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Advertising and sponsoring in the EC
Harmonisation in a partly liberalized market

by Professor Egbert Dommering[1]

The Directive on TV broadcasting has raised several difficult questions of harmonization. One has to analyse the different services involved and the different types of transfrontier activities to understand the case law of the Court. In the concluding remarks the article adresses the question how to regulate advertising and sponsoring in national markets served by national and international commercial broadcasters and national public broadcasters.

1. Introduction

The European Court of Justice, when faced with the question whether the act of broadcasting constituted a transfrontier service in the sense of article 59 of the EC Treaty, ruled that 'at least' two services were involved: the service of advertising and a broadcasting service (consisting of programme and carrier services).[2] The first service can be offered by a (terrestial) broadcaster with a purely national coverage to advertisers in the same country and advertisers from other countries. The only tranfrontier service involved is advertising and the problems from the perspective of the freedom of services are the barriers national laws may put up for the access of the advertising service to the national broadcasting services. The first service can also be offered by a commercial (satellite) broadcaster aiming from one country at the national audience in an other country. In such a case both the advertising and the broadcasting service become transfrontier services. From the perspective of the freedom of services the central issue becomes whether the receiving state may put up barriers against the retransmission of the broadcasts and/or the advertising. We must keep in mind these two situations in order to understand the subsequent case law of the Court and the scope and effect of the TV directive on the harmonization of the law of advertising.

2. The TV directive

The objective of the TV Directive[3] is to ensure the freedom of reception and retransmission within Member States of television programmes broadcasted from one member-state to another, and to ensure harmonisation by means of a 'minimum-regulation'. It provides mainly a minimum harmonization for the transfrontier advertising and sponsoring in broadcasting programmes.[4]

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[2]Case 352/85 (Bond van Adverteerders), 26 April 1988.

[3]Council Directive 89/552/EEC on the co-ordination of certain provisions laid down by law, regulation or administrative action in Memnber States concerning the pursuit of television broadcasting activities.

[4]Apart from some provisions about the quota of European productions and the new guarantees concerning events of public interest.

The TV-Directive gives the Member States explicitly the right to impose a stricter regime on its own residents, for example national public broadcasters. The stricter rule however must comply with the general freedoms of the Treaty.
On 30 July 1997 Directive 97/36/EG has come into force, introducing changes of the TV Directive. This new directive stresses the objective of the TV Directive: to form a legal framework for the freedom to provide services.
In part the new directive clarifies some provisions of the old TV-directive (for example the rules about 'teleshopping'), but also new elements have been added.
The Directive is also applicable in EFTA-countries that are not a member of the Union. This means that Norway, Iceland and Liechtenstein ought to implement the provisions of the Directive with the exception of two specific subjects. One concerns the quota of European productions. The other consists of an addition to Article 15 of the Directive giving the EFTA Countries the right to impose on cable companies, operating on their territory, the duty to scramble or remove commercials for alcoholic beverages.[5]
The EFTA Court gives advisory opinions with regard to the interpretation of the Directive.[6] The EFTA Court and the Court of Justice exchange information to stimulate a uniform interpretation.[7]

3. Home control, no interference in broadcasts from Member States

Member States have different institutional frameworks for broadcasting, and, untill recently, some states only had a public broadcasting system. Therefor they were not particularly eager to 'let through' broadcasts from other Member States.
In various procedures the Court of Justice has emphasized, that, whereas the objective of the Directive is to ensure the free reception of broadcasts from other Member States, reception of broadcasts should be possible *without any interference or second checks by the receiving country*. Member States should rely on the transmitting state in ensuring that the broadcasts falling within the jurisdiction of the transmitting state, comply with the national regulation in conformity with the Directive (the 'transmitting State' or 'Home Control' principle).[8]
The new Directive states the principle in a separate article, art. 2bis, more strongly than the old Directive. The power to suspend the broadcasts in case of a severe violation of the rules for the protection of minors (already present in the old Directive) has been placed under a strict supervision of the Commission.
It was not quite clear what were the powers of the receiving State in areas that were not yet harmonized by the Directive, such as misleading advertising and consumer protection.
In the Norwegian case of 1995 the EFTA Court seemed to allow direct measures by the receiving State.[9] The case was the following: The broadcaster TV3 broadcasted from the United Kingdom programmes aimed at audiences in Denmark, Sweden and Norway. The broadcasts contained commercials for Lego and Mattel products, one showing two girls playing with a Barbie Motorhome and another a Lego town and a magic dragon in the surrounding mountains. The commercials were part of a larger international marketing strategy of the two companies involved. The same

[5]Annex X EEA Agreement, see EFTA judgement 16 June 1995, Cases E-8/94 and E-9/94, Norwegian Consumer Ombudsman v Mattel and Lego, Mediaforum 1995-9, p. B111 ev.

[6]On the bases of art. 34 of the Agreement between EFTA States on the Establisement of a Surveillance Authority.

[7]Article 106 EEA-Convention.

[8] Case C.-412/93 (Société d'importation Édouard Leclerc-Siplec v TF1 Publicité and M6 Publicité SA), 9 February 1995; Case C-11/95 (Commission v Belgium), 10 September 1996; Case C-14/96, (Denuit v Belgium (Coditel), 29 mei 1997.

[9]Joined cases E-8/94 and E-9/94 (Forbrukerombudet/Mattel and Lego), 16 June 1995.

commercials were used in different national markets, only adapted by dubbing in national languages. The surrounding programmes were children programmes. The Norwegian Broadcasting Act prohibits the broadcasting of advertisements in connection with children programmes or advertisements targetting children specifically. Although the EFTA Court held that a general prohibition of children advertising was not in accordance with the Directive '*in cases of transfrontier broadcasting a receiving state might also be better placed to assess whether a TV advertisement directed to an audience in that country may be misleading or not. It was not asserted that the advertisements were misleading. The Court nevertheless notes that, in considering whether an advertisement is misleading or not, higher standards would normally apply if the advertisement is specifically targetting children* '. This part of the judgement gave rise to speculations that there was still room for actions by the receiving state.
In a recent decision in a similar case from Sweden, however, the Court of Justice[10] upheld the principle of non-interference and clarified the relation between harmonized and non-harmonized subjects. Again, the advertisements on the UK based station TV3 were at stake. De Agostini, a publisher of an Encyclopedic Magazine for children, broadcasted on TV3 a commercial 'Everything about Dinosaurs!' drawing the attention of children to the latest issue of the magazine. The Swedish Ombudsman asked the Economic Court in Sweden for an injunction against De Agostini on the same grounds as his Norwegian collegue: the advertisements targeted at children of 12 year, which was not allowed in Sweden either. Furthermore the Ombudsman considered the commercials misleading. The Court's decisions may be summerized as follows:
In matters of misleading advertising the receiving State is free to apply its national rules (partly harmonized by Directive 84/850) applicable without any discrimination on advertisers on its territory, provided measures against misleading advertising do not prevent the retransmission of the broadcasts carrying such advertising. It is my reading of this decision that the Directive prevents in general prior control and barriers on retransmission of transfrontier broadcasts. The Directive, so to say, harmonized the principle of free retransmission and secures the fundamental 'transmitting state' principle. The Directive does not prevent the application of national laws 'ex post' in areas that are not affected by the Directive (for example misleading advertising) as long as those laws are in accordance with the principles of free movement of goods and services. These applications however may not prevent the retransmissions as such. One could think of judicial control on broadcasted commercials after their transmission. In my view this remains within the jurisdiction of the receiving state.
The second decision concerned the commercials specifically targetting the youth. This, in the view of the Court, regards the protection of minors, a subject harmonized by the Directive. In that case it is up to the transmitting State to take care of the implementation of the rules of the Directive which protect minors. This outrules a general prohibition of youth advertising as foreseen by the Swedish law, because it would constitute, contrary to the objective of the Directive, a second control by the receiving State in a matter covered by the Directive.

4. General rules of EC-Law: articles 30 and 59 of the Treaty

We have discussed above that the Court accepts application on a non-discrimanatory basis of rules of misleading advertising, but did not accept the application of national rules that fall within the scope of the directive. I recall my introductionary remark: these decisions concerned the transfrontier broadcasts of the UK based TV3. In the joined case the Ombudsman acted against the same commercials broadcasted by the Swedish commercial station TV4, and, against a Swedish Homeshopping channel for different commercials which made, according to the Ombudsman, misleading statements about a skin-care product ('Body the Life') and a detergent ('Astonish'). In this matter the issue was if the stricter rules imposed on national stations (which the Directive as such

[10] Joined cases C-34/95 to C-36/95 (Konsumentenombudsman/De Agostini), 9 July 1997.

allows) could be upheld against the freedoms of the Treaty, or were a forbidden barrier of the entry of da Agostini to the Swedish market.
The first question to answer is if article 30 applies to advertising.

4.1 Article 30 EC Treaty

The Court of Justice has narrowed down the application of article 30 in the area of advertising in the Keck and Alpine cases[11].
In the Keck-case the Court stipulated that article 30 EC is not applicable to national measures prohibiting or restricting certain modalities of the sale of products, if these measures have in fact and in law the same effects on the territority of the member State on the trade of national products as on the trade of products imported from other Member States. For example one can think of the prohibition of certain practices in door to door selling, but also about rules on advertising.
In the Swedish case the Court adressed the question whether, by applying the 'Keck rule', the Swedish ban on television commercials targetting the youth could be considered as a purely internal affair affecting De Agostini in the same way as any other provider of products for the youth on the Swedish market. The Court affirmed that this was so but at the same time responded to the argument of De Agostini that television advertising for foreign companies is a prerequisite for an effective entry of the Swedish market. Although the effect in law might be the same, there occurred factual differences. The Court left it to the national Court to decide whether the prohibition affected the trade of De Agostini products differently from those of Swedish manufacturers. If the national Court would find that there indeed was a different effect on the sale of the non-Swedish product, it had to decide whether one of the exceptions of article 36 or the 'Cassis de Dijon rule' justified the restrictive practice. In short: whether the television ban is a proportionate measure in the interest of the protection of consumers or maintenance of fair trading practices.

4.2 Article 59 EC Treaty

In the Alpine case the Court has refined its 'Keck rule'. The Alpine case concerned the prohibition of 'cold calling' practices by investment trusts. Cold calling is an agressive method of selling shares to consumers. One calls the prospective buyer at home from an office which produces, for the customer audible, nervous background noises such as ringing phones and talking employees. This creates the environment of exciting big business which makes it possible to talk the customer into some unknown, but very promising, investment with unusual high returns in short time. The prohibition serves the general interest of the protection of the trustworthyness of financial trade. The case concerned a 'cold call' from a member state where the prohibition was in force to customers in other member states. The Court found that in this case the Keck rule about purely national sales practices did not apply while the national prohibition affected directly the transfrontier cold calling service to customers in other countries. Thus it applied the principles of free movement of services on the *exportation* of the service.[12] The Court held that in such a case the freedom of services could be restricted if there was an overriding general interest that was best served in a proportionate way by a general prohibition of the selling practice. It left it to the national court to decide whether such an exception could be invoked.

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[11]Joined cases C-267/91 and 268/91 (Keck and Mithouard), 24 November 1993; Case 384/93 (Alpine), 10 May 1995.

[12]Some commentators were surprised by the idea of the application on the exportation of a service. In my opinion this is logical as soon as one accepts that a service as such (by means of telecommunications) moves from one country to an other. Then it becomes irrelevant if the servise is exported or omported.

In the Swedish case the Court reiterated its decision in the Bond van Adverteerders case[13] that the offering of airtime to an advertiser in an other country (TV4 to Da Agostini) constituted a transfrontier service. In applying the same principle as in the Alpine case, it stated that restrictions on the offering of the service may be justified by an overriding general interest, provided the means of restriction are proportionate with the aim pursued and applied in a non discriminatory manner. The Court recalled that already in its decision in the Dutch cable case[14] it had applied the same principle on national broadcasters. It added that it had also accepted in the Alpine case that an overriding interest could be the protection of consumers and fair trade practices.
The same principle applies, in my view, to the *imported* service of advertising incorporated in a programme broadcasted from the 'transmitting state', provided the subject is not covered by the Directive and provided the restriction imposed does not violate the principle of free retransmission.
This would mean that in cases of television advertising the main regulating principle would be article 59, rather than article 30. The application of the general interest exception on imported advertising would be confined to domains not covered by the Directive.

6. Jurisdiction of a Member State

The TV Directive of 1989 did not define the circumstances which constitute the jurisdiction of a Member State. Under the Directive problems had arisen in case a broadcaster officially had its seat in the state of transmittance, but conducts its main bussines in the receiving state. The new Directive incorporates the case law of the Court of Justice. The two alternative points of attachement for jurisdiction are either the place of business or the place of assignment of a satellite frequency and/or up link facility and/or satellite transponder.
During the period the amendments of the Directive were in preparation, various judgements of the Court regarding transfrontier broadcasts already pointed in this direction.[15] Especially the British case is relevant.[16] The United Kingdom stated that it only had jurisdiction with regard to those broadcasting organisations that used a terrestial transmitter in England to broadcast its programmes. The Court ruled that the place of business was decisive. The place of business is defined as (recital 58) 'the place where the organisation has its center of activities, particularly the place where the decisions about the programming policy and definitive form of the programmes are being made'.

The new Directive refers to the judgement in the Factorame case of 1991[17], in which the Court first determined that the place of business is the place where a company actually carries out economic activities in a permanent establishment.
The criterion is elaborated further in recital 12 of the preamble of the new Directive. The following points are of importance:
- the seat of the headoffice,
- the place where the programming decisions are usually taken,
- the place where the broadcast is put together in definitive form, and
- the place where a substantial part of the personnel that is necessary for the broadcasting is located.

These criteria have been implemented in the new article 2 of the TV Directive.

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[13]Supra note 2.

[14]Case 288/89 (Collectieve Antennevoorziening Gouda), 25 juli 1991.

[15]Case C-11/95, Commision v Belgium, 10 September 1996, Bijlage Mediaforum 1996-10, p. B125; Case C-56/96, VTA v Vlamish Community, 5 juni 1997, Bijlage Mediaforum, 1997-7/8, p. B101.

[16]Case C-222/94, Commission v United Kingdom and Ireland,

[17]Case C-221/89 (the Queen v State for Transport, ex parte Factorame) 25 July 1991, p. I-3905.

An exception to this rule looks at organisations that have chosen their place of business in a certain Member State for the sole reason that they intend to circumvent (the stricter regime of) the jurisdiction of the State to which its broadcasting programmes are directed. This exception is mentioned in recital 14 of the preamble, but not inserted in the articles of the TV Directive. It is a rule developped in the jurisprudence of the Court.
In practice the circumvention-theory is not very easily accepted. Only when a national court can determine that an organisation has its place of business in a certain state for the obvious reason of avoiding the apllication of the law of the receiving State, the law of the receiving state is applicable. In the TV10 case[18] this has lead to the consequence that TV10 which broadcasted from outside the Netherlands was considered to be an unlicensed Dutch station. Consequently it had to cease its broadcasts in the Netherlands.

7. Summing up of the foregoing; sponsoring

7.1. Advertising

Advertizers may benefit from a milder regime of advertising in areas covered by the Directive (such as advertising for a youth audience) in a country of transmittance. Forum shopping by broadcasters may not be allowed, 'channel hopping' by advertisers is not prohibited: it is a logical and necessary consequence of the main principles of the Directive. Member States on the other hand are free to impose stricter rules on national broadcasters. But these rules have to be tested against the principles developped under the articles 30 and 59, which principles are congruent. The exported service of advertising (advertising on a national broadcasting station of the receiving country) can be restricted in a general interest. The same holds true for the imported service of advertising, provided the subject is not covered by the Directive and taking into account that the free retransmission of the broadcast is not jeopardized. Misleading advertising is not covered by the Directive.

7.2. Sponsoring

The same principles hold true for sponsoring. Sponsoring is a subject that is covered by the directive in article 17 (as extended by the amendments of the directive of 1997). The article leaves much room for discretion by the Member States how to implement the sponsorship requirements in their national system, and, consequently practices vary from country to country. This means, in my opinion, that the receiving country has to accept a milder regime (for example with regard to bill boarding) from the transmitting country. A Member State may fall back on the provision that it is allowed to impose stricter rules on national broadcasters, as long as these restrictions hold under the test of article 59. A stricter sponsoring rule therefor has to be an proportionate measure to protect consumers or fair trading practices and other general interests accepted until sofar in the case law of the Court.

8. Regulating advertising and sponsoring in a dual market; the Dutch example

[18]Case C-23/93, Holland v TV10, 5 October 1994, Jur. I 1994, p. 4824.

8.1. The Dutch example

Media regulators are faced with a complicated situation. The retransmission of broadcasted programmes from Member Countries has to be garantueed. Restrictions on the content of the commercials are not allowed in the domain covered by the Directive, such as alcohol, tabacco, medicines and youth. Restrictions on sponsor messages in programmes broadcasted from other Member States are not allowed either. At the same time the Directive leaves it to the Member States to impose stricter rules on broadcasting stations that fall within their jurisdiction, the scope of which has been extended by the recent amendments of the Directive. The exception of the stricter rule obviously sees at the national public broadcasting system, but is not limited to that category. The national regulator, therefor, in principle could apply stricter rules to national commercial broadcasters than he is allowed to do to foreign commercial broadcasters ('transmitting state' broadcasters). He even could subject national public and commercial broadcasters to the same regime. The Netherlands offer an example of this approach in its regulation of sponsoring, which I will briefly discuss first.
The Directive prohibits the sponsoring by producers of certain products and the sponsoring of certain programmes, such as the news. It also stipulates that the name and/or logotype of the sponsor should be mentioned at the beginning and/or the end of a sponsored programme (article 17 section 1 sub b of the Directive). In the RTI case[19] the Court has given an interpretation of this article. The Court noted that there is no basis for the assumption that the mentioning of the sponsor at other times than the beginning or end was prohibited. Therefor the sponsors name or logo may be shown during the programme, as long as this does not lead to the incentive to buy the products of the sponsor (or leads in any way to an infringement of the general rules of the EC Treaty).
The Dutch regime for public and commercial broadcasters is much stricter. The general rule is that the mentioning of the name of a sponsor, the showing of its logo/trademark or the showing of its products are a prohibited form of advertising. The allowed exceptions are:
- advertising blocks between programmes
- the 'natural' use in the context of programmes
- billboard announcements at the start or the end of the programme to inform the audience but without any solliciting effect.
The last rule has been specified further. Public television broadcasters may only show the name/logo 5 seconds. The billboard may not contain moving images and it may not fill the entire screen. Products of the sponsor may only be shown in the progamme if the sponsor has supplied the products as programme attributes and has not given any other financial support to the programme. The restrictions for Dutch commercial broadcasters are different. There is no time constraint for the showing of the billboard and it may contain moving images. But the effect of the billboard as a whole may not result in the promotion of the products or the name of the sponsor. There is no restriction on the showing of the products of the sponsor as long as this is not a promotion of the products.
The Dutch Media Authority, however, until so far has not taken action against billboards of the public broadcasters showing moving images. On the other hand, it applies the rules very strictly towards commercial broadcasters. It is considered prohibited advertising when they run a commercial for the products of the sponsor in an advertising block around the sponsored programme. Also it does not allow sounds (voice, music) acompanying bill boards, because that might have a too promotive effect on the audience.
The result is that in practice the constraints for the public and commercial broadcasts turn out to be very similar.

[19]Cases C-320, 328, 329, 337, 338 and 339/94 (Reti Televisive Italiane Spa cs v Minestero dello Poste e Telecommunicazioni), 12 December 1996.

8.2. Which duality to chose?

The Dutch example shows that the Media Authority choses the duality in regulating, if not in law in fact, the domestic market uniformely. It treats commercial and public broadcasters alike. It recognizes the principle of the transmitting state by not interfering in the imported broadcasts. The consequence is a different treatment of national and foreign broadcasters. It hopes to solve part of the effects of this different treatment by extending its jurisdiction, according to the new rules, to part of the foreign broadcasters (for example RTL). In my opinion this is the wrong approach for two reasons, partly political, partly legal.

The political reason is that treating national and foreign commercial broadcasters differently distorts competition. Extending national jurisdiction, moreover, has a disharmonizing effect, contrary to the main objectives of the Directive. The legal argument is that, although the Directive allows a stricter regime for national broadcasters, this regime still has to comply with the general interest test developped by the Court. How can one justify severe restrictions on commercials to protect the youth, when the same youth has access to commercials that are sent from a country that allows them. The programmes on UK based TV3 and the Swedish TV4 were exactly the same. What is the use of applying different rules on them? Doesn't the Directive have an indirect harmonizing effect on stricter national rules?

In my view, national regulators should take a different approach. The duality the Directive allows should be so framed as to subject national public broadcasters to a stricter regime than commercial broadcasters, national or foreign. The more political argument is that we support public broadcasting because it offers a pluralistic alternative to commercial mass audience programming. This justifies a more restrictive regime on the commercial practices (such as advertising and sponsoring) of the public broadcasters. But there are also legal arguments. The public broadcasters are partly public funded. The Treaty imposes a duty on national regulators to avoid unfair competition between commercial and public institutions. It could well be argued that commercial broadcasters may not be unduly restricted to have access to the market of advertisers and sponsors and therefor should be treated differently from public broadcasters. The way to put it would be that the regime that subjects commercial and public broadcasters to the same restrictions in the market of advertisers and sponsors violates the principles laid down in the articles 3f, 5, 85, 86 ,90.[20] Advertisers, sponsors and public broadcasters who would oppose a stricter regime for public broadcasters could be countered with the argument that the greater restriction on the freedom of services of the public broadcasters serves the general interest of the maintenance of a public service.[21]

If Regulators do not take firm choices on these complex issues they risk to become as commercialized as the public broadcasters already have.

[20]I refer to the well known case law of the Court of Justice in the article 90 cases. For an overview, see David Edward and Mark Hoskins "Article 90: Deregulation and EC law. Reflections arising from the XVI Fide Conference", in: *CML. Rev* 32: 157-186, 1995.

[21] See supra note 14, Collectieve Antennevoorziening Gouda.