IRIS plus
LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

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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Susanne Nikoltchev
IRIS Coordinator
Head of Department Legal Information
European Audiovisual Observatory

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OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

76 ALLEE DE LA ROBERTSAU • F-67000 STRASBOURG
TEL. +33 (0)3 88 14 44 00 • FAX +33 (0)3 88 14 44 19
http://www.obs.coe.int
e-mail: obs@obs.coe.int

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Swings on the Horizontal

The Search for Consistency in European Advertising Law

Jan Kabel
Institute for Information Law (IViR), University of Amsterdam

"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.

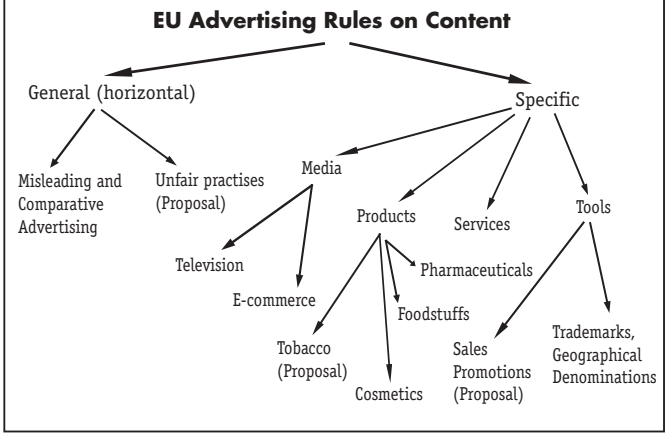
In this respect, however, the qualification "going horizontal" does not excel in transparency. In the context of the making of rules, it could refer to the distinction between self-regulation ("horizontal" in the sense of rules made and upheld by private organisations) and (public) law, with the latter 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



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 promotions[4] 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.[6] 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.

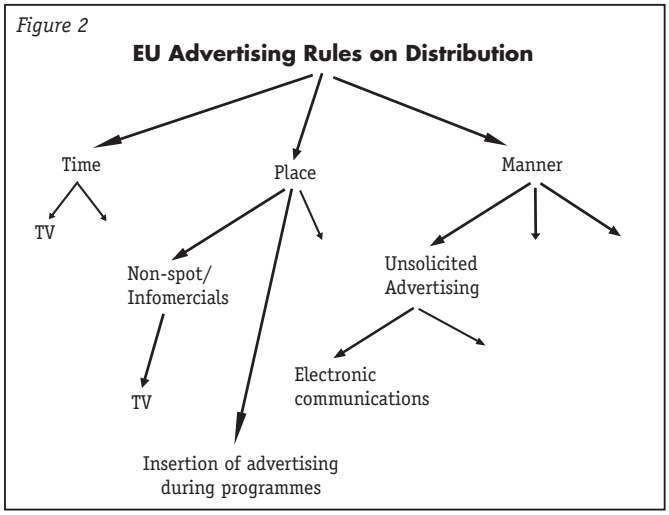
This survey certainly demonstrates that the rules on advertising content find themselves in a very dynamic legal environment, in which it is not always simple to determine the relationship between the different rules. This difficulty must have negative consequences in respect of the demands of consistency 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,[7] 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.[8] 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



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.[9] The ban on surreptitious advertising equally protects viewers of television programmes against unexpected commercial messages. The Directive on electronic commerce[10] 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*,[11] rules concerning cinema advertising, billboards and the like do not hamper free 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,[12] 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 *Feuer, Eis und Dynamite* case,[13] the Federal 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.[14] The Court thus considers transparency as a necessary and *prima facie* 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 seems 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 and from that of the protection against unfair competition, whereas the rules on surreptitious advertising, as laid down in the "Television without Frontiers" Directive, could be considered from the perspective of media independence and of consumer protection against misleading advertising.

More troublesome perspectives are provided by bans and restrictions on certain kinds of advertising, for example, national bans on advertising and sponsoring for tobacco products or for pharmaceuticals, bans on medical claims for foodstuffs, licence systems for the advertising and marketing of lotteries, restrictions on sales promotions, on indecent advertising or these on advertising for the liberal professions. The last perspectives could be considered troublesome, because it is not always clear what kind of interests are being served by these bans and restrictions. The rules on indecent advertising, for instance, neither directly regard consumers' or competitors' interests, nor the protection of media independence. For the most part, these rules are likely to serve the interests of the advertising industry itself, because advertising statements which are too provocative could damage the efficiency of advertising as an institute.

Rules on unfair competition have been said to serve two interests simultaneously: those of competitors and those of consumers. However, as we all know, slavish imitation, dumping and fierce forms of comparative advertising may well be in the interest of the consumer, while at the same time constituting grounds for actions against unfair competition. Rules on consumer protection, could, on the other hand, come into straightforward conflict with the protection against unfair competition. These oppositions clearly came to light during the recent discussions on the Proposal for a Directive on Unfair Commercial Practices. This Proposal, aiming to harmonise the national laws on unfair commercial practices, seems to highlight consumer interests only in relation to these practices, thus, according to German literature mostly, neglecting the need for harmonisation of a body of unfair competition law which takes due account of the interests of both competitors and consumers.[15] The rules on advertising therefore protect different interests and for this reason alone, it does not seem as simple to develop a single set of rules, which combines these interests in a coherent way.

Due to what seems to be an autonomous process in the making 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 problems with Community-wide enforcement.[16] 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.

Both the Court of Justice of the European Communities and the European Court of Human Rights have contributed to this methodological consistency by setting up stepped tests under which the different interests are taken into account. In the second place, the European Commission has been much in favour of another legal method to contribute to consistency, that is the country of origin principle. This principle, laid down *inter alia* in the "Television without Frontiers" Directive and the Directive on electronic commerce, gives exclusive priority to the advertising rules of the State where the advertiser or broadcasting organisation is established, thus contributing to certainty at least as to which rules are applicable. The same sort of answer could, of course, follow from the application of national conflict-rules in private international law, even though the outcome in most cases 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 admissibility of the national decisions in these cases. This margin leaves national authorities a rather great freedom in their policy with regard to restrictions on the content of advertising. This line of reasoning started with the decision of the European Commission of Human Rights in *X and*

Church of Scientology v. Sweden[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 *Jacubowski v. Germany*,[18] *Casado Coca v. Spain*,[19] *Markt Intern v. Germany*,[20] *NOS v. the Netherlands*,[21] *Hempfing v. Germany*,[22] nor in *X and Church of Scientology v. Sweden*, 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, there is methodological consistency present in the international assessment of the admissibility of national restrictions and prohibitions 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 Liquormart v. Rhode Island*,[25] the State failed to establish the required reasonable fit between its regulation (Rhode Island's prohibition on alcohol-price advertising) and its 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*[26] 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.[27] 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*[28] could serve as 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*.[29]

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 thereto of 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. Clinique*,[30] *Gut Springenheide v. Oberkreisdirektor Steinfurt*,[31] *Estée Lauder v. Lancaster*[32]), 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.[33] 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 make no distinction as to the advertising media involved. In this sense, the tools may be called technology-independent.

Methodological Consistency Continued? The Country-of-Origin Principle; Private International Law's Conflict Rules and the Conflict Rules of the EASA System

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 a farfetched aim.

The EASA's Cross-Border Complaints System[34] 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 its own procedure, 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 taken seriously. Nevertheless - and also in my own experience[35] - 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.[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. German writers in particular - Germany being a country with a high level of consumer protection compared to some other Member States – are highly concerned about the dangers of the principle: weakening consumer protection by having to apply, in one's own country, the law of less well provided for countries.[37] The feared dangers are multiplied by the Directive's specific technique that deliberately omits to describe the areas coordinated by the Directive. Consequently, recourse could be had to the country-of-origin principle with respect to the whole field of national rules concerning unfair competition and advertising online.

The "Television without Frontiers" Directive combines the country-of-origin principle with a well-defined area in which the rules have been harmonised, albeit with the possibility for Member States to introduce stricter conditions for their own broadcast organisations. This kind of minimum harmonisation could also cause unfair competition between national broadcasters and foreign commercial broadcasters, with the former being subjected to national rules on product placement and sponsoring that are more restrictive than the provisions of the Directive, whereas the latter only have to comply with the Directive's provisions. The result of this principle could therefore also be that the same commercial activities will be subject to different rules.

To complicate matters, the application of the rules on private international law – which neither Directive excludes - could lead to quite different outcomes; private international law, being national law and therefore also different for different countries and definitely not being based on simple principles like that of the country of origin. The German implementation in cases of electronic commerce, for example, gives preference to the rules of private international law above the principle of the country of origin when the national German rules are less strict than the rules of the country of origin, and also when German rules are more severe, depending on the place where the online advertiser is established.[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?

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[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-orientated, 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 clauses 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.[40] Micklitz *et al.* name their proposal a proposal for unfair *Marktkommunikation*; Köhler *et al.* use the term *unlauterer 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 that these specific rules are technology-independent: 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*[41] and *Pippig v. Hartlauer*[42]). 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,*[43] *Konsumentenombudsmannen v. De Agostini, RTI v. Italy*[44] and *RTL v. Niedersächsische Landesmedienanstalt*[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).

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

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.[46] 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.*; Proposal for 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 are restricted to certain media (the "Television without Frontiers" Directive, *op. cit.*; the Directive on electronic commerce, *op. cit.*; the Directive on Distance Selling;[47] the Directive on privacy and electronic communications, *op. cit.*).
- Rules that are restricted to certain products (foodstuffs, cosmetics, pharmaceuticals, tobacco products, respectively Directive 79/112/EEC, Directive 76/768/EEC as amended by Directive 88/667/EEC and Directive 93/35/EEC; Directive 92/98/EC; Directive 89/622/EEC, Directive 2001/37/EC and Directive 98/43/EC). The European Court of Justice declared the last-named Directive void in Case C-376/98, Germany v. European Parliament and Council of the European Union, *op. cit.* A new proposal has however been launched by the Commission: Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products.[48] A Proposal for a Regulation on Nutrition and Health Claims made on foods, *op. cit.*, has recently been published.
- Rules that are restricted to certain services (Consumer Credit (Directive 87/102/EEC),[49] Travel (Directive 90/314/EEC)[50]).
- Rules that concern certain target groups (Article 16 of the "Television without Frontiers" Directive).
- Rules that concern certain advertising tools (the Trade Mark Directive (Directive 89/104/EEC)[51] and the Directive on price indications (Directive 98/6 EC);[52] the "Television without Frontiers" Directive contains rules on non-spot advertising and sponsoring; Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[53] and Directive 2002/58/EC on privacy and electronic communications, *op. cit.*, contain rules on unsolicited advertising and on the gathering of consumer data for the purpose of marketing and market research; Amended proposal for a European Parliament and Council Regulation concerning sales promotions in the Internal Market, *op. cit.*).

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1) John Walter in the first issue of his *The Daily Universal Register*, 1 January 1785.
2) Council Directive of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (84/450/EEC), as amended by Directive 97/55/EC of European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising; both available at: http://europa.eu.int/comm/consumers/cons_int/safe_shop/mis_adv/index_en.htm# directive. A list of (Proposals for) Directives and Regulations mentioned in this article is included at the end.
3) Proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive), COM (2003) 356 final, 18 June 2003, available at: http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/directive_prop_en.pdf
4) Amended proposal for a European Parliament and Council Regulation concerning sales promotions in the Internal Market, COM (2002) 585 final, 25 October 2002, available at: http://europa.eu.int/eur-lex/en/com/pdf/2002/com2002_0585en01.pdf
5) EC Council Directive 89/552/EEC on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, adopted on 3 October 1989, OJ L 298, 17 October 1989, p.23 and amended by Directive 97/36/EC of the European Parliament and of the Council, adopted on 30 June 1997, OJ L 202, 30 July 1997, p. 60, available at: http://europa.eu.int/comm/avpolicy/regul/regul_en.htm
6) Proposal for a Regulation of the European Parliament and of the Council on nutrition and health claims made on foods, COM (2003) 424 final, 16 July 2003, available at: http://europa.eu.int/comm/food/fs/fl/fl07_en.pdf
7) For an example, see: 512 U.S. 753 (1994) (*Judy Madsen, et al. v. Women's Health Center, Inc., et al.*).
8) Note that an infomercial is advertising disguised as editorial content (whereas an advertorial is advertising with an editorial lay-out).
9) Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31 July 2002, p. 37, available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_201/l_20120020731en00370047.pdf
10) Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ L 178, 17 July 2000, p. 1, available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_178/l_17820000717en00010016.pdf
11) Case C-376/98, Federal Republic of Germany v European Parliament and Council of the European Union, Judgment of the ECJ of 5 October 2000, ECR I-8419.
12) Adopted in 1997, available at: http://www.iccwbo.org/home/statements_rules/rules/1997/advercod.asp
13) BGH, Feuer, Eis und Dynamite, GRUR *1995, 744*; GRUR *1995, 750*.
14) Frauke Henning-Bodewig, "Werbung im Kinospielfilm, Die Situation nach 'Feuer, Eis und Dynamite'", *GRUR* 1996-5, p. 321-330.
15) For the most recent overview, see Helmut Gamerith, "Neue Herausforderungen für ein europäisches Lauterkeitsrecht", *WRP* 2003-2, p. 143-172.
16) Arnold Vahrenwald, "The Advertising Law of the European Union", *EIPR* 1996-5, p. 280.
17) Appn. No. 7805/77, Decision on admissibility by the European Commission of Human Rights of 5 May 1979, DR 16, p. 68.
18) Judgment of the European Court of Human Rights of 23 June 1994, Series A, No. 219.
19) Judgment of the European Court of Human Rights of 24 January 1994, Series A, No. 285.
20) *Markt Intern Verlag GmbH & Klaus Beermann v. Germany*, Judgment of the European Court of Human Rights of 20 November 1989, Series A, No. 165.
21) *Nederlandse Omroepprogramma Stichting v. the Netherlands*, Appn. No. 16844/90, Decision on admissibility by the European Commission of Human Rights of 13 October 1993, unpublished.
22) Appn. No. 14622/89, Decision on admissibility by the European Commission of Human Rights of 7 March 1989, DR 69, p. 272.
23) Judgment of the European Court of Human Rights of 25 March 1985, Series A, No. 90.
24) Judgment of the European Court of Human Rights of 17 October 2002.
25) 44 Liquormart v. Rhode Island, *000 U.S. U10183 (1996)*, available at: http://www.findlaw.com/casecode/supreme.html
26) Case C-267/91 and C-268/91, Mithouard & Keck v. France [1993], Judgment of the ECJ of 24 November 1993, ECR I-6097.
27) Now Article 28 (which reads in its entirety: "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States"), available at: http://europa.eu.int/eur-lex/en/treaties/dat/ec_cons_treaty_en.pdf
28) Case C-405/98, Konsumentenombudsmannen (KO) v. Gourmet International Products AB (GIP) [2001], Judgment of the ECJ of 8 March 2001, ECR I-1795.
29) Joined cases C-34/95, C-35/95 and C-36/95, Konsumentombudsmannen (KO) v. De Agostini (Svenska) Förlag AB and TV-Shop i Sverige AB [1997], Judgment of the ECJ of 9 July 1997, ECR I-3843.
30) Case C-315/92, Verband Sozialer Wettbewerb eV v. Clinique Laboratoires SNC et Estée Lauder Cosmetics GmbH [1994], Judgment of the ECJ of 2 February 1994, ECR I-0317.
31) Case C-210/96, Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung [1998], Judgment of the ECJ of 16 July 1998, ECR I-4657.
32) Case C-220/98, Estée Lauder Cosmetics GmbH & Co. OHG v Lancaster Group GmbH [2000], Judgment of the ECJ of 13 January 2000, ECR I-0117.
33) See para. 31 of Case C-210/96, Gut Springenheide & Tusky v Oberkreisdirektor, *op. cit.*
34) See Oliver Gray, 'EASA's Working Cross-Border Complaints System: Illustrated and Explained', *IRIS Special* 2003, p. 83-87.
35) As Chairman of the Dutch Advertising Code Commission, with responsibility *inter alia* for assessing complaints in this area.
36) See amongst others, Rolf Sack, "Herkunftslandprinzip und internationale elektronische Werbung nach der Novellierung des Teledienstegesetzes (TDG)", *WRP* 2002-3: 271-283.
37) Frauke Henning-Bodewig, "E-Commerce und irreführende Werbung. Auswirkungen des Herkunftlandsprinzips auf das europäische und deutsche Irreführungsreht", *WRP* 2001-7, p. 771-777.
38) See further Rolf Sack, "Herkunftlandprinzip und internationale elektronische Werbung nach der Novellierung des Teledienstengesetzes (TDG)", *WRP* 2002-3, p. 273-278.
39) Health and Consumer Protection Directorate-General.
40) See Hans W. Micklitz and Jürgen Keszler, "Europäisches Lauterkeitsrecht. Dogmatische und ökonomische Aspekte einer Harmonisierung des Wettbewerbsverhaltensrecht im europäischen Binnenmarkt", *GRUR Int* 2002-11, p. 899-901; Helmut Köhler, Joachim Bornkamm and Frauke Henning-Bodewig, "Vorschlag für eine Richtlinie zum Lauterkeitsrecht und eine UWG-Reform", *WRP* 2002-12, p. 1317-1328.
41) Case C-112/99, Toshiba Europe GmbH v Katun Germany GmbH [2001], Judgment of the ECJ of 25 October 2001, ECR I-7945.
42) Case C-44/01, Pippig Augenoptik GmbH & Co. KG v Hartlauer Handelsgesellschaft mbH and Verlassenschaft nach dem verstorbenen Franz Josef Hartlauer [2003], Judgment of the ECJ of 8 April 2003, ECR 2003.
43) ARD v. PRO Sieben Media, C-6/98 Arbeitsgemeinschaft Deutscher Rundfunkanstalten (ARD) v PRO Sieben Media AG, supported by SAT 1 Satellitenfernsehen GmbH, Kabel 1, K 1 Fernsehen GmbH [1999], Judgement of the ECJ of 28 October 1999, ECR I-7599.
44) Joined cases C-320/94, C-328/94, C-329/94, C-337/94, C-338/94 and C-339/94, RTI and Others v. Ministero delle Poste e Telecomunicazioni [1996], Judgment of the ECJ of 12 December 1996, ECR I-6471.
45) Case C-245/01, RTL v. Niedersächsische Landesmedienanstalt, pending case.
46) See the landmark decisions BGH 16. Februar 1973, *GRUR* 1973, p. 552 (Briefwerbung); BGH 19. Juni 1970, *NJW* 1970, p. 1738 (Telephonwerbung); BGH 3. Februar 1988, *GRUR* 1988, p. 614-619 (Bildschirmtext).
47) Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144, 4 June 1997, p. 19.
48) (presented by the Commission pursuant to Articles 47(2), 55 and 95 of the EC Treaty), COM/2001/0283 final - COD 2001/0119, available at: http://www.europarl.eu.int/meetdocs/committees/envi/20020321/283-01_en.pdf
49) Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, OJ L 42, 12 February 1987, p. 48.
50) Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ L 158, 23 June 1990, p. 59.
51) First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, OJ L 40, 11 February 1989, p. 1.
52) Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, OJ L 80, 18 March 1998, p. 27.
53) OJ L 281, 23 November 1995, p. 31.