Swings on the Horizontal
The Search for Consistency in European Advertising Law

The rules governing transfrontier advertising are multi-layered. They may stem from national law or European legislation, and can apply to advertising in general or advertising in certain media. They may complement each other, although they may achieve different results. They may be considered incomplete in some parts and too extensive in others. And they exist alongside rules of self-regulation.

Are there any commonly accepted principles within current advertising regulations? Do they pursue the same objectives, systems and methods? Do guidelines for consistent regulation exist in case-law? How do proposals for new EC advertising legislation fit into the existing legal framework? How close are we to horizontal regulation of advertising?

These questions are addressed in this issue of IRIS plus. It soon becomes clear that the debate over “horizontal regulation” is anything but a methodological game.

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Swings on the Horizontal

The Search for Consistency in European Advertising Law

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“...I hold that I have a right to consider only whether the advertisements offered for inserting contain anything contrary to law and morality, and that, if they do not, I should violate my duty to the public in refusing to insert them when paid for.”1

Swings on the Horizontal

Advertising could be considered as an interesting case study for the question of whether or not content-related areas should be subject to a single set of rules, applicable across the media. Such a single set of rules has been realised to some extent with regard to self-regulatory schemes for advertising. John Walter’s self-regulatory scheme, quoted above, is a first and most striking example. Against the background of the general theme of the IRIS plus series for this year - “going horizontal” - this question seems to have a connection with a much broader issue which is, in point of fact, of specific importance for the rules on advertising. This issue is the methodological and material consistency of these rules. A single set of rules may, of course, contribute to consistency.

In this respect, however, the qualification “going horizontal” does not excel in transparency. In the context of the making of rules, it could refer to the distinction between self-regulation (“horizontal” in the sense of rules made and upheld by private organisations) and (public) law, with the latter being, of course, an exponent of the vertical relationship between government and the governed. In the context of media technology, it could refer to the distinction between rules applicable to all media, calling these general rules apparently horizontal rules, as opposed to technology-specific rules which apply only to a specific medium and which, therefore, in this remarkable terminology, should be called vertical rules. Furthermore, “horizontal” could refer also to general rules, as opposed to specific product (or service) rules. The latter rules, according to the same terminology, should also be called vertical rules. In the same sense, the term could be used to describe cross-sectoral regulation. To complicate matters, it should be noted that the aforementioned distinctions not only apply to the content of advertising, but also to the distribution of advertising content. Finally - yet importantly - these questions are also directly connected with legal policy problems. Or is it not an issue for determination by political bodies whether certain fields of advertising should be regulated by self-regulation only, by co-regulation or only by law (civil or criminal, or maybe administrative law)? One may wonder how to stay upright during these giant swings on the horizontal.

The debate’s underlying goal, however, seems to be far more important than these somewhat Byzantine distinctions. That must be, in my view, the application of a consistent set of rules, or at least of rules which use the same definitions and the application of which does not lead to conflicting results or different outcomes, but to more or less predictable decisions. “Going horizontal” should therefore be considered as an effort to discover whether there is method in the existing set of advertising rules and if not, whether tools could be provided – if necessary - which could contribute to the application of a consistent set of rules. More particularly, by way of conclusion, these efforts should be directed at the audiovisual sector. One has to be conscious, however, of the fact that advertising on audiovisual media is subject not only to media-specific rules, but also to the whole set of advertising rules. Therefore, the picture we are attempting to sketch should be broad.

Existing Rules on Advertising Content: Not Much of a System?

If we look closer at the existing body of advertising rules, all of the distinctions already mentioned seem to be present. Restricting our subject to European law pertaining to the content of advertising, the following, loosely sketched, legal framework appears (Figure 1).

Figure 1

EU Advertising Rules on Content

<table>
<thead>
<tr>
<th>General (horizontal)</th>
<th>Specific</th>
</tr>
</thead>
<tbody>
<tr>
<td>Misleading and Comparative Advertising</td>
<td>Unfair practices (Proposal)</td>
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<tr>
<td>Media</td>
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<td>Television</td>
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<td>E-commerce</td>
<td>Pharmaceuticals</td>
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<tr>
<td>Tobacco (Proposal)</td>
<td>Foodstuffs</td>
</tr>
<tr>
<td>Cosmetics</td>
<td>Sales Promotions (Proposal)</td>
</tr>
</tbody>
</table>

Distinctions could be made between general (horizontal) and specific rules, between media technology specific and other rules and between sectoral regulation and cross-sectoral regulation. Moreover, many of these rules lay a particular emphasis on the importance of self-regulation in the field of advertising.

Relatively speaking, this body of law looks rather small. Notably, at the moment there exists only one general Directive, the Directive on misleading and comparative advertising.2 With the introduction of a Proposal for an Unfair Commercial Practices Directive,3 the former will be incorporated into the latter, with the result that the former will only be applicable to business-to-business relations. The specific rules represent a much wider area; nevertheless, its incompleteness, at least for the moment, is particularly striking in the field of specific marketing methods like promotional offers, lotteries and competitions. The Proposal for a Regulation on sales promotions4 will partly remove this incompleteness. Specific regulation for advertising directed towards children, sponsoring, product placement and the like is only to be found in the “Television without Frontiers” Directive.5 The same is the case with advertising for alcoholic beverages. Comparative advertising, disparagement of competitors and taking undue advantage of competitors’ publicity achievements included, belonging to the broader field of unfair competition, is the only part of unfair competition law in the European Union that is harmonised. Other parts that could be of interest for the regulation of advertising (trade names, domain names, passing off, nuisance advertising) still await harmonisation.

A comparison with self-regulation – recalling what is stated above, that self-regulation has to some extent achieved a single set of rules – provides for other areas, not regulated on an Internal Market level, like indecent advertising; general rules for advertising directed at children; exploitation of fear in advertising; general rules
about the distinction between advertising on the one hand and other media-content on the other — including the recognisability of advertising as such; anonymous advertising; subliminal advertising; the use of testimonials; advertising for so-called health products and advertising with environmental claims. Health claims at the moment are the subject of a Proposal for a Regulation on nutrition and health claims made on foods. The Proposal for a Directive on Unfair Commercial Practices will cover a great part of the other areas mentioned supra and could be considered as a real Framework Directive, albeit only in the field of consumer protection.

This survey certainly demonstrates that the rules on advertising content find themselves in a very dynamic legal environment, in which it is not always simple to determine the relationship between the different rules. This difficulty must have negative consequences in respect of the demands of consistency and coherence of the system of rules. As we shall see, the legal framework on the distribution of advertising has to offer elements that are more positive in this respect.

**Existing Legal Framework on the Distribution of Advertising Content: Time, Place and Manner Restrictions**

It is not always easy to make clear distinctions between rules on content and (content-neutral) rules on the distribution of content. Surreptitious advertising, for instance, may be considered as a problem of content as well as a problem of distribution. This form of non-spot advertising is as a matter of fact both misplaced and misleading as to its content. It should appear in the advertising part of a medium and be recognisable; when it is not, it could be considered as misleading advertising as to the nature of the information. Nevertheless, at the risk of saying things twice, albeit from another perspective, it is more or less possible to represent the existing legal framework on the distribution of advertising content.

The rules constituting this framework could be qualified, according to the US Supreme Court’s case-law, as “Time, Place and Manner” restrictions and this qualification indeed covers the field for the most part. Figure 2 depicts the situation as far as European law is concerned. As in Figure 1, only the fields that are governed by EU rules are mentioned. One may note that classic advertising media (press, radio, direct mail, cinema advertising, billboards) are not regulated at all on a European level. The focus is on electronic media, including television.

**Figure 2**

**EU Advertising Rules on Distribution**

- **Time**
  - TV
  - Non-spot/Infomercials
  - Electronic communications
- **Place**
  - TV
  - Insertion of advertising during programmes
- **Manner**
  - Unsolicited Advertising

The problems regulated mainly concern a coherent set: protection against forms of advertising which could irritate the consumer in one way or another. Such is the case with the restrictions on the amount of advertising time on television, or that of commercial breaks in television programmes. The same holds for the recent ban on unsolicited electronic mail, as laid down in the Directive on privacy and electronic communications. The ban on surreptitious advertising equally protects viewers of television programmes against unexpected commercial messages. The Directive on electronic commerce contains general rules concerning the identification of the advertiser and the identifiability of advertising as such. Nevertheless, the framework is rather small, compared to self-regulation and national law on the distribution of advertising content, which also provide for rules in the field of other advertising media.

One may question, on the one hand, the necessity of a coherent framework for the whole field on a European level. As is clearly demonstrated in the case of Germany v. EP and Council, rules concerning cinema advertising, billboards and the like do not hamper trade in the Internal Market. Would a European rule on the distinction between advertising and editorial content in print media be necessary? I doubt it: self-regulating forces are strong enough in the world of the independent press-media to safeguard the interests protected by such a distinction. The sending of unsolicited commercial print mail for the most part is already provided for by harmonised rules on the processing of personal data for the purposes of direct marketing. Happily, radio is and always has been, a much under-regulated medium on the European level. Therefore, it could be defended that the framework at least is rather coherent, even if it is restricted to electronic media and of a very general nature only as far as online advertising is concerned. The framework consists of rules that are relatively easy to control. Time and place regulations could, as a matter of course, be more or less technically controlled without much ado about the interpretation of the rules. The rules on surreptitious advertising on television necessitate research into the financial relations between advertisers and broadcasting organisations. This also could result in hard and fast rules. In addition, these rules and the time and place regulations for television advertising are being maintained by national Media Authorities, which cooperate on an international level, thus developing single sets of rules. All of this does not leave out the necessity of monitoring developments and of keeping a tight rein on commercial forces.

On the other hand, it could not be denied that some aspects of time, place and manner regulations for electronic media, having until now been contained in a media technology-dependent system, are in fact part of a general legal context. The rules on surreptitious advertising, for example, are based on a principle that holds for all media with a mix of editorial matter and advertising. According to this principle, partly laid down in Article 12 of the International Chamber of Commerce International Code of Advertising Practice, media are obliged to make a clear distinction between advertising and editorial content and to present advertisements in such a way that the public will readily recognise them as such. This principle has for instance been applied to cinema films. In the case of Feuer, Eis und Dynamite, the German Court ruled that product-placement in cinema films is permissible, provided that the audience is made aware of it beforehand, and at the latest in the opening credits. The Court thus considers transparency as a necessary and sufficient principle, based on the protection against misleading information concerning the character of the information: viewers should be able to know what kind of information they are looking at. Such a ruling, applied to television films, however, would certainly undermine the present rules on product placement in television programmes. At the same time, considering these present rules in their broader context, one may ask whether sufficient transparency should not be enough. Considering the broader context of media-specific rules is useful in the search for consistency. At the end of this contribution, I will consider which vertical technology-dependent rules could be transposed to a general framework and which rules could not withstand such a transformation.
The Plausibility of Heterogeneity

The body of European advertising law on content, as we have seen, is quite heterogeneous and there are reasonable grounds for it having this character. Firstly, it must be remembered that the goal of this body of rules is primarily directed at the withdrawal of obstacles to trade in the Internal Market. This goal could of course contribute to a consistent and single set of rules for advertising, but that result does not necessarily follow. As we have seen in the foregoing paragraph, national rules that do not hamper free trade are irrelevant with respect to this goal.

Furthermore, the rules for commercial advertising serve the protection of different interests. Considered broadly, these interests relate to the protection of consumers; the protection against unfair competition and the safeguarding of media independence. The Directive on misleading and comparative advertising, for instance, could be seen from the perspective of consumer protection against misleading advertising.

The Plausibility of Heterogeneity

The rules on advertising therefore protect different interests and of rules, another characteristic of the rules on advertising is their media technology-dependent character: specific rules exist on a European level for commercial communications on the Internet and for television advertising. Technology-dependent regulation is not always the wrong way to tackle problems and certainly not when new technologies in the field of advertising on television or the Internet are being developed. Given also the fact that lots of specific products and services are provided with specific rules by different Departments and Directorates in very different social and economic environments, one may not be surprised that the body of advertising law, even on a European level, is quite heterogeneous. Vahrenwald mentions another eleven reasons for this heterogeneity: most of these reasons stress the existence of differences between the Member States in the choice of legal instruments; the various interpretations of important concepts like misleading advertising or the problem with Community-wide enforcement. Indeed a coherent, and even less a consistent, legal system applicable to the content of advertising is evidently not yet available.

Attempts to Reach Consistency: an Overview

Different instruments could be and indeed are used to reach a certain level of consistency. Consistency in the legal approach with respect to national restrictions on transborder advertising has been reached, at least on the methodological level, in the first place by the case-law of the Court of Justice of the European Communities (ECJ) on primary EC law and, it should not be forgotten, by the case-law regarding commercial speech of the European Court of Human Rights. The jurisprudence of the latter court is also of importance for the legal treatment of restrictions of a purely national importance. We know how to handle national restrictions and while it may be largely true that the results of this rather consistent method lead to different results on the national level in many cases, an important step forward towards the consistent application of rules relevant to advertising would of course be taken if everyone were to agree about the legal method for balancing the relevant interests at stake.

The Directive on Unfair Commercial Practices. This Proposal, aiming to harmonise the material rules by EC Directives and Regulations is not so easy to predict. Next to these methodological methods, the harmonisation of material rules by EC Directives and Regulations and the corresponding jurisprudence could of course offer consistency. The discussion regarding this method has become most important. It seems that in this field, we are standing at a crossroads. With respect to both the rules on applicable law and the harmonisation of material rules, much has already been achieved on an international level by two self-regulating bodies: the European Advertising Standards Alliance (EASA) and the International Chamber of Commerce (ICC).

Case-Law of the European Courts and its Contribution to Methodological Consistency

The lesson to be learned from twenty-five years of case-law from the European Court of Human Rights on content-restrictions for commercial advertising is quite simple. The national authorities are, in principle, in a better position than the international judge to give an opinion on the exact content of the requirements with regard to the necessity of a restriction. The Court thus applies a broad margin of appreciation to the admisibility of the national decisions in these cases. This margin leaves national authorities a broad margin of appreciation to the admissibility of the requirements of the Directive on Unfair Commercial Practices. This Proposal, aiming to harmonise the material rules by EC Directives and Regulations is not so easy to predict. Next to these methodological methods, the harmonisation of material rules by EC Directives and Regulations and the corresponding jurisprudence could of course offer consistency. The discussion regarding this method has become most important. It seems that in this field, we are standing at a crossroads. With respect to both the rules on applicable law and the harmonisation of material rules, much has already been achieved on an international level by two self-regulating bodies: the European Advertising Standards Alliance (EASA) and the International Chamber of Commerce (ICC).
Church of Scientology v. Sweden\(^\text{17}\) and has since then been consistently maintained, though with the result that every national restriction brought before the Court has survived the test of Article 10(2) of the European Convention on Human Rights. Neither in Jacobovski v. Germany\(^{20}\), Casado Coca v. Spain\(^{19}\), Markt Intern v. Germany\(^{20}\) KOS v. the Netherlands\(^{21}\), Hempfing v. Germany\(^{22}\), nor in X and Church of Scientology v. Sweden\(^{20}\) was there a successful attempt to have the impugned national provision declared not justified by the Court. Two exceptions seem to prove this rule, Barthold v. Germany\(^{23}\) and Stambuk v. Germany\(^{24}\), both on the admissibility of restrictions on freedom of expression for the medical profession. In these two cases, the freedom of the press was clearly concerned; the relevant promotional statements having been made in the course of press-interviews. Nevertheless, it is important to note that, dating from the Scientology decision, commercial advertising has been introduced into the domain of freedom of expression. Consequently, the test of Article 10(2) is available and obligatory for the assessment of the admissibility of national restrictions on commercial advertising. This test provides for legal examination of the clarity and the accessibility of the relevant limitation; the legitimacy of its aims and the important question of whether the limitation or prohibition is necessary in a democratic society, i.e., an examination of whether the national rule is appropriate and proportionate to its aim. At least, one may conclude, society, whether the limitation or prohibition is necessary in a democratic society, whether the limitation or prohibition is necessary in a democratic society, whether the limitation or prohibition is necessary in a democratic society, whether the limitation or prohibition is necessary in a democratic society, whether the limitation or prohibition is necessary in a democratic society.

The case of (ex-)Article 30 of the Treaty establishing the European Community. In the course of time, however, the strict decision has been softened and it now leaves ample room for an assessment of national restrictions on commercial advertising. This is not unimportant: the same method has led to material results in the case-law of the US Supreme Court. In 44 Liquorman v. Rhode Island\(^{20}\), the State failed to establish the required reasonable fit between its regulation (Rhode Island’s prohibition on alcohol advertising) and its legitimate goal. The Court therefore held that the relevant statutory prohibition against advertisements that provide the public with accurate information about retail prices of alcoholic beverages was invalid. Such an advertising ban was considered as an abridgement of speech protected by the US First Amendment.

The ECJ’s method is quite comparable to that of its sister-court. In a long line of decisions, it has tested again and again the suitability and proportionality of national restrictions to its aims. The case of Mithouard & Keck v. France\(^{25}\) seems at first sight to have unexpectedly restricted the Court’s assessment area by deciding that certain selling arrangements fell outside the scope of (ex-)Article 30 of the Treaty establishing the European Community. At first, it seemed that as a consequence of this decision, the whole field of national advertising law had been exempted from the application of the principles of free trade within the European Community. In the course of time, however, the strict interpretation of this decision has been softened and it now leaves ample room for an assessment of national restrictions on transborder advertising within the Internal Market. The case of Konsumentenombudsmannen v. Gourmet\(^{26}\) could as serve an example: a case in which a Swedish ban on advertising for alcoholic beverages was tested against Article 28 of the Treaty. This line of thought had already been set out in De Agostini v. Sweden\(^{27}\).

Gourmet dealt with the question of whether national legislation, entailing a general ban on the advertising of alcoholic drinks was in principle precluded by the Treaty’s prohibitions on quantitative restrictions on imports or on restrictions on the freedom to provide services. The Court, recalling its Keck decision whereby advertising restrictions could fall within the category of rules on selling arrangements, nevertheless, by applying its condition that the rules in question should not discriminate in law or in fact, concluded that without advertising, products from other Member States were at a disadvantage and that their access to the Swedish market was impeded more by the rules than the access to domestic products. Therefore, the national Swedish rules could be tested against Article 30 of the Treaty. De Agostini followed the same line with respect to access to the Swedish market for children’s magazines.

The Court’s important contribution to the perception of an advertising message by the average consumer also seems very appropriate for bringing methodological order into the scrutinising exercise. In several decisions (Verband Sozialer Wettbewerb v. Clinic\(^{28}\), Gut Springenheide v. Oberkreisdirektor Steinfurt\(^{29}\), Esteé Lauder v. Lancaster\(^{30}\)), the Court has developed a standard definition of the average consumer that is essential for defining the borderline between misleading and not misleading statements. According to this standard definition, in order to determine whether a description, trade mark or promotional text is liable to mislead the purchaser, the Court takes into account the presumed expectations of an average consumer who is reasonably well-informed and reasonably observant and circumspect. Taken together, these methodological tools, although they do not necessarily have to lead to exactly the same material results in the different national legal orders of the Member States, are nevertheless important touchstones in the search for consistency. It is important to note that these methodological tools are not used in isolation as to the advertising media involved. In this sense, the tools may be called technology-independent.


Both the principle and rules aim for the same solution: certainty on the applicable law, in our case the law on advertising. The principle looks simple; private international law conflict rules are complicated; the EASA System is less complicated. The application of private international law is wholly technology-independent; the application of the EASA’s system partly so and the application of that of the country-of-origin principle, as laid down in existing Directives (the “Television without Frontiers” Directive and the Electronic Commerce Directive), wholly technology-dependent. The principle and rules are not mutually exclusive of one another and both could even be applied to one and the same case, although perhaps with different results. Therefore, whereas at first sight certainty regarding the applicable law could be considered as an important tool to reach consistency on the methodological level, at second sight, taking into account the different outcomes, consistency in this sense is sometimes just a far-fetched aim.

The EASA’s Cross-Border Complaints System\(^{31}\) is based on the country-of-origin principle and serves the same goal: ensuring that advertisements circulating in more than one country have to comply with only one set of rules. This goal is reached by requiring conventional media-advertisements to comply with the rules of the country in which the advertising medium is published and by requiring direct advertising (direct mail, e-mail and other online advertising) to comply with the rules of the country where the advertiser is established. In both cases, the national Self-Regulatory Organisation (SRO) of the country of origin handles the complaint according to that country’s rules, irrespective of the origin of the complaint. The local SRO established in the country of the complainant files the complaint and forwards it to the SRO of the country of origin. This is a very practical system, because complainants at any rate may be satisfied that their complaints are plainly at any rate may be satisfied that their complaints are plainly investigated and that at any rate may be satisfied that their complaints are plainly investigated and that at any rate may be satisfied that their complaints are plainly investigated. Nevertheless – and also in my own experience\(^{32}\) - the lack of effective remedies often causes a continuance of infringements by the same advertisers.

Whereas the principle of the country of origin as laid down in the “Television without Frontiers” Directive and in the Directive on electronic commerce restricts the meaning of the term “country of origin” to the country in which an advertiser or a broadcast organisation is established, the EASA’s meaning of “country of origin” also includes the country in which an advertisement has been published. The competence of the EASA also includes online and television advertising and therefore, consistency as to the
application of the same national rules of law and of self-regulation on a certain advertisement is not actually realised.

The country-of-origin principle, as laid down in the Directive on electronic commerce, has been the subject of much debate; especially insofar as unfair competition law and advertising law are concerned.\(^\text{36}\) The core of the debate is directed at the weak side of consistency in this field: the application of rules could be consistent, without necessarily also securing a high level of consumer protection, for example. It is very consistent to have only an opt-out regulation for electronic mail, but this rule may be not consonant with a high level of consumer protection, and definitely not based on the principle of the country of origin, and also when German rules are more severe, depending on the place where the online advertiser is established.\(^\text{38}\)

Material Consistency: Proposals, Vertical Directives and Regulations and the Role of the ECJ

The solution to the problem of consistency then has to be found in a material approach also. Indeed, a single set of advertising rules, starting from the same concepts and definitions, with the same rules of behaviour all over the European Union could be very helpful. Does it already exist somewhere? Would that be an ideal? Could it be reached? Is it necessary to implement such a system?\(^\text{48}\)

These issues are at stake nowadays, and featured in the recent debate about the way Europe has to build up its advertising and marketing law. Above, we sketched the existing rules on advertising content and concluded that it does not seem to amount to much of a system. Recently, two new approaches have followed by the European Commission, approaches that seem to contradict each other: a horizontal one and a vertical one. The first is followed by DG SANCO\(^\text{39}\) and is given shape in its Proposal for a Directive on unfair business-to-consumer commercial practices, the second by DG Internal Market in the form of a (amended) Regulation concerning sales promotions in the Internal Market. Whereas the first contains a general framework; the second's character is problem-oriented, like many other vertical initiatives in this field, but with the difference of being a Regulation and not a Directive. Despite its general character, the Proposal for a Directive on Unfair Commercial Practices is restricted to consumer protection, business-to-business relations are excluded. In this sense, the Proposal does not provide for a harmonisation of unfair competition in general.

The Proposal for a Directive defines the conditions that determine whether a commercial practice is unfair. It also contains an Internal Market clause, which provides that traders only have to comply with the requirements of the country of origin and therefore prevents other Member States from imposing additional requirements on those traders who do so. Furthermore, it fully harmonises the EU requirements relating to these unfair practices and Member States will therefore not be able to use the minimum contribution in other Directives (for instance in the "Television without Frontiers" Directive) to impose additional requirements in the field coordinated by the Directive. Next to the summing up of specific types of unfair practices, it contains a general prohibition which should replace the existing, national general clauses and which should function as a safety-net to provide for unlawful behaviour not caught by the clauses on specific types of unfair practices. Unfairness is directly related to the economic behaviour of the consumer; the main objective of the Proposal being the protection of the consumer against practices that materially distort or are likely to distort his/her economic behaviour with regard to products and services.

This focus on consumer protection evidently offers no place for other advertising rules. However, as we have seen, the body of advertising law and self-regulation is much wider. The rules on unfair competition have already been mentioned. Therefore, some German writers have made proposals, which include protection against unfair competition, the protection of general interests and the interests of minors.\(^\text{40}\) Micklitz et al. name their proposal a proposal for unfair Marktverkehrsgesetze; Kühler et al. use the term unauterter Wettbewerb (unfair competition). The latter proposal therefore has a broader field of application, including also forms of unfair competition other than those by communication alone. Together, both Proposals mark steps towards the development of a framework that could indeed be considered a single set of rules for advertising. Consistency in both Proposals is furthered significantly by enclosed proposals about paragraphs on the enforcement of protection (injunction, damages, right to sue, measures to secure evidence, etc.). The structure of these proposals is based upon a mixed approach: a general clause, combined with specific rules, like the Commission's Proposal for a Directive. It must be noted, however, that these specific rules are technology-dependent: their specific nature relates to specific acts of unfairness and is not restricted to certain advertising media.

Of course, proposals like these contain terms which need clarification and interpretation. As we have seen, the Court of Justice's contribution to common standards is quite marginal insofar as non-harmonised areas are concerned. Even the Court's interpretation of terms in harmonised rules could leave ample room for national discretion, as the jurisprudence on misleading advertising shows. The experience with the new clauses on comparative advertising, however, demonstrates that the Court has been able to give material guidance to the national courts when they are applying the implemented national rules on comparative advertising (Toshiba Europe v. Katun\(^\text{41}\) and Pippig v. Hartlauer\(^\text{42}\)) and that the same could be held when considering the cases in which the Court decided on the "Television without Frontiers" Directive provisions on advertising and sponsoring (ARD v. Pro Sieben Media;\(^\text{43}\) Konsumentenombudsmanden v. De Agostini, RTI v. Italy\(^\text{44}\) and RTL v. Niedersächsische Landesmedienanstalt\(^\text{45}\)). This guidance could be much strengthened by the Proposal's model of a mixed approach. The summing up of specific unfair practices will no doubt colour the filling-in by the Court of the general clause.
Farewell to a Technology-Dependent Approach?
Cleaning up Vertical Directives

What do these developments towards a horizontal, non-media-specific, mixed approach, mean for a regulatory framework for advertising in the audiovisual sector? Will a technology-dependent approach, as currently laid down in the “Television without Frontiers” Directive, the Directive on privacy and electronic communications or the Directive on electronic commerce, survive? Let us, by way of experiment, look at the advertising rules of these Directives and pose the question whether these rules could be transposed into a horizontal, single set of rules for advertising.

In the following table, EC stands for the Directive on electronic commerce, PEC for the Directive on privacy and electronic communications and TWF for the “Television without Frontiers” Directive. If a corresponding article from the (horizontal) self-regulatory Code of the International Chamber of Commerce is available, it will be mentioned too (ICC).

<table>
<thead>
<tr>
<th>Advertising Rules</th>
<th>Articles in Vertical Directives</th>
<th>Possible Transposition into Horizontal Rules</th>
</tr>
</thead>
<tbody>
<tr>
<td>Advertising clearly identifiable as such</td>
<td>Art. 6 (a) EC, Art. 7.1. EC (unsolicited electronic communication), Art. 10.1. TWF</td>
<td>Yes, Art. 12 ICC</td>
</tr>
<tr>
<td>Advertiser clearly identifiable</td>
<td>Art. 6 (b) EC</td>
<td>Only necessary when there is an invitation to purchase, then: Yes (see e.g. Art. 7.3 (b) Proposal on Unfair Commercial Practices)</td>
</tr>
<tr>
<td>Promotional offers, competition or games clearly identifiable as such; conditions for qualification or participation easily accessible and presented clearly and unambiguously</td>
<td>Art. 6 (c) and 6 (d) EC</td>
<td>Yes</td>
</tr>
<tr>
<td>Obligation to respect opt-out registers concerning unsolicited electronic commercial mail</td>
<td>Art. 7.2. EC, but in effect rendered obsolete by Art. 13.1 PEC</td>
<td>Yes, follows from Art. 14 of the Directive on the protection of personal data</td>
</tr>
<tr>
<td>Opt-in obligations</td>
<td>Art. 13.1 PEC</td>
<td>No</td>
</tr>
<tr>
<td>TV Advertising and Teleshopping to be kept separate from other parts by optical and/or acoustic means</td>
<td>Art. 10.1 TWF</td>
<td>Specific separation follows from general rule (advertising must be clearly identifiable): Yes</td>
</tr>
<tr>
<td>Isolated TV and Teleshopping spots shall remain the exception</td>
<td>Art. 10.2 TWF</td>
<td>No</td>
</tr>
<tr>
<td>Subliminal techniques prohibited</td>
<td>Art. 10.3 TWF</td>
<td>Yes</td>
</tr>
<tr>
<td>Surreptitious TV Advertising and Teleshopping prohibited</td>
<td>Art. 10.4 TWF</td>
<td>Follows from general rule (advertising must be clearly identifiable): Yes</td>
</tr>
<tr>
<td>Specific rules on the insertion of advertising during programmes</td>
<td>Art. 11 TWF</td>
<td>No</td>
</tr>
<tr>
<td>No infringement of human dignity</td>
<td>Art. 12 (a) TWF</td>
<td>Yes, Art. 4.1. ICC</td>
</tr>
<tr>
<td>No discrimination</td>
<td>Art. 12 (b) TWF</td>
<td>Yes, Art. 4.1. ICC</td>
</tr>
<tr>
<td>No offending of religious or political convictions</td>
<td>Art. 12 (c) TWF</td>
<td>Yes, implicit in Art. 2 ICC (no offending of prevailing standards of decency)</td>
</tr>
<tr>
<td>No incitement to behaviour that is injurious to health, safety or environment</td>
<td>Art. 12 (d) TWF</td>
<td>Yes, Art. 13 and Art. 17 ICC</td>
</tr>
<tr>
<td>Ban on public advertising and Teleshopping for tobacco products</td>
<td>Art. 13 TWF</td>
<td>Yes, see e.g. the Proposal for a Directive on the advertising and sponsorship for tobacco products</td>
</tr>
<tr>
<td>Ban on public advertising for medicinal products and on Teleshopping for medical treatment</td>
<td>Art. 14 TWF</td>
<td>Yes, see the Directive on medicinal products</td>
</tr>
<tr>
<td>Moderate advertising for alcoholic beverages</td>
<td>Art. 15 TWF</td>
<td>Yes</td>
</tr>
<tr>
<td>Restrictions on advertising directed to minors</td>
<td>Art. 16 TWF</td>
<td>Yes, Art. 14 ICC</td>
</tr>
<tr>
<td>Editorial independence not to be influenced by sponsors</td>
<td>Art. 17.1 (a) TWF</td>
<td>Yes</td>
</tr>
<tr>
<td>Sponsor to be clearly identified as such</td>
<td>Art. 17.1 (b) TWF</td>
<td>Yes</td>
</tr>
<tr>
<td>Editorial content may not contain special promotional references to the sponsor's products or services</td>
<td>Art. 17.1 (c) TWF</td>
<td>Yes</td>
</tr>
<tr>
<td>Ban on sponsoring of news and current affairs</td>
<td>Art. 17.4 TWF</td>
<td>Yes</td>
</tr>
<tr>
<td>Ban on sponsoring of editorial content by tobacco firms</td>
<td>Art. 17.2 TWF</td>
<td>Yes, see e.g. the Proposal for a Directive on the advertising and sponsorship for tobacco products</td>
</tr>
<tr>
<td>Ban on sponsoring of editorial content by pharmaceutical firms when specific medicinal products or treatments is promoted</td>
<td>Art. 17.2 TWF</td>
<td>Yes, see the Directive on medicinal products</td>
</tr>
<tr>
<td>Time restrictions</td>
<td>Arts 18, 18a, 19 and 19a TWF</td>
<td>No</td>
</tr>
</tbody>
</table>

Looking at the results of this schematic comparison, many rules from vertical Directives could be exported to a general framework, either because these rules already exist in a completely identical manner or just follow from general rules. Exceptions are few. The discussions on opt-in and opt-out regulations concerning unsolicited electronic mail have also taken place in connection with other forms of unsolicited mail by fax, post or telephone, sometimes with the result of an opt-in regulation for these other media, as has been the case in Germany. In the present article, Article 13.1 of the Directive on privacy and electronic communications, is restricted to automatic calling machines, fax and electronic mail, but an opt-in system as such is not necessarily restricted to electronic mail. The obligation that isolated television and teleshopping spots shall remain an exception, is indeed not conceivable with other forms of advertising. The same is the case with the rules on the insertion of advertising spots between programmes and with the time restrictions on television advertising and teleshopping. For the rest, there seems to be a lot to clean up.
EC Directives, Regulations and Proposals

• General rules pertaining to all forms of advertising (the Directive on misleading and comparative advertising (as amended) op. cit.); Proposing a Directive concerning unfair business-to-consumer commercial practices in the Internal Market and amending Directives 84/450 EEC, 97/7/EC and 98/27/EC, op. cit.);

• Rules that restricted to certain media (the “Television without Frontiers” Directive, op. cit.; the Directive on electronic commerce, op. cit.; the Directive on Distance Selling, op. cit.; the Directive on privacy and electronic communications, op. cit.);

• Rules that are restricted to certain products (foodstuffs, cosmetics, pharmaceutical products, medical devices, etc.)


Now Article 28 (which reads in its entirety: “Quantitative restrictions on imports and all measures having equivalent effect are prohibited”) is now inserted (in part available at: http://europa.eu.int/eur-lex/en/treaties/dat/teur Allies_treaty_en.pdf).

Joined cases C-34/95, C-35/95 and C-36/95, Konsumzentrumsbund (KZ) v. De Apogon (Krensa) Furling AB and TV-Shop i Sverige AB [1997], Judgment of the ECJ of 9 July 1997, ECR I-1364.


Case C-245/01, RTI v. Niedersächsischer Landesmedienanstalt, pending case.

See the landmark decisions BGH 16. February 1973, GRUR 1973, p. 592 (Brieferwerbung);


Regulated by the Commission through article 1 (B, 59 and 95 of the EC Treaty).


Case C-245/01, RTI v. Niedersächsischer Landesmedienanstalt, pending case.

See the landmark decisions BGH 16. February 1973, GRUR 1973, p. 592 (Brieferwerbung);
