE, DE, ES.

<sup>19</sup> This form of advertising was named by HR, PL, ES.

<sup>20</sup> This form of advertising was named by ES.

<sup>21</sup> This form of advertising was named by BE (CSA).

### 2.3. Challenges faced by regulators

Questioned on **challenges they face in applying advertising rules to VoD-platforms**, most respondents claim that they do not face any problems. This is mostly due to the fact that either VoD-platforms and/or commercial communication on VoD-platforms do not (yet) play a significant role in these countries or that the media authority is not the competent authority in charge of monitoring these platforms.

The same seems to apply for users<sup>22</sup>. Surprisingly enough, only the Dutch, the French, the Norwegian and the UK regulators report to have received some complaints. In the UK, Advertising on UK VOD services is regulated by the ASA. In 2013, the ASA received 148 complaints about advertising on VOD services. The ASA has not highlighted any particular challenges in regulating advertising on VOD services. Sponsorship and product placement on VOD services is regulated by Ofcom co-regulatory partner, ATVOD. ATVOD does not report any particular issues in regulating these forms of commercial communication.

The Dutch CvdM occasionally finds it challenging to determine the scope of its jurisdiction as a regulator in the field of commercial audiovisual media services. When a video service on internet qualifies as an on-demand media service, it is not always clear whether the commercial communication outside the video should be regulated as well. Similarly, for the Norwegian NMA, the main challenge is that advertising rules only apply to the VoD service itself and not the surrounding area on the screen which shows commercial content (that would not be permitted according to the advertising rules). In addition, the separation between commercial and editorial content is less clear in a non-linear environment. The same challenge is mentioned by the Bulgarian CEM. Germany finds it difficult that commercial content in on-demand services and on websites only has to be recognizable as such while TV advertising has to be labeled. The Finish FICORA mentioned the placing of product placement identifier after advertising breaks as an example. The Belgium CSA is currently focusing on commercial communication on VoD-platforms by conducting a public consultation<sup>23</sup> and will present its preliminary outcome during in the Working Group.

Croatia, Estonia, Greece, Lithuania, the Netherlands, Norway and Serbia felt that **legal solutions** at the EU-level would be helpful to solve merging challenges. Denmark, Germany, FYR Macedonia and Spain preferred **regulation** both **at EU- and national level** while Bulgaria favored a national approach due to the different progress levels. The Belgian CSA wishes to wait until its current consultation is completed in order to use its results to produce guidelines.

### III. Future Trends and Challenges in terms of Commercial Communication

At present the **second screen** in terms of advertising does not appear to be an issue for most regulatory authorities, though the majority of respondents are confident that it will play a role in the

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<sup>22</sup> Another - less optimistic - explanation could be that the public is not aware that regulation applies on such services or do not know who is the competent regulator.

<sup>23</sup> <http://www.csa.be/consultations/27>

future. Only the Dutch CvdM, the Irish BAI, the French CSA and the Belgian CSA stated that they are already facing such issues, but so far they do not really appear to create new challenges for media authorities except for the Belgian CSA, who considers that existing rules are too general and not practicable in a convergent environment. Norway emphasized the increasing relevance of multi screens for advertising purposes.

Albania, Belgium and Norway see a need for (platform neutral) regulation.

In the UK, Ofcom has commissioned qualitative research in 2013 on the future of commercial communications in television<sup>24</sup>. The main conclusions highlighted that:

- TV remains the only medium that delivers the reach and impact that major advertisers require;
- Yet technology changes will enable dramatic change in the market;
- This disruption could curtail growth in linear TV spot advertising and its relative importance will diminish.
- New routes and relationships with audiences already include direct investment in TV programmes, complementary advertising via second screens, investment in video content delivered via the internet and investment in alternative forms of engagement marketing. Further research will be needed to determine the disruptive effects of these techniques and their implications for regulation.

In December 2014, the French CSA contributed to a public consultation on digital advertising led by the Conseil national du numérique (CNUM, an independent consultative commission on digital impact on society and economy<sup>25</sup>).

A similar picture emerges for the use of **profiling techniques** used by broadcasters in order to gain advertising revenues. In the opinion of several respondents, a (future) challenge will be the protection of personal data and privacy, as well as the protection of the editorial integrity with regard to **Connected TVs**.

The Dutch CvdM notes that user profiling needs to be addressed by both media content regulation and privacy and data protection rules – the latter being outside the scope of activities and legal tasks of most broadcasting regulators. As a consequence, this is likely to require closer cooperation between content regulators and regulators in area of data and privacy protection in future.

Ofcom's commissioned research (mentioned above) also noted that industry stakeholders' use of data collection and analytics could also cause disruption and challenges for regulation. A more advanced data economy might offer the potential for advertising to be targeted at smaller groups of individuals rather than the broad demographic groups. As the use of IPTV delivery and the penetration of smart TVs rises, return path data collection could result in TV display advertising adopting certain characteristics of internet display advertising. Such techniques could test the existing regulatory framework (although in some cases, user profiling could be used to better target ads for the protection of viewers, e.g. minors).

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<sup>24</sup> [http://stakeholders.ofcom.org.uk/binaries/research/tv-research/Future\\_of\\_Commercial\\_Comms.pdf](http://stakeholders.ofcom.org.uk/binaries/research/tv-research/Future_of_Commercial_Comms.pdf)

<sup>25</sup> <https://contribuez.cnummerique.fr/debat/92/avis/2383>



The Hungarian media authority also named the protection of minors as well as the creation of a level playing field as major challenges.

**As key issues in advertising/commercial communication that will merit regulatory attention in the upcoming 5 to 10 years** were quoted:

- the recognizability of commercial communication,
- the merging of commercial and editorial content/preserving editorial responsibility,
- the asymmetry in the quantitative advertising rules (between linear and non-linear services),
- the advertising of alcohol, food (particularly in relation to advertising HFSS foods to children) and gambling services,
- virtual advertising,
- surreptitious advertising,
- commercial communication via “branded channels”,
- (multi) media platforms,
- multi-screen advertising,
- convergence and growth of (less regulated) on-line advertising,
- the intervention of intermediaries and new actors,
- new advertising techniques,
- product placement,
- the usage of big data and user profiling,
- personification of advertising and targeted advertising,
- consumer protection,
- preserving the non-commercial nature of PSM in order to preserve its distinctive character.