



Commercial communications in the AVMSD revision

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Foreword

As technology grows, so too do highly technologically influenced markets such as the audiovisual market. Already at the time of publishing the IRIS *Special* on “New forms of commercial communications in a converged audiovisual sector” at the end of 2014,¹ the claim for this report was: “Who’s afraid of the big bad data? The face of advertising has changed forever. “Commercial communications” (as they are now known) now exist in an increasingly converged media universe. As a result, the lines between real content and advertising are increasingly unclear.”

This is even truer today, as we face the emergence of a digital duopoly with Google and Facebook representing up to 85% of all digital advertising market growth in 2016 and the many challenges the whole industry has to address as a consequence. One of these is certainly the future of traditional advertising-financed media companies, such as commercial TV channels, newspapers and magazines which have a far more limited audience reach. A connected issue is the role of data, which has become the most valuable resource in the online economy, and which is also causing new social divide issues between citizens who can pay for the services and others who pay for them by providing their personal data and allowing themselves to be exposed to advertising. At the same time, consumers are becoming more demanding and are starting to reject interruptive advertising formats, which has in turn led advertisers and media companies to rethink how to capture attention.

Against these market realities, legislation is undergoing a significant revision process with the reform of the Audiovisual Media Services Directive (AVMSD). Considering the increased blurred boundaries between the various types of audiovisual services, existing advertising rules have been criticized for not ensuring fair competition, on the assumption that they are too severe for linear services and too soft for non-linear ones. Among the goals of the reform, the European Commission has mentioned the provision of rules to shape technological developments and create a level playing field for emerging audiovisual media, and for this reason the rules on commercial communications are undergoing a significant overhaul.

This report analyses the ongoing AVMSD reform in relation to commercial communications: it begins by setting the scene with regard to the market developments that have triggered it; it goes on to look into the foreseen developments in the advertising sector (chapter 1); and then it delves into the currently applicable rules as defined by the current AVMSD, investigating both the general rules for commercial communications on whatever type of audiovisual services and the specific ones applicable to television advertising, teleshopping and product placement, as well as other directives mentioned in the AVMSD (chapter 2).

¹ European Audiovisual Observatory, Press release, *Who’s afraid of the big bad data? New forms of audiovisual commercial communications in a converged audiovisual sector*, 9 December 2014, <http://www.obs.coe.int/-/pr-iris-special-new-forms-of-audiovisual-commercial-communications>.

The national implementation of the rules is analysed in chapter 3, with regard to both the general qualitative restrictions and the more stringent ones applicable to sponsorship and product placement, as well as to the quantitative restrictions applicable to linear transmissions. Self- and co-regulatory initiatives at international and EU level are dealt with in chapter 4, with particular emphasis on unhealthy foods and beverages and alcohol advertising. Relevant judiciary and administrative case law at European and national level is examined in chapter 5, with particular attention paid to the definitions, advertising limits and stricter rules applicable to linear transmissions. The final chapter provides an overview of the ongoing AVMSD reform and analyses the proposal tabled by the European Commission in May 2016 in light of the amendments proposed by both the European Parliament and the European Council in May 2017 with regard to definitions and general principles, advertising and teleshopping rules, and provisions concerning sponsorship and product placement.

The report is completed by an Annex with eight valuable overview tables that go into more detail on the transposition of the rules on product placement and quantitative restrictions, self- and co-regulatory schemes, national case law and ongoing AVMSD reform.

Strasbourg, September 2017

Maja Cappello

IRIS Coordinator

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1. Setting the scene

1.1. Introduction

The online advertising market is growing² and in 2016, as was already the case in 2015, it generated more advertising spend in Europe³ than the television sector, with EUR 41.8 billion (+12.2% year-to-year).⁴ Whereas advertising spend on other media is either stagnating (TV, out-of-home, cinema, radio) or shrinking (print), the growth of the online advertising sector drives the growth of the general European advertising market.

However, this growth is not shared equally among players in the advertising ecosystem. The transition from advertising in a linear, analogue world, where mass-advertising was the norm, towards the digital space, where individualised advertising is king, has also shifted the balance of power for players competing for the same advertising budgets. The appearance of global players on the advertising scene has escalated the competition for advertising budgets and is forcing traditional national media players in Europe and elsewhere to adapt to the changes in order to remain relevant in the digital world, a space where the rules are different from the pre-internet era and where other competitive advantages are needed to succeed.

Of course, legacy advertising sectors such as linear TV will not disappear overnight, but the transition from a digital- to a mobile- and in the future to an Artificial Intelligence and cloud-first ecosystem is well under way, in advertising and in other sectors of the digital economy, and this shift will bring further digital disruption.⁵

The industry is realising that the days of a market equilibrium, where most of the competition was fought out between national players on a national market, are over and that the digital transformation of our societies is giving birth, on the one hand, to new

² For a more detailed overview of the online and TV advertising sector in the European Union and main figures, please refer to: Grece C., *The online advertising market in the EU - Update 2015 and Focus on programmatic advertising*, Strasbourg, 2016,

http://www.obs.coe.int/industry/video/-/asset_publisher/H7fRZzll0wZv/content/2016-the-online-advertising-market-in-the-eu; Fontaine G. and Grece C., *Online advertising in the EU – Update 2014*, March 2015, http://www.obs.coe.int/industry/tv/-/asset_publisher/r4Rm3F8SIOiy/content/dqconnect-note-2-online-advertising-in-the-eu-update-2014-nov-2015.

³ 21 EU Member States and Russia, Turkey, Norway, Serbia, Switzerland and Belarus.

⁴ See *IAB Europe study: AdEx Benchmark 2016 preliminary results*, 23 May 2017, <https://www.iabeurope.eu/research-thought-leadership/programmatic/adex-benchmark-2016-study/>.

⁵ See *The economic essentials of digital strategy – A supply and demand guide to digital disruption*, McKinsey Quarterly, March 2016, <http://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/the-economic-essentials-of-digital-strategy>.



“winners”, often in a “winner takes all”⁶ configuration enabled by network effects, and, on the other hand, to more “losers”. According to Zenith,⁷ in 2016, two companies, Google Inc. and Facebook Inc., already had a 20% share of the global advertising market (all advertising, not only digital), and their share and impact on the global advertising market is on the rise.

Although it is challenging to compete in a market where two companies generate most of the growth and dominate the landscape,⁸ national players are finding ways to adapt to the new competitive context in the United States and in Europe, for example through:

- the adoption, slowly and reluctantly, by TV channels of programmatic - automatic – advertising;
- the acquisition⁹ of, or investment¹⁰ in digital video platforms and services;
- experimentation with shorter and new advertising formats;
- diversification into e-commerce¹¹ or new forms of digital entertainment such as e-Sports¹² (e-Sports generated USD 280 million in advertising globally, an amount which is expected to rise to USD 1 billion by 2021 according to IHS¹³);

Will these innovations and changes by European media players be sufficient to adapt to changing content consumption patterns by the audience; increased fragmentation between platforms, services and devices; and an abundance of content as never seen before? Only the future will tell, but the challenges traditional media companies face to

⁶ See *Investing in a 'Winner Takes All' Economy*, The Wall Street Journal, 9 April 2017, <https://www.wsj.com/articles/investing-in-a-winner-takes-all-economy-1491790561>.

⁷ See *Google and Facebook bring in one-fifth of global ad revenues*, The Guardian, 2 May 2017, <https://www.theguardian.com/media/2017/may/02/google-and-facebook-bring-in-one-fifth-of-global-ad-revenue>.

⁸ In 2015, Google and Facebook took between 75% and 85% of all new online advertising spending, according to the *Internet Trend report* by Mary Meeker of Kleiner Perkins Caufield & Byers <http://www.kpcb.com/blog/2016-internet-trends-report>. See also *Advertising: Facebook and Google build a duopoly*, Financial Times, 23 June 2016, <https://www.ft.com/content/6c6b74a4-3920-11e6-9a05-82a9b15a8ee7?mhq5j=e1>.

⁹ Such as the acquisition by RTL Group of the Multi-Channel Network and digital content creator BroadbandTV in June 2013 for USD 36 million. See *RTL Takes Control of BroadbandTV with \$36 Million Investment*, Variety, 26 June 2013, <http://variety.com/2013/digital/global/rtl-takes-control-of-broadbandtv-with-36-mil-investment-1200501849/>

¹⁰ Such as TF1's and Mediaset's into ProSiebenSat.1's multichannel network Studio 71. See *France's TF1 and Italy's Mediaset Join Collective Digital Platform Studio71*, Variety, 12 January 2017, <http://variety.com/2017/digital/news/frances-tf1-and-italys-mediaset-join-collective-digital-platform-studio-71-1201958865/>

¹¹ ProSiebenSat.1 has bought 40 e-commerce firms since 2012 at a total cost of EUR 1.1 billion. See *Investors struggle to figure out ProSieben's digital strategy*, Reuters, 6 June 2017, <http://www.reuters.com/article/us-prosieben-media-strategy-analysis-idUSKBN18X22L>.

¹² Such as the acquisition in 2015 by Modern Times Group of ESL, the largest e-Sport organization worldwide, for EUR 78 million. See *Swedish media house buys world's largest eSports company*, Engadget, 7 January 2015, <https://www.engadget.com/2015/07/01/esports-mtg-acquires-esl/>.

¹³ See *Global Market for Esports Video is Booming, with China Leading the Way*, IHS Markit Reports, Business Wire, 9 May 2017, <http://www.businesswire.com/news/home/20170509005380/en/Global-Market-Esports-Video-Booming-China-Leading>.



find a sustainable business model which will thrive in the online world and resist further innovations in the media field are daunting for most players.

Other pressing concerns linked to matters of public interest and consumer safety are also coming under the spotlight in the digital advertising ecosystem; these include so-called “brand safety” issues, which refer for example to advertising spots inserted next to extremist videos on YouTube¹⁴ or in fake news sites.¹⁵ Other issues, such as advertising fraud and the measurement of the viewability of advertising spots, or the increased rejection by consumers of the interruptive nature of online advertising through the use of advertising blockers,¹⁶ also constitute new challenges for publishers.¹⁷

The following paragraphs explain the current challenges in online advertising in more detail. It is not an exhaustive assessment on the state of the online advertising sector but rather a survey of the most pressing challenges facing the industry.

1.2. Current challenges facing the digital advertising ecosystem

1.2.1. The emergence of a digital duopoly

In 2016, it became an accepted fact that the online advertising sector was a duopoly, dominated by two tech firms, Google Inc. (Alphabet) and Facebook Inc. According to various studies, the two companies represented up to 85% of all digital advertising growth in 2016¹⁸ and were expected to continue to dominate the sector. Other studies

¹⁴ See *YouTube Hate Videos Haunt Advertisers on Google*, Bloomberg, 23 March 2017, <https://www.bloomberg.com/news/articles/2017-03-23/youtube-hate-videos-snare-ikea-ads-as-google-crisis-spans-europe>.

¹⁵ See *Advertisers Try to Avoid the Web's Dark Side, From Fake News to Extremist Videos* The Wall Street Journal, 18 June 2017, <https://www.wsj.com/articles/advertisers-try-to-avoid-the-webs-dark-side-from-fake-news-to-extremist-videos-1497778201>.

¹⁶ Between 20.9% (United Kingdom) and 29% (Germany) of internet users are using Ad Blockers in Europe according to eMarketer, *Ad Blocking Losing Steam in EU-3*, eMarketer, 7 June 2017, <https://www.emarketer.com/Article/Ad-Blocking-Losing-Steam-EU-3/1015974>.

¹⁷ See *As Ad Blocker Use Grows, Publishers Face New Challenges*, eMarketer, 26 June 2017, <https://www.emarketer.com/Article/Ad-Blocker-Use-Grows-Publishers-Face-New-Challenges/1016076>.

¹⁸ In France, the two companies captured 92% of mobile advertising growth in 2016. See *Pub en ligne : le duopole Google-Facebook pointé du doigt*, Les Echos, 26 January 2017, https://www.lesechos.fr/26/01/2017/lesechos.fr/0211734893066_pub-en-ligne---le-duopole-google-facebook-pointe-du-doigt.htm and in the United Kingdom both are expected to have a 70% share of the display advertising market by 2020. See *Google and Facebook to take 71% of UK online ad revenue by 2020*, The Guardian, 15 December 2016, <https://www.theguardian.com/media/2016/dec/15/google-facebook-uk-online-ad-revenue>.



show that they even represented all digital advertising growth in the United States by capturing 99% of digital ad growth in 2016.¹⁹

Their scale and reach, through a large user base²⁰ and therefore ownership of large amounts of personal data on individual users, give them a major competitive advantage; one with which national media companies can hardly rivalise. Why is that the case? Advertising is the business of trading consumers' attention, captured by websites and services through their content offering videos, social networks, news, etc., against the advertisers' payments for the placement of advertising messages.²¹ Advertisers therefore flock to the services which best capture the attention of consumers – social networks, video sharing sites and, to a lesser extent, digital publishers of all sorts. As people spend more time online, increasingly on mobile devices,²² advertisers logically follow the shift in attention. In some European countries (in Germany, France and the United Kingdom), adults spend more time with digital media than with any other media, TV included, according to eMarketer. The access to digital media content is tightly controlled by tech players, even if the content is not.

The prominent place of these two companies in the digital ecosystem (they are both basically platforms and act thus as intermediaries between the audience and the content) allows for an ever increasing accumulation of data on users (the new oil in a digital first economy,²³ in advertising used to tailor and target specific advertising messages to users), which renders them almost unavoidable for advertisers and their agencies.

Traditional TV companies have until now not had a direct link with their viewers (they have been distributed on DTT, cable, satellite and IPTV networks) and therefore are lacking the data needed to provide tailored and targeted ads wanted by advertisers.

As Time Warner's CEO stated, the need for data to be able to compete with the Googles, YouTubes, Facebooks and Amazons of the world was the main reason why Time Warner agreed to be sold to At&T.²⁴ TV companies are starting to collect data on their viewership by using log-ins for their catch-up services or through different means. However, not being in a central position, it seems almost impossible for their collection data to be as wide-reaching as those of the web giants that are in almost every place of a consumer's journey on the web, on desktop or mobile.

¹⁹ As claimed by Pivotal research based on IAB figures, *Facebook and Google completely dominate the digital ad industry*, Yahoo! Finance, 26 April 2017, <https://finance.yahoo.com/news/facebook-google-completely-dominate-digital-204836182.html>.

²⁰ Facebook claims as of June 2017 2 billion monthly users, YouTube 1.5 billion and Facebook-owned Instagram 700 million. See *Facebook now has 2 billion monthly users... and responsibility*, TechCrunch, 27 June 2017, <https://techcrunch.com/2017/06/27/facebook-2-billion-users/>.

²¹ The so-called "two-sided markets", http://lexicon.ft.com/term?term=two_sided-markets&mhq5j=e1.

²² See *Time Spent with Major Media Continues to Rise in Europe*, eMarketer, 12 December 2016, <https://www.emarketer.com/Article/Time-Spent-with-Major-Media-Continues-Rise-Europe/1014834>.

²³ See *The world's most valuable resource is no longer oil, but data*, The Economist, 6 May 2017, <http://www.economist.com/news/leaders/21721656-data-economy-demands-new-approach-antitrust-rules-worlds-most-valuable-resource>.

²⁴ See *Time Warner's CEO says its \$85 billion sale to AT&T is all about battling Google and Facebook*, Recode, 31 May 2017, <https://www.recode.net/2017/5/31/15722460/time-warner-ceo-jeff-bewkes-code-conference-2017>



This market development towards an oligopoly in digital sectors is common;²⁵ however, the impact of these evolutions on the traditional media ecosystem has profound and long lasting consequences. A large pan of the media ecosystem²⁶ (the production of audiovisual content and news reporting and therefore the companies in these businesses, commercial TV channels and publishers) is financed through advertising. As it becomes harder for traditional media companies to secure the same amount of advertising budgets as in the analogue age, the future of advertising-financed content produced by traditional players could come increasingly under threat.

Although the online advertising sector continues its growth and has surpassed TV advertising in 2016 in Europe, several challenges remain for the digital advertising industry: advertisers, advertising tech players and media groups/publishers/content producers.

1.2.2. What future for traditional advertising-financed media companies?

The first question of concern is the place that traditional advertising-financed publishers (commercial TV channels, newspapers and magazines, digital-only websites) will occupy in this advertising ecosystem; in a digital economy, scale, reach and data are of utmost importance, and while Google and Facebook can boast a user base of more than a billion, national publishers in Europe have a much more delimited reach and fewer monthly users. As the advertising pie is divided among more players (as opposed to a national market before the irruption of the web), it will be crucial for traditional media players to find ways to remain attractive to advertisers and brands in order to maintain their place in the media ecosystem and continue playing their role in content production, information/news, education and their societal impact.

However, and on this point the dominance of global tech players becomes evident, they need the audience that these players bring them. Users are increasingly primarily accessing news on Facebook,²⁷ and free audiovisual content viewing is still mainly done on YouTube (and Facebook), with global OTT viewers watching more than 1 billion hours of videos on YouTube per day.²⁸ In the United States, eMarketer estimated that 85% of digital video viewers are YouTube viewers and that 95% of OTT video services users also watch videos on the service. Therefore it is almost impossible for content owners and

²⁵ See for example Netflix's and Amazon's domination of the European SVOD market, Amazon's reign in e-commerce or Android and iOS in the smartphone operating systems market.

²⁶ According to the Observatory, in 2015, advertising on television represented 31% of EU audiovisual services revenues, just behind pay TV, see Yearbook 2016, European Audiovisual Observatory.

²⁷ See *Social media 'outstrips TV' as news source for young people*, BBC, 15 June 2016, <http://www.bbc.com/news/uk-36528256>.

²⁸ See *YouTube Tops 1 Billion Hours of Video a Day, on Pace to Eclipse TV* », The Wall Street Journal, 27 February 2017, <https://www.wsj.com/articles/youtube-tops-1-billion-hours-of-video-a-day-on-pace-to-eclipse-tv-1488220851> and *YouTube Viewership Hits 1 Billion Hours a Day*, eMarketer, 28 February 2017, <https://www.emarketer.com/Article/YouTube-Viewership-Hits-1-Billion-Hours-Day/1015332>.



media companies not to be present on these two services where the majority of digital video viewers flock to. As they share their content on these services, they can monetise it (at a much lower rate than on broadcast TV) but they also have to share the advertising revenues with these platforms. A sort of “frenemy” relationship (or “coopetition”) is therefore developing between media companies and content right holders and digital platforms, which take a cut of revenues in their role as intermediaries.²⁹

Other global players are in the starting blocks to challenge the duopoly. For now, a player that looks well positioned to transform the duopoly into a triumvirate is Amazon³⁰ with its suite of audiovisual services (from Twitch, an e-sport streaming platform to Amazon Prime Video), e-commerces, cloud-computing business and even traditional retailers since the acquisition of Whole Foods. TV and media companies are well aware of the threat posed by having to compete with another global giant for the same advertising budgets and content.³¹ With the launch of its channel programme in Europe,³² Amazon is surely in a position to severely challenge established broadcasters in Europe and elsewhere. Basically Amazon is proposing to other TV channels to be distributed on its website, and is putting forward its amount of data to find new subscribers and viewers. Starz’s COO Jeffrey Hirsch puts it this way: “They are spectacular at finding an audience, finding targets and selling into it”.³³ According to WPP’s CEO Martin Sorell, Amazon has a strategic place with its plethora of digital business to take a major place in the online advertising ecosystem and BBC’s worldwide chief executive Davie states: “If you look at single country broadcaster commissioner, you cannot compete with Amazon”, adding, “There are few companies that are both full partners and full competitors” and “There is no one who is the outright enemy. Ultimately, my customer now might be my competitor tomorrow.”³⁴

Amazon is not the only player competing for TV’s advertising money; several new ones have also entered the competition such as Snap’s Inc. Snapchat and, of course, Chinese tech giants which have not yet significantly expanded abroad and into Europe.³⁵

²⁹ Jason Kint describes the relationship between publishers and Facebook as follows: *Media companies are like serfs working Facebook’s land*. See *Media Companies Are Getting Sick of Facebook*, Bloomberg Businessweek, 19 June 2017, <https://www.bloomberg.com/news/articles/2017-06-19/media-companies-are-getting-sick-of-facebook>.

³⁰ See *The Race Is On to Challenge Google-Facebook ‘Duopoly’ in Digital Advertising*, The Wall Street Journal, 19 June 2017, <https://www.wsj.com/articles/the-race-is-on-to-challenge-google-facebook-duopoly-in-digital-advertising-1497864602>.

³¹ As the CEO of German cable operator Unitymedia (owned by Liberty Global) says: I have “*huge respect for Amazon*” because “*they are going out there and taking our business away*”. See *Amazon will have ‘bigger impact’ than Netflix*, DigitalTVEurope, 30 May 2017, <http://www.digitaltveurope.net/701831/amazon-will-have-bigger-impact-than-netflix/>.

³² See *Amazon TV Service Helps Starz, HBO Stand Out in Netflix Era*, Bloomberg, 23 May 2017, <https://www.bloomberg.com/news/articles/2017-05-22/amazon-s-a-la-carte-tv-helps-starz-hbo-stand-out-in-netflix-era>.

³³ Idem.

³⁴ See *‘The one to watch’: Amazon is set to turn the duopoly into a troika*, Digiday UK, 9 June 2017, <https://digiday.com/marketing/amazon-set-turn-duopoly-troika>.

³⁵ Snap’s recent USD 100 million deal with Time Warner for shows and ads indicates that the company has to be taken seriously as it makes more in-roads into TV coveted audience: younger generations. Snap’s takes advantage of the fact that it is a mobile-first (or even only) application and as users spend more time with



When the rise of handheld mobile devices is taken into account and the ever growing attention we devote to them, the challenges for traditional players are even more steep – on the mobile web, only a handful of players seem to be in a position to truly reap the benefits of the increase in media consumption brought to the sector through these devices.

Furthermore, advertising rates on the mobile web are much lower in the digital space than they were in the analogue one, and this has a profound impact on commercial television business models. In order to attain a certain threshold in digital advertising, businesses need scale and a large user base; the shift from mass-advertising towards individualised advertising, as is the case on the web, clearly benefits companies which have a large user base. Traditional media companies are therefore experimenting with changes to their traditional model and formats for selling advertising in order to adapt to these new competitive challenges and often have to rely on the services of the same tech companies they are competing with to reach their audience.

Competing with the duopoly (or oligopoly if Amazon or another tech player reaches a significant market share in online advertising) seems to get harder by the day as these services expand their reach and presence on the web and into our daily lives.

“Content is king” but data and distribution are queens in the digital age. Media companies have the content, now they need to know (data) and reach (distribution) their audiences online. A pessimist might think that for digital media distribution and knowledge of audiences, the game has already been played and has designated its winners.

1.2.3. The role of data and the rising concerns about consumers’ digital privacy

Another question which comes with several consequences attached is the central position that personal data (collected throughout a user’s journey on the web) occupies in the advertising-financed web ecosystem. Data is clearly the most valuable resource in the online economy and the majority of so-called “free” services and digital products are only “free” in exchange for access to the user’s data.

As seen before, traditional free television players are either entirely lacking data on their audience because until now they have had no direct link with them, or are starting to collect basic data (gender, age, location) which is quite pale in comparison to all data points collected by tech players throughout a consumer’s journey on the web.

their mobile device for media consumption, the company appears to be in a prime position to reach and engage with a younger audience one which is sought after by advertisers. See at *Time Warner Signs \$100 Million Deal With Snap for Shows and Ads*, The Wall Street Journal, 19 June 2017, <https://www.wsj.com/articles/time-warner-signs-100-million-deal-with-snap-for-shows-and-ads-1497885737> and *Snapchat Shows: Inside the Plan to Reimagine TV for the Mobile Era*, Variety, 23 May 2017, <http://variety.com/2017/digital/news/snapchat-shows-inside-the-plan-to-reimagine-tv-for-the-mobile-era-1202440096/>.



Data (and data analytics) are the condition *sine qua non* to be able to target users with advertising messages tailored to their personal preferences and interests.

While traditional media companies are still switching their mindset and starting to collect data on their viewers, tech giants are already a step ahead. It would take too long to dress an exhaustive landscape of the use made of personal data collected on and off the web, so here are just two examples of how data can be used to lure in more advertisers:

- Google said that it plans to track credit card spending offline in stores in order to allow advertisers to see if the online advertising campaigns generate offline sales.³⁶ There are not even a handful of players worldwide who are in a position to propose such a service to advertisers. This new suite of advertising tools is also integrated into YouTube.
- Facebook made similar enticing announcements for advertisers. In June 2017, the company launched an advertising tool that allows advertisers to target the people most likely to buy their products. Advertisers can therefore optimize their budgets to target users most interested in their products and services and at the same reduce wastage caused by targeting people who are not interested, and these new tools are free for marketers.³⁷

These two examples show the power of having enormous data points for companies whose business model is based on advertising. In the digital world, marketers can target and evaluate the performances of their advertising campaigns like never before; but in order to be able to propose such innovations, the prerequisite is to have collected these data points on individual users, online and offline, and then to be able to analyse them correctly – not an easy feat when the amount of data collected runs into billions. However, the presence of global corporations not only in our digital, but also in our physical daily lives is starting to raise increasing concern among consumers and governments.³⁸ And if we consider the fact that Facebook tracks (or was tracking) all users around the web,³⁹ not only Facebook users, it becomes quite evident that these web

³⁶ At the announcement of the service, Google said that it already captures 70% of all credit and debit card transactions in the United States and that its location data will be able to further close the gap between the physical and the digital world. See *Google plans to track credit card spending*, BBC, 26 May 2017, <http://www.bbc.com/news/technology-40027706> and *Google Adds YouTube to Suite of Ad Tools Tracking Retail Sales*, Bloomberg, 23 May 2017, <https://www.bloomberg.com/news/articles/2017-05-23/google-adds-youtube-to-suite-of-ad-tools-tracking-retail-sales>.

³⁷ See *New Facebook Tools Help Marketers Serve Ads to People Most Likely to Spend Money*, The Wall Street Journal, 12 June 2017, <https://www.wsj.com/articles/new-facebook-tools-help-marketers-serve-ads-to-people-most-likely-to-spend-money-1497279600>.

³⁸ Just as an example, as actions by national regulators, the EU Commission or governments abound. See *Facebook facing privacy actions across Europe as France fines firm €150k*, The Guardian, 16 May 2017, <https://www.theguardian.com/technology/2017/may/16/facebook-facing-privacy-actions-across-europe-as-france-fines-firm-150k>.

³⁹ See *Facebook 'tracks all visitors, breaching EU law'*, The Guardian, 31 March 2015, <https://www.theguardian.com/technology/2015/mar/31/facebook-tracks-all-visitors-breaching-eu-law-report>



giants know a lot more about us⁴⁰ than most private companies or even public organisations. The recent fine of EUR 110 million by the European Commission over Facebook's use of WhatsApp data⁴¹ (the messaging service Facebook acquired in 2014 for USD 19 billion) to match users shows the importance of data for digital advertising-based services and businesses. Data has become the decisive competitive advantage.

As citizens around the world are becoming more concerned about the collection and use of their personal data, there is a risk of creating a division between the poorer and the wealthier members of society;⁴² those who are wealthier are starting to pay for their services and digital products in order to escape this data collection frenzy and protect their privacy (for example, the rise of the subscription-based business model in media, the usage of VPNs and ad blockers), and those who are not financially able or willing to pay for their privacy, 'pay' for their free digital services and products by giving up control of their personal data.

1.2.4. Increased rejection by consumers of interruptive digital ad formats

However, the rise of ad blockers (the installation of ad blockers is mostly a protection used by consumers against interruptive ad formats during their media consumption) has shown that there is only so much 'annoyance' that consumers will accept. By not having adapted advertising to the digital age (interruption during an activity such as watching a video or reading a website, the same advertising as interrupts broadcasted TV content) where attention spans are getting shorter,⁴³ the advertising industry (advertisers, advertising tech players, publishers...) is in part responsible for the consumers' increased rejection of digital advertising. These issues need to be addressed to ensure that advertising remains effective online.

Attention is a scarce commodity online as consumers have a nearly infinite choice of entertainment options and content. As Microsoft's CEO Satya Nadella stated in a company internal memo in 2015: "We are moving from a world where computing power

⁴⁰ See *You Probably Don't Know All the Ways Facebook Tracks You*, Gizmodo, 8 June 2017, <http://fieldguide.gizmodo.com/all-the-ways-facebook-tracks-you-that-you-might-not-kno-1795604150>

⁴¹ See *EU fines Facebook over 'misleading' WhatsApp data claim*, BBC, 18 May 2017, <http://www.bbc.com/news/business-39958630>.

⁴² See *How Privacy Became a Commodity for the Rich and Powerful*, The New York Times, 9 May 2017, <https://www.nytimes.com/2017/05/09/magazine/how-privacy-became-a-commodity-for-the-rich-and-powerful.html>.

⁴³ The average attention span is estimated at 8 seconds in 2016, down from 12 seconds in 2000. See *The Eight-Second Attention Span*, The New York Times, 22 January 2016, <https://www.nytimes.com/2016/01/22/opinion/the-eight-second-attention-span.html>



was scarce to a place where it now is almost limitless, and where the true scarce commodity is increasingly human attention.”⁴⁴

Therefore advertisers, media companies and tech players have to rethink how best to capture our attention and how to convey advertising messages in such a way that they are no longer seen as intrusive and unworthy of our short and scarce resource, our attention. The measure taken by Fox to limit all advertising on its digital services to six seconds is a step in the right direction, but there are still unexplored areas for brands and media companies alike to explore. As the web content is still mainly financed through advertising, it is essential that advertising is reinvented for the digital age. The focus here lies mainly on audiovisual players; digital-first companies such as BuzzFeed, YouTube, Facebook, and Pinterest are aware of the situation and have been constantly innovating advertising formats, duration and types.

1.2.5. The concern for brand safety and advertising fraud

Just as consumers have increasingly rejected the interruptive digital advertising experience, advertisers have realised through several examples (ads near extremist content on YouTube,⁴⁵ fake news⁴⁶ or objectionable political content such as Breitbart⁴⁷) that their brands can be put in jeopardy when ads for them appear next to questionable content.

These issues are regrouped under the umbrella term “brand safety” but reference the concerns advertisers have as their ads are placed on websites through an increasingly automatized process (programmatic advertising), with sometimes little control over the content next to which the ads are displayed. Ad giants such as Google’s YouTube and Facebook are currently addressing these issues in order to reassure advertisers and agencies that their services represent a safe environment for their brands. It seems that for YouTube, the exodus of advertisers has stopped and that several are back on the service after YouTube cleaned up videos next to which ads could appear.⁴⁸ Clearly, brands are protecting their brand reputation as if it were the apple of their eyes, but forgoing

⁴⁴ See *Microsoft’s CEO Sent a 3,187-Word Memo and We Read it So You Don’t Have To*, The Atlantic, 10 July 2014, <https://www.theatlantic.com/technology/archive/2014/07/microsofts-ceo-sent-a-3187-word-memo-and-we-read-it-so-you-dont-have-to/374230/>

⁴⁵ See *YouTube Advertiser Exodus Highlights Perils of Online Ads*, The New York Times, 23 march 2017, <https://www.nytimes.com/2017/03/23/business/media/youtube-advertisers-offensive-content.html>

⁴⁶ See *Google has banned 200 publishers since it passed a new policy against fake news*, Recode, 25 January 2017, <https://www.recode.net/2017/1/25/14375750/google-adsense-advertisers-publishers-fake-news>

⁴⁷ See *Breitbart ads plummet nearly 90 percent in three months as Trump’s troubles mount*, Digiday UK, 6 June 2017, <https://digiday.com/media/breitbart-ads-plummet-nearly-90-percent-three-months-trumps-troubles-mount/>

⁴⁸ See *YouTube Wins Back Some Marketers After Ad Uproar, but Others Stay Away*, The Wall Street Journal, 20 June 2017, <https://www.wsj.com/articles/youtube-wins-back-some-marketers-after-ad-uproar-but-others-stay-away-1497951005>



major services which draw billions of consumers cannot last long. “Brand safety”⁴⁹ will remain a concern, but one which the major players in the online advertising industry are sure to address since their revenues depend on it.

Another looming threat to the digital advertising industry is linked to advertisers’ concerns about advertising fraud⁵⁰ (robots, not humans, are clicking on ads) and the viewability of ads⁵¹ (ads are displayed and charged for, yet no human eye has seen them). These issues have forced several services, notably YouTube⁵² and Facebook,⁵³ to allow third-party measurement on their sites to reassure advertisers that their ads are actually seen by humans (consumers). These commitments to third-party measurements have often come after serious errors committed by these companies in the measurement of ads,⁵⁴ which has drawn the ire of advertisers.

However, even if the concerns over brand safety, advertising measurement and advertising fraud are serious, the rapid shift of consumers’ media consumption (and therefore their attention) towards the digital space indicates that advertisers and brands will continue to target and tailor their advertising messages to their desired audiences online.

1.2.6. Foreseen developments in the advertising sector

Several recent market developments and technological innovations are set to further impact the already shifting advertising sector. This is only an outlook of what might lie ahead and it is clear to the sector that the pace of innovation has not yet slowed down. Some of the issues and developments which will further challenge traditional players as they battle for a share of the advertising pie could include the following:

1.2.6.1. Original content acquisition, production and commissioning by tech giants

The main source of competition for traditional audiovisual companies comes from the fact that tech players are also investing in original scripted content (and not only web series or short-form content), a trend famously launched by the SVOD giant Netflix (who

⁴⁹ See *Google to Allow ‘Brand Safety’ Monitoring by Outside Firms*, The Wall Street Journal, 3 April 2017, <https://www.wsj.com/articles/google-to-allow-brand-safety-monitoring-by-outside-firms-1491256676>

⁵⁰ See *The Fake Traffic Schemes That Are Rotting the Internet*, Bloomberg 2015, <https://www.bloomberg.com/features/2015-click-fraud/>

⁵¹ See *Ad Measurement Feuds on Facebook, YouTube Hinge on Code*, the Wall Street Journal, 9 November 2016, <https://www.wsj.com/articles/ad-measurement-feuds-on-facebook-youtube-hinge-on-code-1478689200>

⁵² See *Google Agrees to YouTube Metrics Audit to Ease Advertisers’ Concerns*, The Wall Street Journal, 21 February 2017, <https://www.wsj.com/articles/google-agrees-to-youtube-metrics-audit-to-ease-advertisers-concerns-1487678403>

⁵³ See *Facebook Takes Steps to Improve Advertising Data After Criticism*, The New York Times, 10 February 2017, <https://www.nytimes.com/2017/02/10/business/media/facebook-takes-steps-to-improve-advertising-data-after-criticism.html>

⁵⁴ See *Facebook Discloses Yet Another Ad-Measurement Glitch, Will Refund Affected Clients*, Variety, 16 May 2017, <http://variety.com/2017/digital/news/facebook-advertising-measurement-error-refunds-1202429254/>



operates a paid service which does not depend on advertising for revenues) but which has been taken up in recent years by several players (including Amazon, also for its SVOD service).

Facebook has started to cooperate with publishers (Buzzfeed, Vox Media, ATTN, Group Nine Media and others) to create original video shows for its service, which will carry ads.⁵⁵ But the service is also talking to Hollywood studios for the production of TV-quality shows with the aim of launching its original programming by late summer (2017).⁵⁶ The shows will be aimed at audiences aged between 13 and 34 and the budgets for the shows are as high as USD 3 million, budgets which equal high-end pay TV shows. Facebook aims to own the shows, which it plans to display in a separate video tab,⁵⁷ hoping thus to open up a new advertising revenue stream as its newsfeed becomes too cluttered.⁵⁸

Google's YouTube has also commissioned 40 original shows, of which at least 6 will be run on its advertising-supported service and the rest on its subscription-based YouTube Red service.⁵⁹ YouTube is thinking on a global scale, as YouTube's chief business officer Robert Kyncl said in an interview: "We're turning the infrastructure we've built for original programming into supporting our biggest partners," "Nobody is doing it the way we are. Nobody can release originals on a global basis with the scale we have in advertising."⁶⁰

Other digital players, like BuzzFeed⁶¹ or Snapchat,⁶² are following the example. The clear aim is to go after TV advertising budgets, and after having already taken a big chunk out of print advertising, tech players could well insert themselves into the TV budgets by providing long-form premium content; an unequalled large user base in the billions; and the matching data to target advertising to this user base. Only the future will show if they succeed, but the threat is real.

⁵⁵ See *Facebook signs BuzzFeed, Vox, others for original video shows*, The Sydney Morning Herald, 25 May 2017, <http://www.smh.com.au/technology/technology-news/facebook-signs-buzzfeed-vox-others-for-original-video-shows-20170525-gwqcq57.html>.

⁵⁶ See *Facebook Is Going Hollywood, Seeking Scripted TV Programming*, The Wall Street Journal, 25 June 2017, <https://www.wsj.com/articles/facebook-is-going-hollywood-seeking-scripted-tv-programming-1498388401>

⁵⁷ See *Facebook Plans Original Content to Grow Video Tab*, Techvibes, 15 June 2017, <https://techvibes.com/2017/06/15/facebook-plans-original-content-to-grow-video-tab>.

⁵⁸ See *Facebook says it's running out of places in News Feed to show people ads*, Recode, 27 July 2016, <https://www.recode.net/2016/7/27/12305002/facebook-ad-load-q2-earnings>.

⁵⁹ See *With 40 New Original Shows, YouTube Targets TV's Breadbasket*, Bloomberg, 5 May 2017, <https://www.bloomberg.com/news/articles/2017-05-04/with-40-new-original-shows-youtube-targets-tv-s-breadbasket>.

⁶⁰ *Idem*.

⁶¹ BuzzFeed is currently developing 31 shows with the aim to distribute them on the major platforms. See *BuzzFeed bets big on original shows for platforms*, Digiday UK, 16 March 2017, <https://digiday.com/media/inside-buzzfeeds-original-shows-strategy/>.

⁶² Snapchat has launched 10 new shows for its Discovery service thanks to the USD 100 million received from Time Warner, Vice has received an investment of USD 450 million to develop more original content and the service Musical.ly has also launched its first set of original short-form series. See *The Moves Tech Giants Just Made That Should Terrify Hollywood*, Variety, 20 June 2017, <http://variety.com/2017/digital/opinion/moves-tech-giants-made-terrify-hollywood-apple-facebook-1202470920/>.



Mention should also be briefly made of the impact of SVOD viewing, which, even if it is not in competition with advertising-supported services, does however take up the consumer's precious time and attention. As attention is becoming increasingly scarce and tech giants are competing with traditional media players on their turf, getting the same amount of attention as in the analogue and linear world already seems out of reach for traditional media companies.

1.2.6.2. Live streaming

Live events, such as major sporting events, still remain a major viewer attraction for linear television, even in the digital age.⁶³ With the aim of competing with these audience attractions, Facebook, Twitter, Amazon and YouTube have all invested into live streaming, some of them taking the streaming rights to major sports leagues.

Live streaming is only starting, and in future, tech giants might enter bids for premium sports rights and challenge media players (commercial, public and pay TV channels) in a domain which was seen until now as belonging exclusively to traditional broadcasters. But as consumption habits change, innovations allow for new forms of broadcasting, and tech giants want a share of the TV advertising pie, live streaming is set to render the equation even more difficult for traditional companies that cannot compete with the budgets tech giants have at their disposal.

1.3. Concluding remarks

These are only two of the several developments which will further disrupt the advertising market, online and offline. As technology progresses, new innovations such as the introduction of Artificial Intelligence; the shift to cloud-computing; the increased adoption of Virtual and Augmented reality by consumers; and the emergence of self-driving cars, leading to drivers' time and attention being freed up, will see the competition for advertising budgets intensify. For now, Tech players seem to be in the best position to take advantage of these new changes; traditional media players, battling for a share of the advertising pie, have to prepare themselves to experience further ground-shifting developments. As we have already seen in the print sector, advertising revenues are no longer guaranteed in an ecosystem where traditional and digital players are in competition for the same advertising budgets. Audiovisual players are already aware of this; only the future will tell if they manage a successful transition.

In the physical and analogue world, which is limited by scarcity of resources (technical such as frequencies and content), the power comes from controlling the supply of these resources. In the digital world, where content is abundant and entertainment

⁶³ Even if the recent results of Sky's Premier league viewership appear to have had their biggest drop since 2010, live sports will remain, for the mid-term, an attractive way to generate mass audiences for TV channels. See *Sky TV suffers fall in viewers of live Premier League games*, Financial Times, 12 June 2017, <https://www.ft.com/content/45e8a3e8-4d1e-11e7-a3f4-c742b9791d43>.



options almost unlimited, the power comes from controlling demand. For now, only a handful of players control the demand (for digital content) which exists among vast parts of our societies. With network effects and externalities, distribution and transaction costs close to zero, and a “winner takes all” outcome, the digital online advertising market’s state of equilibrium could well be that of an oligopoly.⁶⁴

⁶⁴ See *Ends, Means, and Antitrust*, Stratechery, 28 June 2017, <https://stratechery.com/2017/ends-means-and-antitrust/>.



2. European framework

Rules concerning commercial communications are contained in various EU directives. This chapter will consider the provisions that are directly connected to the regulation of its various forms, be it advertising, teleshopping, sponsorship or product placement, namely:

- the Audiovisual Media Services Directive (AVMSD) and the set of acts mentioned therein, namely
 - the Unfair Commercial Practices Directive,
 - the Tobacco Advertising Directive,
 - the Directive concerning Medicinal Products for Human Use,
 - the Regulation on Nutrition and Health Claims.

This chapter will also cover some closely connected acts, such as:

- the Directive concerning Misleading and Comparative Advertising and
- the e-Commerce Directive,

whereas the Data Protection Directive and competition law related aspects will be left out, being unrelated to the content of commercial communications as such.

2.1. The Audiovisual Media Services Directive

The main regulatory reference for commercial communications within the European Economic Area and the neighbouring countries that have started an approximation process is the AVMSD⁶⁵.

According to Recital 79 AVMSD, the increase in consumer choice has led to a situation where:

Detailed rules governing audiovisual commercial communication for on-demand audiovisual media services thus appear neither to be justified nor to make sense from a

⁶⁵ Directive of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32010L0013>. In this chapter reference will be made to this consolidated version of the Directive, unless specified otherwise. For a general reference, see the European Commission dedicated webpages for general information, <https://ec.europa.eu/digital-single-market/en/audiovisual-commercial-communications-avmsd>, and various related publications from the European Audiovisual Observatory, <http://www.obs.coe.int/legal/advertising.jsessionid=A14C1027AAFD6AD3728BA52B9A123BE9>.



technical point of view. Nevertheless, all audiovisual commercial communication should respect not only the identification rules but also a basic tier of qualitative rules in order to meet clear public policy objectives.

This two-tier structure reflects the graduated approach of the AVMSD, whereby a set of basic rules of a qualitative nature applies to all forms of commercial communications, independently from their linear or non-linear transmission, and a different set of stricter quantitative rules applies only to linear broadcasting.

2.1.1. Definition of audiovisual commercial communications

The notion of “audiovisual commercial communication”, as defined by Article 1(1)h AVMSD,⁶⁶ describes different forms of promotion of goods and services, namely television advertising, sponsorship, teleshopping and product placement, and defines certain mandatory elements:

- there must be a promotional purpose, whether direct or indirect,
- the promoted goods, services or images must pertain to a natural or legal entity with an economic purpose,
- the promotional images must be shown in return for payment or similar consideration, including self-promotional purposes,
- it covers television advertising, teleshopping, sponsorship and product placement.

Commercial communications also fall under the definition of “audiovisual media services” as provided by Article 1(1)a AVMSD but, interestingly, there is not always an exact correspondence between the two concepts. When excluding certain services from the scope of the AVMSD, Recital 22 AVMSD⁶⁷ does not also exclude the advertising thereof. As

⁶⁶ Article 1(1)h AVMSD: “audiovisual commercial communication’ means images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, *inter alia*, television advertising, sponsorship, teleshopping and product placement.”

⁶⁷ Recital 22 AVMSD: “For the purposes of this Directive, the definition of an audiovisual media service should cover mass media in their function to inform, entertain and educate the general public, and should include audiovisual commercial communication but should exclude any form of private correspondence, such as e-mails sent to a limited number of recipients. That definition should exclude all services the principal purpose of which is not the provision of programmes, that is to say, where any audiovisual content is merely incidental to the service and not its principal purpose. Examples include websites that contain audiovisual elements only in an ancillary manner, such as animated graphical elements, short advertising spots or information related to a product or non-audiovisual service. For these reasons, games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services, as well as on-line games and search engines, but not broadcasts devoted to gambling or games of chance, should also be excluded from the scope of this Directive.”



a consequence, the country of origin principle⁶⁸ applies to commercial communications even if they concern services that do not fall under a harmonised legislative framework, and the country of destination⁶⁹ applies to the services themselves. This is in particular the case for services that are subject to national legislation considering their connection with health and public order issues, and therefore excluded from the principle of free circulation.

A very concrete example concerns lotteries and betting services, which are explicitly included in the exceptions mentioned in Recital 22. The disconnection between the country origin principle applicable to the commercial communications – which can therefore freely circulate within the Union and also target the country where the advertised service is provided – and the country of destination principle applicable to the underlying services has sometimes led to cases of “*forum shopping*”.⁷⁰

2.1.2. General rules for audiovisual commercial communications

The AVMSD lays down a set of general rules that are applicable to all forms of commercial communications, independently from the linear or non-linear nature of the service. These provisions concern all audiovisual media services, a category to which commercial communications also belong, and respond to very general principles.

Apart from the very general ban provided by Article 6 AVMSD, according to which all audiovisual media services, hereunder also commercial communications, shall “not contain any incitement to hatred based on race, sex, religion or nationality”, Article 7 AVMSD provides that all services provided by audiovisual media service providers, and therefore, arguably, also commercial communications, shall be “gradually made accessible to people with a visual or hearing disability”.

The most significant provision is Article 9 AVMSD. This is the first provision of the AVMSD, exception made for the definitions, which concerns specifically commercial communications and is directly connected to the content that is shown in the advertisements. It establishes that all kinds of commercial communications must comply with a set of requirements:

⁶⁸ According to the country of origin principle, where a service is provided by a service provider established in one of the member states, the applicable law is the law of the country where the service provider is established. Article 2 AVMSD sets specific criteria in order to identify which member state holds jurisdiction.

⁶⁹ According to the country of destination principle, where a service is received in a country that is different from the one of establishment of the service provider, the applicable law is the law of the country of reception. Article 3 AVMSD identifies the circumstances where such a derogation can apply.

⁷⁰ Swiss Institute of Comparative Law, “Study of gambling services in the internal market of the European Union, Lausanne, 2006, see part 1 “Legal Study”, chapter 1 “National reports”, <https://ec.europa.eu/docsroom/documents/9725/attachments/1/translations/en/renditions/native>. European Commission, Staff working document, “Online gambling in the Internal Market”, COM(2012) 345 DEF, <https://publications.europa.eu/en/publication-detail/-/publication/a78e3b0b-cb3e-44ef-a9b1-dfe4dae6202f/language-en>.



- be readily recognisable and (Article 9(1)a),
- not be surreptitious (Article 9(1)a) nor use subliminal techniques (Article 9(1)b),
- respect human dignity (Article 9(1)c)i),
- not include/promote discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation (Article 9(1)c)ii),
- not encourage behaviour prejudicial to health or safety (Article 9(1)c)iii) or to the protection of the environment (Article 9(1)c)iv)
- not promote tobacco products (Article 9(1)d),
- not promote alcohol aiming at minors or encouraging excessive consumption thereof (Article 9(1)e),
- not promote medicinal products available only on prescription (Article 9(1)f),
- not cause physical or moral harm to minors nor directly exploit minors' inexperience or credulity nor encourage minors to pressurise parents to make a purchase (Article 9(1)g).

2.1.3. Television advertising and teleshopping

As with any other kind of commercial communications, television advertising (Article 1(1)i AVMSD)⁷¹ and teleshopping (Article 1(1)l AVMSD)⁷² are subject to the above-mentioned set of basic rules. At the same time, they are also subject to a set of stricter provisions than the other types of audiovisual commercial communications.

The AVMSD being a minimum harmonisation directive which allows member states “to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive provided that such rules are in compliance with Union law” (Article 4(1) AVMSD), this possibility applies in two cases:

- Transfrontier services, “in order to ensure that the interests of consumers as television viewers are fully and properly protected” (Recital 83 AVMSD),
- Purely national services, limitedly to setting “different conditions for the insertion of advertising and different limits for the volume of advertising in order to facilitate these particular broadcasts” (Recital 84 AVMSD), and rules concerning interruptions and quantitative restrictions (Article 26 AVMSD).

The minimum rules laid down by Chapter VII of the AVMSD (“Television advertising and teleshopping”) concern four main aspects:

- Presentation (Article 19 AVMSD),

⁷¹ Article 1(1)i AVMSD: “television advertising’ means any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking or natural person in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment.”

⁷² Article 1(1)l AVMSD: “teleshopping’ means direct offers broadcast to the public with a view to the supply of goods or services, including immovable property, rights and obligations, in return for payment.”



- Frequency (Article 20 AVMSD),
- Content (Articles 21 and 22 AVMSD),
- Quantity (Article 23 and 24).

This set of rules also applies to advertising, teleshopping and self-promotion channels, exception made for those concerning insertion and quantity (Article 25 AVMSD).

2.1.3.1. Presentation

Article 19(1) AVMSD provides for a general obligation to be “readily recognisable and distinguishable from editorial content”. This principle of separation can be accomplished either by optical means (for example, a pictogram shown on the screen) and/or acoustic means (for example, a sound announcing the start of the advertising) and/or spatial means (for example, split-screen solutions). These means should not prevent the use of new advertising techniques.

In order not to impair the integrity of programmes, Article 19(2) AVMSD provides that isolated advertising and teleshopping spots should remain the exception. The ratio of this provision, which opens up for a derogation in the case of the transmission of sport events, is explained in the “Interpretative communication of 2004 on certain aspects of the provisions on televised advertising in the “Television without frontiers” Directive”⁷³ which remains, limitedly to linear broadcasting, still applicable with regard to the provisions that remained substantially unchanged during the revision process of 2007. The practice of “mini-spots” used to concern primarily sports events, hereunder football matches where the natural intervals were extensively interpreted by several broadcasters so as to include the suspension of the game due to incidents. The Interpretative Communication opened up for isolated spots during games, provided that the principle of separation was maintained. This restriction was repealed by the AVMSD, which opened up for isolated spots without limitations during the transmission of sport events.

2.1.3.2. Frequency

The purpose of the rules concerning the frequency of advertising is notably to protect the integrity of the programmes, considering that the AVMSD “is intended to safeguard the specific character of European television, where advertising is preferably inserted between programmes” (Recital 86 AVMSD).

Should advertising be inserted during programmes, Article 20(1) AVMSD provides for a certain number of restrictions whereby they:

- should not prejudice the integrity of the programme during which they are inserted,

⁷³ European Commission, Interpretative communication on certain aspects of the provisions on televised advertising in the “Television without frontiers” Directive, [http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52004XC0428\(01\)](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52004XC0428(01)).



- should take into account the natural breaks, the duration and the nature of the concerned programme,
- should not prejudice the rights of the rightsholders.

For certain categories of programmes that would need particular protection because of their artistic value, Article 20(2) AVMSD restricts the insertion of advertising during films made for television, cinematographic works and news programmes to only once in each scheduled period of at least 30 minutes. In the case of children's programmes, the same rule applies, "provided that the scheduled duration of the programmes is greater than 30 minutes". In the case of the transmission of religious services, commercial communications are not allowed.

2.1.3.3. Content

Since the ban on commercial communications for cigarettes and other tobacco products is a general one, it has not been explicitly repeated in the set of rules applicable only to linear services. Nevertheless, Recital 88 recalls the importance of not limiting the application of the ban to direct promotion, and of addressing also indirect forms of advertising that may try to circumvent the ban "by using brand names, symbols or other distinctive features of tobacco products or of undertakings whose known or main activities include the production or sale of such products"

Considering that teleshopping implies a direct offer of products, and not only their promotion, the restrictions on medicinal products and treatments applicable to teleshopping are wider and include not only the cases of products available on prescription, but also where they are subject to a marketing authorisation (Article 21 AVMSD).

Specific restrictions have been introduced for alcoholic beverages under Article 22 AVMSD. In addition to the two limitations applicable to any kind of commercial communications, namely that alcohol advertising should not be aimed at minors (Article 22(1)a AVMSD), and that it should not encourage immoderate consumption thereof (Article 22(1)e AVMSD), the following are provided:

- not link alcohol consumption to enhanced physical performance or to driving (Article 22(1)b AVMSD) nor to social or sexual success (Article 22(1)c AVMSD),
- not claim that alcohol has therapeutic qualities (Article 22(1)d AVMSD), or that alcohol is a positive quality of the beverage (Article 22(1)f AVMSD).

2.1.3.4. Quantity

Quantitative restrictions are by nature applicable only to linear transmission, where the scheduling of advertising can be determined in advance and is not dependent on the choices of the consumer, which would make their exposure to commercial communications unpredictable in advance.



Whereas there used to be a double limit under the previous "Television without frontiers" Directive (TVWFD), both in the original version of 1989⁷⁴ and in the revised one from 1997⁷⁵, with a daily limit whose aim it was to preserve viewers from an excessive quantity of advertising while at the same time preserving the overall distribution of resources between press and television, during the revision of 2007 account was taken of the fact that:

The limitation that existed on the amount of daily television advertising was largely theoretical. The hourly limit is more important since it also applies during 'prime time'. Therefore the daily limit should be abolished, while the hourly limit should be maintained for television advertising and teleshopping spots. (Recital 59 of the 2007 version of the TwFD).

As a result, in order to "give flexibility to broadcasters with regard to its insertion where this does not unduly impair the integrity of programmes" (Recital 85 AVMSD), according to Article 23(1) AVMSD advertising and teleshopping spots may not take up more than 20% of any given hour of broadcasting time, exception made for:

- broadcasters' announcements about their own programmes (self-promotion) or ancillary products directly derived from them (Article 23(2) AVMSD),
- public service messages and charity appeals broadcast free of charge (Recital 31 AVMSD).

With reference to teleshopping windows, Article 24 establishes a minimum duration limit of 15 minutes.

⁷⁴ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31989L0552>. Article 18(1) provided that "The amount of advertising shall not exceed 15 % of the daily transmission time. However, this percentage may be increased to 20 % to include forms of advertisements such as direct offers to the public for the sale, purchase or rental of products or for the provision of services, provided the amount of spot advertising does not exceed 15 %."

⁷⁵ Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:31997L0036>. The new text provided that: "The proportion of transmission time devoted to teleshopping spots, advertising spots and other forms of advertising, with the exception of teleshopping windows within the meaning of Article 18a, shall not exceed 20 % of the daily transmission time. The transmission time for advertising spots shall not exceed 15 % of the daily transmission time."



2.1.4. Sponsorship and product placement

2.1.4.1. General distinction

The distinction between sponsorship and product placement is quite subtle:

“Sponsorship” means any contribution made by public or private undertakings or natural persons not engaged in providing audiovisual media services or in the production of audiovisual works, to the financing of audiovisual media services or programmes with a view to promoting their name, trade mark, image, activities or products. (Article 1(1)k AVMSD)

“Product placement” means any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within a programme, in return for payment or for similar consideration. (Article 1(1)m AVMSD)

The decisive criterion distinguishing sponsorship from product placement is the fact that in product placement the reference to the product is built into the action of a programme. In contrast, sponsor references may be shown during programmes but are not part of a plot.

At the same time, sponsorship should also be kept distinct from advertising spots, given that the set of rules that apply to them are quite different. In this case, the decisive criterion should be drawn using the purpose of these forms of audiovisual commercial communications: the purpose of sponsorship is to promote the sponsor's name, trademark, image, activities or products by contributing to the financing of programmes, without making promotional references to the supply of the products themselves, whereas the purpose of advertising spots is precisely to promote this supply.

2.1.4.2. Specific rules applicable to sponsorship

Rules on sponsorship were already introduced in the TVWFD in view of its “growing importance [...] in the financing of programmes” (Recital 30 TVWFD). The main principles have remained unchanged over time and Article 10 AVMSD provides that sponsored content:

- Shall not be influenced so as to affect the editorial responsibility and editorial independence of the AVMS provider (Article 10(1)a AVMSD),
- Shall not directly encourage the purchase or rental of goods by making direct promotional references (Article 10(1)b AVMSD),
- Shall be clearly identified as such so as to inform the viewers of the existence of a sponsorship agreement (Article 10(1)c AVMSD)

In addition to these general rules, a ban on sponsorship is envisaged in the case of tobacco products (Article 10(2) AVMSD) and of medicinal products and treatments



available only on prescription in the country of origin of the AVMS provider (Article 10(3) AVMSD). Sponsorship is also banned in the case of current affairs programmes, but it is left to the member states whether to prohibit it also during children's programmes, documentaries and religious programmes (Article 10(4) AVMSD).

2.1.4.3. Specific rules applicable to product placement

Rules on product placement were introduced for the first time during the revision process that led to the approval of the AVMSD in 2007 so as to take account of the fact that “product placement is a reality in cinematographic works and in audiovisual works made for television” and “in order to ensure a level playing-field, and thus enhance the competitiveness of the European media industry” (Recital 91 AVMSD).

Considering the nature of product placement, which is placed “within” a programme, one of the main concerns of the legislator was to clearly distinguish it from surreptitious advertising, which applies to goods or services that are represented “in” programmes with the purpose of serving as advertising so as to mislead the public as to its nature (Article 1(1)j AVMSD)⁷⁶. For this purpose the opening statement of Article 11 AVMSD is that “Product placement shall be prohibited”.

The third paragraph paves the way for derogations by introducing an opting-out principle for member states wishing to allow it, but limitedly to a set of cases that form a so-called “positive list” (Recital 92 AVMSD) “unless a Member State decides otherwise” (Article 11(3) AVMSD). More precisely, the prohibition can be waived in the following circumstances:

- When there is payment, in the case of certain kinds of programmes (cinematographic works, films and series made for audiovisual media services, sports and light entertainment programmes),
- When there is no payment, in the case of production props or prizes.

Member states can decide differently and opt out, totally or partially, from this list of derogations. Recital 92 AVMSD mentions one example, “by permitting product placement only in programmes which have not been produced exclusively in that Member State”, but member states remain free to introduce further cases. The only non waivable case concerns children's programmes.

In light of the above-mentioned concern of ensuring an adequate distinction from surreptitious advertising, the second part of Article 11(3) defines a certain number of cumulative protection measures, which recall to a certain extent those concerning sponsorship, according to which:

⁷⁶ Article 1(1)j: “surreptitious audiovisual commercial communication” means the representation in words or pictures of goods, services, the name, the trademark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the media service provider to serve as advertising and might mislead the public as to its nature. Such representation shall, in particular, be considered as intentional if it is done in return for payment or for similar consideration”.



- Programmes featuring product placement shall not be influenced so as to “affect the responsibility and editorial independence of the media service provider” and shall not “directly encourage the purchase or rental of goods or services” nor give them “undue prominence” (Article 11(3), second part, letters a, b, c),
- Viewers must be clearly informed about the existence of product placement at the start and at the end of the programme and when a programme resumes after an advertising break (Article 11(3), second part, letter d).

Again, it is possible for member states to waive the requirements set by the Directive, but limitedly to the information obligations when the programme has neither been produced nor commissioned by the media service provider itself.

Further non waivable circumstances are defined by Article 11(4), which bans product placement of tobacco products and of medicinal products or treatments available only on prescription.

The article concerning product placement is probably one of the most articulated provisions of the AVMSD and results from the compromise exercise that was carried out during the revision process of the TVWFD. To summarise:

Table 1. Scheme of rules on product placement (Article 11 AVMSD)

General rule	Derogation cases	Possible waivers	Limits to waivers
Ban	When against payment in cinematographic works, films, TV series, sports programmes, light entertainment	Total or partial	Never allowed in children’s programmes
Ban	When for free in the case of production props or prizes	Total or partial	Never allowed in children’s programmes
Ban	Tobacco products or medicinal products on prescription	Never	Never
Requirements	- Not affect editorial responsibility of AVMS provider - Not encourage purchase or rental - Not give undue prominence	Total or partial	No restriction
Requirements	Inform viewers	Partial	Only in the case of third party programmes

Source: European Audiovisual Observatory



2.2. Directives mentioned in the AVMSD

As stated in the introduction to this Chapter, the AVMSD mentions various acts that might overlap with the scope of the AVMSD: the Unfair Commercial Practices Directive, the Tobacco Advertising Directive, the Directive concerning Medicinal Products for Human Use and the Regulation on Nutrition and Health Claims (Recital 82 AVMSD).

The present section will provide an overview of the most significant provisions contained therein.

2.2.1. Unfair Commercial Practices Directive

The Unfair Commercial Practices Directive (UCPD)⁷⁷ aims at contributing “to the proper functioning of the internal market” and at achieving “a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers’ economic interests.” (Article 1 UCPD). Annexed to the Directive is a blacklist of practices considered unfair in all circumstances.

The UCPD applies to unfair commercial practices occurring in audiovisual media services, such as misleading and aggressive practices, to the extent that they are not covered by the provisions mentioned above.⁷⁸

With regard to the interplay between this Directive and the AVMSD, it could be argued that they are applicable to providers of audiovisual media services and advertisers alongside the AVMSD, even if recital 82 AVMSD negates the parallel application of these legal instruments. Art. 2(d) UCPD identifies commercial communication and in particular advertising as a business-to-consumer commercial practice; therefore, these directives may play a role in the relationship between (i) service providers and advertisers themselves and (ii) service providers and users of audiovisual media services.

Unfair commercial practices are prohibited (Art. 5(1) UCPD). They are defined as:

- practices contrary to the requirements of professional diligence, which
- materially distort or are likely to materially distort the economic behaviour with regard to the product of
 - the average consumer whom it reaches or to whom it is addressed,

⁷⁷ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32005L0029&from=EN>.

⁷⁸ See Commission Staff Working Document - Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices, http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf.



- or of the average member of the group when a commercial practice is directed to a particular group of consumers.

Moreover, “commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group.” However, making exaggerated statements or statements which are not meant to be taken literally is considered a “common and legitimate advertising practice” (Article 5(3) UCPD).

2.2.2. Tobacco Advertising Directive

The Tobacco Advertising Directive (TAD)⁷⁹ regulates tobacco advertising and promotion in the printed media, on radio, in information society services and through tobacco-related sponsorship.⁸⁰ The TAD excludes audiovisual media services from its scope as these services are regulated by the AVMSD.⁸¹

Article 2 TAD introduces the following definitions:

- “tobacco products” means all products intended to be smoked, sniffed, sucked or chewed inasmuch as they are made, even partly, of tobacco;
- “advertising” means any form of commercial communications with the aim or direct or indirect effect of promoting a tobacco product;
- “sponsorship” means any form of public or private contribution to any event, activity or individual with the aim or direct or indirect effect of promoting a tobacco product;

The prohibition of advertising tobacco products is medium-dependent:

⁷⁹ Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32003L0033&from=EN>. See also, Corrigendum [2004] OJ L 67/34. The legality of the directive was confirmed by the Court of Justice of the European Union in December 2006, see Chapter 5.2.2. of this publication.

⁸⁰ In addition to this, a non-binding Council recommendation urges EU governments to take various measures to limit advertising in their countries, see Council Recommendation of 2 December 2002 on the prevention of smoking and on initiatives to improve tobacco control, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32003H0054&from=EN>. Furthermore, Directive 2014/40/EU extended the EU rules on tobacco advertising and promotion to electronic cigarettes, see Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0040&from=EN>.

⁸¹ See Chapter 2.1.



- Press and printed publications: advertising is banned except for publications intended exclusively for the tobacco trade, or those printed and published outside the European Union and not intended for an EU audience.
- Radio: all forms of advertising are banned. Programmes may not be sponsored by companies whose main activity is the manufacture and sale of tobacco.
- Sponsorship: this is banned for all events and activities involving or taking place in more than one EU country. The ban extends to the free distribution of tobacco products.⁸²

In May 2008, the European Commission published a report on the Directive's implementation.⁸³

2.2.3. Directive concerning Medicinal Products for Human Use

The Directive concerning Medicinal Products for Human Use (MPD)⁸⁴ applies to medicinal products "intended to be placed on the market in Member States".⁸⁵ It regulates in its Title VIII the advertising of medicinal products, which shall include any form of door-to-door information, canvassing activity or inducement designed to promote the prescription, supply, sale or consumption of medicinal products. This definition includes the advertising of medicinal products to the general public in audiovisual media services or information society services.

The MPD contains two rules that run parallel to the AVMSD:

- Article 87(1) MPD prohibits any advertising of a medicinal product in respect of which a marketing authorisation has not been granted in accordance with EU law. Article 21 AVMSD contains the same rule in regard of teleshopping.
- Article 88(1) MPD prohibits the advertising to the general public of medicinal products which are available on medical prescription only, a ban which is also explicitly stipulated in the AVMSD. The same rule is contained in Art. 9(1)f AVMSD.

⁸² See summary of Directive 2003/33/EC on advertising and sponsorship of tobacco products, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:c11571&from=EN>.

⁸³ Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee - Report on the implementation of the tobacco advertising directive (2003/33/EC), <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52008DC0330&from=EN>.

⁸⁴ Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001L0083&from=en>.

⁸⁵ Art. 2(1) MPD.



2.2.4. Directive concerning Misleading and Comparative Advertising

The Directive concerning Misleading and Comparative Advertising (MCAD)⁸⁶ aims at protecting traders against misleading advertising and the unfair consequences thereof and to lay down the conditions under which comparative advertising is permitted.

The MCAD provides the following definitions:

- ‘advertising’ means the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations (Article 2(a) MCAD);
- ‘misleading advertising’ means any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor (Article 2(b) MCAD);
- ‘comparative advertising’ means any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor (Article 2(c) MCAD);

According to Article 5 MCAD, misleading advertising is to be eliminated in the internal market. Accordingly, Article 3 MCAD explains that, for the determination of advertising as misleading, account shall be taken of all its features, and in particular of any information it contains concerning:

- the characteristics of goods or services, such as their availability, nature, execution, composition, method and date of manufacture or provision, fitness for purpose, uses, quantity, specification, geographical or commercial origin or the results to be expected from their use, or the results and material features of tests or checks carried out on the goods or services;
- the price or the manner in which the price is calculated, and the conditions on which the goods are supplied or the services provided;
- the nature, attributes and rights of the advertiser, such as his identity and assets, his qualifications and ownership of industrial, commercial or intellectual property rights or his awards and distinctions.

According to Article 4 MCAD, comparative advertising is allowed under the following conditions:

- it is not misleading within the meaning defined by the MCAD and the UCPD;
- it compares goods or services meeting the same needs or intended for the same purpose;

⁸⁶ Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version), <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32006L0114&from=EN>.



- it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;
- it does not discredit or denigrate the trademarks, trade names, other distinguishing marks, goods, services, activities or circumstances of a competitor;
- for products with designation of origin, it relates in each case to products with the same designation;
- it does not take unfair advantage of the reputation of a trademark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;
- it does not present goods or services as imitations or replicas of goods or services bearing a protected trademark or trade name;
- it does not create confusion among traders, between the advertiser and a competitor or between the advertiser's trademarks, trade names, other distinguishing marks, goods or services and those of a competitor.

2.3. Other AVMSD relevant directives

2.3.1. e-Commerce Directive

The e-Commerce Directive (ECD)⁸⁷ seeks to “contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States.” To this effect, it approximates certain national provisions on information society services relating among others to commercial communications.

For the purpose of this Directive, Article 2(f) ECD defines commercial communications as “any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession.” Excluded from this definition are:

- information allowing direct access to the activity of the company, organisation or person, like domain names or electronic-mail addresses,
- communications relating to the goods, services or image of the company, organisation or person compiled in an independent manner, particularly when this is without financial consideration.

Article 5 ECD lists the general information to be rendered accessible by a service provider. Moreover, Article 6 ECD enumerates the conditions that commercial communications “which are part of, or constitute, an information society service” shall comply with:

⁸⁷ 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’), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:en:HTML>.



- the commercial communication shall be clearly identifiable as such;
- the natural or legal person on whose behalf the commercial communication is made shall be clearly identifiable;
- promotional offers, such as discounts, premiums and gifts, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions which are to be met to qualify for them shall be easily accessible and be presented clearly and unambiguously;
- promotional competitions or games, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented clearly and unambiguously.

With regard to unsolicited commercial communication by electronic mail, Article 7 ECD requires that such commercial communication “shall be identifiable clearly and unambiguously as such as soon as it is received by the recipient.”



3. National transposition

Pursuant to Article 33 AVMSD, every three years, the European Commission must submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of the Directive. Among the aspects of the Directive covered by the report, the European Commission shall assess the television advertising accompanying or included in children's programmes, and examine whether the quantitative and qualitative rules contained in the directive have afforded the required level of protection.

The first application report was issued by the Commission on 4 May 2012 and it related to the period 2009-2010.⁸⁸ The report highlighted issues in relation to consumer protection, and particularly to the protection of minors, in audiovisual commercial communications and called for assessing whether the AVMSD still attains its consumer protection objectives in a converging media world. The second report, which was issued on 25 May 2016 in the context of the REFIT evaluation of the AVMSD⁸⁹ for the period 2011-2013, expressed some concern in relation to the application of rules for certain types of commercial communications.

3.1. Implementation of general qualitative restrictions

As described in Chapter 2 of this publication, the AVMSD provides for general rules that apply to all audiovisual media services. These include the qualitative standards applicable to all audiovisual commercial communications, as well as the requirements for or limitations to the inclusion of certain products or services, as set out in Article 9 AVMSD.⁹⁰

⁸⁸ Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2010/13/EU "Audiovisual Media Service Directive", Audiovisual Media Services and Connected Devices: Past and Future Perspectives (COM(2012) 203 final), 4 May 2012, <http://ec.europa.eu/transparency/regdoc/rep/1/2012/EN/1-2012-203-EN-F1-1.Pdf>.

⁸⁹ Commission Staff Working Document, Ex-post REFIT evaluation of the Audiovisual Media Services Directive 2010/13/EU, *Accompanying the document* Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the collaboration of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, Brussels, 25 May 2016, SWD(2016) 170 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0170&from=EN>.

⁹⁰ For further details, see Section 2.1.2. of this publication.



The implementation of the qualitative restrictions on advertising – alcohol advertising, gender discrimination and advertising targeting minors - was monitored for the first time in eight member states in the 2012 report covering the period 2009-2010, and more recently in ten member states in the 2016 report, as part of the REFIT evaluation of the AVMSD over the period 2011-2013.

The 2012 report showed that 22 member states had put in place stricter rules than required by the Directive concerning alcohol advertising. This represented between 0,8% and 3% of all overall advertising activity on audiovisual media services, based on the total number of spots broadcast over the period 2009-2010. This proportion went down slightly to 0,7% and 2,4% in the next monitored period covering 2011-2013.

Over these two periods, very few cases of clear infringement of the provisions of the AVMSD were found in the member states monitored. However, both monitoring exercises stress that some advertising techniques geared towards minors are frequently used in television advertising (for example, music, humour, young-looking protagonists, etc.).

As far as the protection of minors in advertising is concerned, both the 2012 and the 2016 reports found that the Directive's provisions were seldom contravened. As with alcohol advertising, because of the detailed wording of the relevant provisions, there are few infringements of the AVMSD. However, here too the main issue is the use of techniques that can attract the attention of young audiences. It is worth noting that, in general, advertising is, together with the protection of minors, the main area where member states have adopted new stricter rules over the last few years.

In the field of discriminations in commercial communications, the 2012 report highlighted some types of sex discrimination and gender stereotypes in advertising spots, especially as regards the stereotyped representation of gender roles in 21% to 36% of the spots analysed.

3.2. Implementation of the stricter qualitative restrictions applicable to sponsorship and product placement

As explained in Chapter 2 of this publication, stricter qualitative rules are provided for sponsorship and product placement, due to the fact that this form of commercial communication is less evident to identify than commercial communication from the viewer's perspective. Accordingly, the AVMSD provides that product placement shall be prohibited (Article 11(2) AVMSD), although certain derogations are allowed, in certain types of programmes such as cinematographic works, films, series and other light entertainment formats (Article 11(3) AVMSD). In practice, this derogation may cover most formats, except for children's programmes, where product placement is expressly banned, or news and current affairs programmes, and where there is no payment but only the



provision of certain goods or services free of charge (such as production props and prizes), with a view to their inclusion in a programme (Article 11(3) AVMSD).⁹¹

According to the 2016 report of the Commission for the years 2011-2013, 17 member states⁹² have transposed stricter rules than set forth in the Directive as far as product placement is concerned, based on different cultural and social grounds. Some member states have broadened the scope of the programmes in which product placement is prohibited, either to refer expressly to news programmes (Belgium- French community,⁹³ Bulgaria,⁹⁴ Hungary⁹⁵), religious programmes (Bulgaria, Hungary) or political programmes and programmes dedicated to reporting on official events (Hungary).

Other countries have chosen to allow product placement only on TV and in cinematographic films and music video clips (France),⁹⁶ or to impose stricter rules on nationally-produced TV programmes (Denmark,⁹⁷ United Kingdom⁹⁸).

Other limitations can be found at national level, such as in relation to the conditions imposed on product placement in certain programme formats (limited to a maximum of 3 minutes in cinematographic films and 1 minute for series, sports and light entertainment programmes in Cyprus)⁹⁹ or through a narrow definition of “light entertainment programmes (Germany).¹⁰⁰

On the contrary, some member states have focused on the type of broadcasters concerned by introducing a ban on product placement only for public service broadcasters

⁹¹ For further details, see Section 2.1.4.3. of this publication.

⁹² Austria, Belgium (Flemish and French Communities), Bulgaria, Cyprus, Germany, Denmark, Estonia, Spain, France, Hungary, Lithuania, Malta, Netherlands, Poland, Portugal, Sweden, United Kingdom.

⁹³ Articles 21.1 and 21.2, Décret coordonné sur les services de médias audiovisuels (CSA consolidated version of 8 July 2016), <http://www.csa.be/documents/1440>.

⁹⁴ Articles 83 and 84, Radio and Television Act (consolidated version of 2017), http://www.cem.bg/files/1506340921_zrt_15092017.pdf; Consolidated version of 2011 also available in English at: https://www.mtitc.government.bg/upload/docs/Radio_and_Television_Act_en.pdf.

⁹⁵ Article 30, Act CLXXV of 2010 On Media Services and Mass Media (consolidated version of 2015), (in English), http://hunmedialaw.org/dokumentum/153/Mttv_110803_EN_final.pdf.

⁹⁶ Article 14.1 and Title IV, Law no 86-1067 of 30 September 1986 on the Freedom of communication (consolidated version 2016),

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000512205&fastPos=1&fastReqId=78965485&categorieLien=cid&oldAction=rechTexte>; Délibération no 2010-4 du 16 février 2010 relative au placement de produit dans les programmes des services de télévision,

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000021920619>.

⁹⁷ Article 85.a, Radio and Television Broadcasting Act (consolidated version 2016), <https://www.retsinformation.dk/Forms/R0710.aspx?id=181623>; Article 31(1) and 32, Executive Order on advertising and sponsorship, 21 June 2013, <https://www.retsinformation.dk/pdfPrint.aspx?id=152695>.

⁹⁸ Article 368H, The Audiovisual Media Services Regulations 2009, http://www.legislation.gov.uk/uksi/2009/2979/pdfs/uksi_20092979_en.pdf; See also Ofcom Broadcasting Code, Section 9, <https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code>.

⁹⁹ Article 30G. (2) and (3), Law on Radio and Television Organisations, consolidated version of 2016, http://www.cylaw.org/nomoi/enop/non-ind/1998_1_7/full.html.

¹⁰⁰ Articles 7(7), 15, 44, Interstate Treaty on Broadcasting and Telemedia (consolidated version 2017), https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Rundfunkstaatsvertrag_RStV.pdf.



(Belgium-Flemish community,¹⁰¹ the Netherlands,¹⁰² Bulgaria with certain derogations concerning cinematographic works, films and series) or they have limited the prohibition to regional broadcasters (Austria).¹⁰³

Similar to the general standards laid down in Article 9 AVMSD, the product placement of cigarettes and other tobacco products, as well as that of medicinal products and medical treatments, is prohibited under Article 11(4) AVMSD. Although the advertising of alcoholic beverages is allowed in principle,¹⁰⁴ many member states have opted to add alcohol and spirits to the list of prohibited products. This is the case in Austria, France, Malta (during the watershed),¹⁰⁵ the Netherlands (no product placement for alcoholic drinks between 06:00 and 21:00 for commercial broadcasters – a complete ban for the public service broadcaster), Sweden,¹⁰⁶ Slovenia,¹⁰⁷ and the United Kingdom (for programmes produced under UK jurisdiction).

Some countries have also prohibited the product placement of products considered as prejudicial for babies and young children (baby food in France, baby milk in the United Kingdom, or toys in Cyprus).

Products generally considered as unhealthy (Portugal,¹⁰⁸ Spain, “fatty” food in the United Kingdom on UK produced programmes) or products which are harmful for the environment are also excluded from product placement in certain countries.

Other types of products may be prohibited, such as gambling (United Kingdom, Malta during watershed), or weapons (France).

¹⁰¹ Articles 50(3), 99, 100, Act on Radio and Television Broadcasting (consolidated of 12 August 2014 (in English),

http://www.vlaamseregulatormedia.be/sites/default/files/act_on_radio_and_television_broadcasting.pdf, also available in Flemish at:

<http://www.vlaamseregulatormedia.be/nl/search/website?searchKey=sites%20default%20files%20mediadecreet%20270309%20pdf.n>.

¹⁰² Articles 2.88b, 3.19a, Act no 552 amending the media Act 2008 and the <http://wetten.overheid.nl/BWBR0025040/2017-04-01>; Tobacco Act for the implementation of the Audiovisual Media Services Directive, 10 December 2009, <https://zoek.officielebekendmakingen.nl/stb-2009-552.html>.

¹⁰³ Articles 16. (2) and (4), Federal Act on the Austrian Broadcasting Corporation (ORF-G), (consolidated 13 August 2015), <https://www.rtr.at/de/m/ORFG>.

¹⁰⁴ It is only limited in the sense that the commercials are not allowed to be directly “aimed at minors” and must not “encourage immoderate consumption of such beverages” under Art. 9(1)(e) AVMSD. For further details, please see at Chapter II of this publication.

¹⁰⁵ Article 16M, Broadcasting Act (Cap. 350) (consolidated version of 2015, in English), https://www.google.fr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0ahUKEwjv2orQ2_TTAhWEvRoKHVOBD0cQFggwMAE&url=http%3A%2F%2Fwww.ba-malta.org%2Ffile.aspx%3Ff%3D262&usq=AFQjCNFepcWveRoEYUDIFsxLOTYD6n3FIQ&sig2=3wnGeMphiW6kBUmQBab_MO&cad=rja.

¹⁰⁶ Chapter 6, Section 11, Radio and Television Act, consolidated 17 June 2010, http://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/radio--och-tv-lag-2010696_sfs-2010-696.

¹⁰⁷ Audiovisual Media Services Act (ZAvMS), (consolidated version 2015), <http://pisis.si/Pis.web/pregledPredpisa?id=ZAKO6225>.

¹⁰⁸ Article 41, Law of 11 April 2011 amending the Television Act of 2007 (in English), <https://www.anacom.pt/render.jsp?contentId=1105532>; Law 37/2007 of 14 August (Tobacco Act), http://data.euro.who.int/tobacco/Repository/PT/Portugal_Law%20no.37.2007%20of%2014%20August_2007.pdf.



Concerning the derogation allowed under Article 11(2)b) AVMSD for production props and prizes, 11 member states have opted for a stricter approach than the Directive by prohibiting derogations in children's programmes (Belgium-French and Flemish communities - limited to the public service broadcaster in the latter case -, Cyprus, Germany, Estonia, Spain, Finland, Poland, Portugal, United Kingdom).

Some countries also expressly prohibit derogations for production props and prizes in news and/or political programmes (Belgium-French community, Bulgaria, Hungary, Lithuania).

For a more comprehensive overview of the national implementation of the AVMSD provisions on product placement in the EU-28, please refer to Table 2 in the Annex to this publication.

3.3. Implementation of the quantitative restrictions applicable to linear transmissions

Besides the general qualitative rules applicable to all audiovisual commercial communications, the AVMSD also provides for detailed quantitative restrictions that only concern television broadcasting. Thus, according to Article 23 AVMSD, the proportion of advertising and teleshopping spots within a given clock hour shall not exceed 20% (the so-called "12-minute rule"). In addition, the directive defines how often TV films, cinematographic works and news programmes may be interrupted by advertisements and/or teleshopping.¹⁰⁹

3.3.1. Diverging interpretative issues of key concepts

Although the AVMSD provides for definitions of the various forms used to promote goods and services covered by the term "audiovisual commercial communication", such as "sponsorship", "self-promotion" and "product placement", member states have implemented the concept of "advertising spots" in different ways. These diverging interpretations have given rise to some discussions at national level with respect to the implementation of the 12-minute rule.

An illustration of these interpretative issues was given in the 2012 application report with the example of Spain, where certain special commercial formats ("*anuncios publicitarios de patrocinio*", "*microespacios*", "merchandising spots", "telepromotion spots", etc.)¹¹⁰ were not qualified by Spanish authorities as advertising spots and hence did not

¹⁰⁹ For further details, see Section 2.1.3.4. of this publication.

¹¹⁰ See Article 14.1 and 15.1 of Spanish General Law No. 7/2010 of 31 March on Audiovisual Media – consolidated 1 May 2015, <https://www.boe.es/buscar/act.php?id=BOE-A-2010-5292>.



fall under the 12-minute rule, although such formats were considered by the European Commission as “clearly promotional”.¹¹¹

The Court of Justice of the European Union (CJEU) has brought some clarifications about the scope of the definition of “advertising spot” by adopting a wide interpretation of this notion which shall include

*any type of advertising broadcast between programmes or during breaks, unless it is covered by another form of advertising expressly governed by the AVMSD or unless it requires, because of the way it is presented, a duration greater than that of advertising spots, on condition that an application of the restrictions prescribed for advertising spots would, without valid justification, amount to disadvantaging the form of advertising concerned.*¹¹²

However, despite this clarification, the latest monitoring of advertising practices carried out by the European Commission still revealed a number of issues in the area of commercial communications concerning the scope of concepts of “sponsorship”, “self-promotion” and “product placement”. In particular, the 2016 application report showed that the main issue in relation to sponsorship announcements was their potential undue promotional character and the interpretation to give to this notion. In some member states, sponsorship announcements were closer to shorter forms of advertising spots.

Product placement, on the other hand, raised the issue of undue prominence and lack of indication in some programmes in certain countries. Furthermore, the monitoring exercise revealed in some marginal cases that some spots did not always clearly fulfil the characteristics of self-promotion and would have to be counted in the 12-minute rule.

These diverging interpretations have led, according to the European Commission, to fragmentation between member states and, in some cases, they have contributed to an increase in the number of breaches of the 12-minute rule.

3.3.2. Implementation of the 12-minute rule

Most of the member states have transposed almost verbatim Article 23(1) AVMSD by limiting the maximum time allowed for advertisements and teleshopping to 20% or 12 minutes per hour.

Some member states have introduced stricter rules for public service broadcasters (Belgium-French community, Bulgaria, France, Germany, Latvia), conditional access television services (Portugal), or different minutage for channels covering areas of 10 million inhabitants (France).

¹¹¹ See First Report on the application of Directive 2010/13/EU, 4 May 2012, cit., p. 6.

¹¹² Case C-281/09, Commission/Spain, 24 November 2011. For further details on caselaw, see Chapter 5 of this publication.



Likewise, the exceptions foreseen by Article 23(2) AVMSD have been transposed almost verbatim in most member states. As well as self-promotion by broadcasters, some countries have excluded sponsorship and product placement, the advertising of cinematographic works (co-)financed by the public service broadcaster (Austria), virtual advertising (Belgium-French community), and the promotion of European works (Bulgaria).

A few member states have also excluded charity communications and public benefit causes (Bulgaria, Czech Republic, Germany) or ideological and social advertising (Finland, Greece).

For a more comprehensive overview of the national implementation of the 12-minute rule in the EU-28, please refer to Table 3 in the Annex of this publication.





4. Self and co-regulation

4.1. International standards of self- and co-regulation in the advertising sector

Self- and co-regulation (SR/CR) has traditionally played an important role in regulating the advertising industry. This is due in part to the interest of companies themselves in safeguarding fair advertising practices in order to maintain consumers' trust in their products and brands. This interest resulted in a high degree of organisation in the sector, with a great number of associations at international, European and national levels.

According to the European Advertising Standards Alliance (EASA),¹¹³ SR/CR has also numerous advantages for consumers and regulators. From the consumer perspective, it provides an additional layer of protection, as consumers can complain quicker in the event of an advertiser breaching the standards fixed through SR/CR. For regulators, advertising standards complement regulation at no additional cost, as the cost of developing, implementing and enforcing these standards is borne by the local advertising ecosystem.

SR/CR in the advertising sector is made possible through the adoption of codes of conduct, either of a general scope or addressing specific sectors (for example, food, alcohol, toys, cosmetics..), a specific public (for example, children) or formats (all advertising formats or specific formats). The first of these codes to offer an integrated system of ethical rules for commercial communications at international level was the "International Code of Advertising and Marketing Communication Practice" (the "ICC Code").¹¹⁴ The ICC Code was adopted in 1937 by the International Chamber of Commerce ("ICC") and still serves today in its consolidated version as a basis for most self-regulatory codes worldwide, as well as a reference for many national legislators.

In particular, local codes founded on these international standards are designed by the local advertising ecosystem in consultation with stakeholders, reflecting the different cultural, business, legal and economic contexts. In practice, the advertising industry, composed of advertisers, agencies and the media, agree on a code in consultation with stakeholders, and set up an independent self-regulatory body (the "self-regulatory organisation", SRO), which then administers it.

¹¹³ See details at: <http://www.easa-alliance.org/>.

¹¹⁴ For further details, see the International Chamber of Commerce (ICC) Consolidated Code of Advertising and Marketing Communications Practices, at: <http://www.codescentre.com/downloads.aspx>.



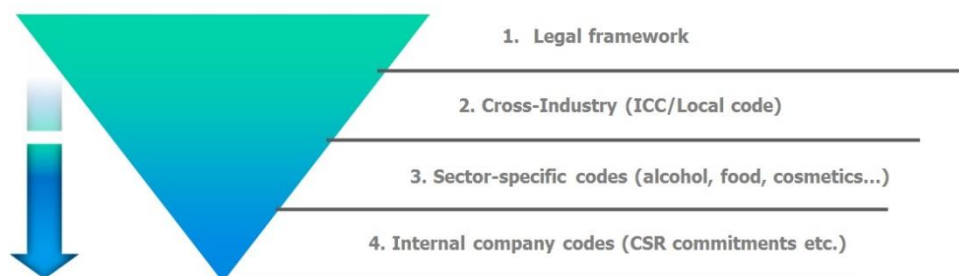
Depending on national sensibilities and the maturity of the SRO, codes might concern issues such as advertising and children, advertising and the environment, the advertising of particular products (for example alcohol, food or cosmetics) or a type of advertising across different media (for example digital).

The SRO is made up of the main stakeholders of the sector and is responsible for keeping the code up to date so that advertising standards will be able to respond to any new relevant developments in that field. The application of the code is usually overseen by the permanent secretariat of the SRO. Before the publication of advertising, this takes the form of copy advice or pre-clearance. The secretariat is also responsible for determining whether complaints are of substance in relation to the code.

Complaints regarding advertising can generally be filed with the SRO, either by the general public or by competitors. In this case, an independent and impartial jury is responsible for interpreting the code and deciding on sanctions. Sanctions may consist in the amendment or withdrawal of an advertisement (a very costly process for the advertisers); the publication of decisions (which generates adverse publicity for advertisers – so-called "name and shame" by the sector); compulsory pre-clearance for advertisers who frequently breach the rules; expulsion from trade organisations; and in extreme cases, referral to the relevant authorities.

Although sanctions are not binding on parties, it is worth noting that the industry players are generally willing to comply with them as they have a stake in the system. In cases where they don't, the SRO will ask the media to stop running the advertising spot. According to the EASA, it is considered best practice to have an appeals procedure in place to facilitate due process.¹¹⁵

Figure 1. The hierarchy of rules applicable to the advertising sector



Source: European Advertising Standards Alliance (EASA) website, available at: <http://www.easa-alliance.org/ad-standards/what-are-ad-standards/regulatory-framework>

¹¹⁵ For more details, see: <http://www.easa-alliance.org/ad-standards/what-are-ad-standards/systems>. See also: <https://iccwbo.org/publication/advertising-and-marketing-communication-practice-consolidated-icc-code/>; <http://www.codescentre.com/>.



4.2. EU promotion of self and co-regulation in the advertising sector

4.2.1. General obligation of promotion under EU law

The AVMSD imposes an obligation on member states to encourage the development of SR/CR mechanisms¹¹⁶ in the fields coordinated by the Directive (for example, advertising, the protection of minors, accessibility) to the extent permitted by their legal systems.¹¹⁷ Such mechanisms shall be “broadly accepted” by the main stakeholders, meaning that they shall have representativeness. Furthermore, they shall be effective, meaning that the member states should provide effective enforcement.

SR/CR should not be seen as a substitute for the obligations of the national legislator, but rather as a complement to the legislative and judicial and/or administrative mechanisms in place.¹¹⁸ As a complementary method of implementing certain provisions of the Directive, self-regulation shall be in line with the national legal framework implementing the Directive. The rationale behind this approach is that “measures aimed at achieving public interest objectives in the emerging audiovisual media services sector are more effective if they are taken with the active support of the service providers themselves.”¹¹⁹

Article 4 AVMSD gives member states a wide margin of discretion as to the means of encouragement. Depending on whether the transposition is done by a member state with a long tradition of SR/CR or by a member state where SR/CR is hardly or only recently being used, the transposition measures differ significantly. The European Commission monitors the implementation of this provision through its regular application reports.

Other EU Directives also recognise SR/CR as a useful means in the advertising field. This is the case for the Unfair Commercial Practices Directive, which authorises member states to encourage the use of codes of conducts, and allows recourse to SROs by consumers against unfair commercial practices such as misleading or aggressive advertisements.¹²⁰ Likewise, the E-Commerce Directive makes an explicit reference to codes of conduct at Community level as the best means to regulate professional ethics in

¹¹⁶ According to Recital 44, AVMSD, “self-regulation constitutes a type of voluntary initiative which enables economic operators, social partners, non-governmental organisations or associations to adopt common guidelines amongst themselves and for themselves.” Self-regulation is described as a complementary method of implementing certain legal requirements and should not constitute a substitute for the obligations of the national legislator. On the other hand, Recital 44 defines “co-regulation”, as giving “in its minimal form, a legal link between self-regulation and the national legislator in accordance with the legal tradition of the Member States.”

¹¹⁷ Article 4(7) AVMSD.

¹¹⁸ Recital 44, paragraph 2 AVMSD.

¹¹⁹ Recital 44, paragraph 1 AVMSD.

¹²⁰ Article 10 UCPD. See section 2.2.1. on other relevant provisions of this Directive.



relation to commercial communications in an online environment.¹²¹ Member States and the Commission shall encourage professional associations and bodies to develop codes of conduct, for instance regarding the practical implementation of the information requirements for advertisers.¹²²

In an area such as the processing of personal data, which is increasingly related to the advertising field, the EU legislator has also recently recognised the usefulness of codes of conducts to provide guidance on the application of the General Data Protection Regulation (“GDPR”).¹²³ This recognition paves the way for future developments of codes of conducts and guidelines in relation, for example, to the collection of children’s personal data for behavioural advertising purposes and parental consent and verification mechanisms.¹²⁴

4.2.2. Self and co-regulation in commercial communications of specific products

4.2.2.1. Unhealthy foods and beverages

In view of the growing challenges to health posed by the obesity epidemic, the issue of protecting children in particular from the impact of commercial communication for energy-dense foods and beverages has become a policy priority at international and EU level in recent years.

In 2006, the Ministers attending the World Health Organisation (WHO) Conference on Counteracting Obesity signed the European Charter on Counteracting Obesity, which calls for the development of codes on marketing food to children. As a follow-up to this Charter, in 2007, the European Commission adopted a White Paper on “A strategy for Europe on nutrition, overweight and obesity related health issues.”, where it called for voluntary initiatives in this field.

Several networks and platforms were established, such as the European Network on reducing marketing pressure on children, which was created in January 2008 under the chairmanship of the Norwegian Directorate of Health and which currently consists of 20 countries in the WHO European Region. The WHO network discusses approaches to controlling the marketing of food and non-alcoholic beverage to children, including SR/CR and voluntary measures, and presented a code on marketing food and non-

¹²¹ Recital 32 ECD.

¹²² Article 8(2) ECD.

¹²³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), http://ec.europa.eu/justice/data-protection/reform/files/regulation_oj_en.pdf.

¹²⁴ For further details, see Verdoodt V., Lambrecht I. and Lievens E. (2016). Mapping and analysis of the current self and co-regulatory framework of commercial communication aimed at minors. A report in the framework of the AdLit research project, www.AdLit.be.



alcoholic beverages towards children. Many other organisations are also active in relation to food marketing aimed at children and have developed recommendations and codes of conducts.

At the regulatory level, besides the general obligation to promote SR/CR, the AVMS Directive created a specific obligation for the member states and the European Commission to encourage media service providers to develop codes of conduct regarding the inappropriate advertising of unhealthy foods and beverages (foods high in fat, salt and sugar - HFSS) accompanying or included in children's programmes.¹²⁵ Accordingly, the European Commission and the member states are obliged to encourage media service providers (both linear and on-demand) to develop codes of conduct in this respective area. Their activities or lack of activities will be subject to a monitoring and reporting obligation.

The term "code of conduct" (or "deontological" code) refers to voluntary rules (self-regulation) set by the audiovisual media service providers themselves or in cooperation with other sectors (for example, the food and advertising industries). The codes should cover audiovisual commercial communications – *inter alia* traditional television advertising, sponsorship, teleshopping and product placement for HFSS foods.

4.2.2.2. Alcohol

Due to the major public health issue represented by alcohol consumption in the European Union, many SR/CR initiatives have been launched by the industry in relation to commercial communications for alcoholic beverages.

One example of these initiatives was the Responsible Marketing Pact (RMP),¹²⁶ which was launched in June 2015 by the leading producers cooperating in the World Advertising Federation (WFA); this pact was aimed at creating common standards supported by beer, wine and spirit producers throughout the European Union with a view to reducing visibility and minimising the appeal of alcohol marketing communications amongst minors.

At sector level, three trade associations (spiritsEUROPE, The Brewers of Europe and the *Comité Européen des Entreprises Vins*) have adopted sector-specific guidelines to complement existing national codes, legislations, principles and self-regulation initiatives from the industry to promote responsible marketing communications.¹²⁷

¹²⁵ Article 9(2) AVMSD.

¹²⁶ <http://pledge.brewersofeurope.eu/commercial-communications/responsible-marketing-pact/>.

¹²⁷ For more details, see the SpiritsEUROPE Guidelines for the Development of Responsible Marketing Communications, 2012, [http://spirits.eu/upload/files/publications/SE_CommStand_2015_EN_v1a\(low\).pdf](http://spirits.eu/upload/files/publications/SE_CommStand_2015_EN_v1a(low).pdf); Responsible Commercial Communications – Guidelines for the Brewing Industry, 2003, <http://www.brewersofeurope.org/uploads/mycms-files/documents/archives/publications/guidelines.pdf>; EU wine Communications Standards (2009), https://www.wineinmoderation.eu/files/Programme_Toolkit/WIM-WCS_EN_final.pdf.



At company level too, leading producers of alcoholic beverages often adopted their own guidelines and codes of conduct based on the Digital Guiding Principles (DGPs)¹²⁸ and the RMP.

4.2.3. Overview of self and co-regulatory schemes in commercial communications in the EU-28

4.2.3.1. The effectiveness of SR/CR schemes in commercial communications

In the framework of the REFIT evaluation of the AVMSD, the European Commission commissioned a study on the effectiveness of SR/CR in the context of implementing the AVMSD.¹²⁹ SR/CR mechanisms were assessed in two areas covered by the AVMSD, namely audiovisual commercial communications and the protection of minors against harmful content.

In general terms, SR/CR schemes were considered, under certain circumstances, as efficient approaches, providing higher chances of industry accountability, faster-paced decision making and greater sustainability.

The Panteia/VVA study highlighted the importance of national environments and contexts when analysing SR/CR schemes in place across Europe. Some of the key contextual factors that were identified include:

- Political and social will;
- Cultural norms;
- Economic considerations;
- Existing legal frameworks;
- Technological developments.

As far as audiovisual commercial communications are concerned, the study revealed that the vast majority of member states have put in place SR/CR schemes¹³⁰ that often complement and detail a broad statutory regulation, such as the law on broadcasting or on audiovisual media. In most cases, these schemes are based on the standards set out at international level in the ICC code.

National advertising codes of conduct differ from one country to another, mainly in the level of detail and importance, but also in terms of focus. In fact, some countries choose to give priority to ethical or deontological considerations, whereas others opt for a

¹²⁸ <http://eucam.info/wp-content/uploads/2014/04/IARD-DigitalGuidingPrinciples.pdf>.

¹²⁹ See Panteia and VVA Europe Valdani & Associati, “The effectiveness of self and co-regulation in the context of implementing the AVMS Directive”, April 2016, http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=15796.

¹³⁰ According to the Panteia/VVA study, cit., the distinction between self- and co-regulation is not always clear; some organisations and individuals use the terms differently.



more pragmatic approach, for example with specific rules on content. Despite these differences, the Panteia/VVA study¹³¹ reports a good level of sharing of information and experiences amongst member states and the various SROs and scheme owners, in particular through organisations such as EASA Alliance,¹³² with its best practice recommendations and its system for cross-border complaints.

Concerning the representation of stakeholders in SR/CR schemes, media and broadcasting companies and advertising companies alike were reported as almost always involved, with regulators also present in many cases. However, the findings show that consumer groups and civil society organisations were often not represented in the development of the majority of the schemes identified.

In terms of implementation and efficiency, in most of the schemes identified, the specification of formal objectives and specific targets and indicators was not formalised, contrary to what the “Principles for Better Self- and Co-Regulation”¹³³ recommend to help evaluate a scheme and improve it. On many occasions, the implementation and monitoring of SR/CR mechanisms refer to the use of consumer complaints as an indicator for compliance.

This is also one of the conclusions reached by the European Commission in its 2016 Application report¹³⁴ in which it stresses that the majority of regulatory bodies do not monitor the implementation of the codes of conduct, except where co-regulatory systems are in place. They rely on the monitoring carried out by SROs, only a few of whom report to the regulator in the event of non-compliance. In those member states where statutory rules were adopted, the monitoring and enforcement activities are carried out regularly by the regulatory bodies.

For a comprehensive overview of the SR/CR schemes in commercial communications in the EU-28, please refer to Table 4 in the Annex to this publication.

¹³¹ See Panteia and VVA Europe Valdani & Associati (2016), cit., Annex 10.

¹³² <http://www.easa-alliance.org/>.

¹³³ The “Principles for Better Self- and Co-regulation” are designed to offer guidance in cases where two or more actors (public or private) decide to work together to improve the status quo, by resolving a problem or exploiting an opportunity. They offer a benchmark for effective SR/CR but are not final or comprehensive. For more information, see: <https://ec.europa.eu/digital-single-market/en/best-practice-principles-better-self-and-co-regulation>.

¹³⁴ See Second Report (2016) on the application of Directive 2010/13/EU, 25 May 2016, cit.





5. Case law

This chapter describes the most important judgments at international and national level concerning commercial communications. It starts with the jurisprudence of the European Court of Human Rights (ECtHR),¹³⁵ and then continues with case law from the Court of Justice of the European Union (CJEU)¹³⁶ related to some of the EU Directives mentioned in Chapter 2 of this publication. After that, two tables provide an overview of the most significant case law and decisions of regulatory bodies at EU member state level.

As a basis for this research, we have used our very own IRIS Merlin database,¹³⁷ which enables users to access more than 7,800¹³⁸ articles reporting on legal events of relevance to the audiovisual industry. These articles describe relevant laws, decisions of various courts and administrative authorities, and policy documents from more than 50 countries. They also report on legal instruments, decisions, and policy documents of major European and international institutions. The articles include exact references to the original legal texts and, where possible, give access to them through hyperlinks.

5.1. European Court of Human Rights

The European Court of Human Rights (ECtHR)¹³⁹ has made important decisions in cases concerning political advertising on television (*Verein gegen Tierfabriken v. Switzerland*;¹⁴⁰ *TV*

¹³⁵ <http://echr.coe.int>.

¹³⁶ <https://curia.europa.eu/>. For the sake of clarity we will use the acronym “CJEU” for all cases, even if the decision is made under e.g. the old name of “Court of Justice of the European Communities”.

¹³⁷ <http://merlin.obs.coe.int/cgi-bin/search.php>.

¹³⁸ As of September 2017.

¹³⁹ For a structured insight into the European Court of Human Rights’ case-law on freedom of expression and media and journalistic freedoms see Voorhoof D. et al and McGonagle T. (Ed. Sup.), *Freedom of Expression, the Media and Journalists: Case-law of the European Court of Human Rights*, IRIS themes, European Audiovisual Observatory, Strasbourg, 2016,

<http://www.obs.coe.int/documents/205595/2667238/IRIS+Themes+-+Vol+III+-+2016+Edition+EN+FINAL.pdf/9d9f75ba-ddbf-476e-aa65-81108471c6c9>.

¹⁴⁰ Judgment of the ECtHR of 30 June 2009 (Grand Chamber), case of *Verein Gegen Tierfabriken Schweiz (VgT) v Switzerland* (Application no. 32772/02), <http://hudoc.echr.coe.int/eng?i=001-93265> and Judgment of the ECtHR of 28 June 2001, case of *VgT Verein gegen Tierfabriken v. Switzerland* (Application no. 24699/94), <http://hudoc.echr.coe.int/eng?i=001-59535>. See Voorhoof D., “European Court of Human Rights: Case of *Verein Gegen Tierfabriken Schweiz (VgT) v Switzerland*”, IRIS 2009-10, <http://merlin.obs.coe.int/iris/2009/10/article2.en.html> and Voorhoof D., “European Court of Human Rights: Case of *VGT Verein gegen Tierfabriken v. Switzerland*”, IRIS 2001-7, <http://merlin.obs.coe.int/iris/2001/7/article2.en.html>.



*Vest SA and Rogaland Pensjonistparti v. Norway*¹⁴¹, *Animal Defenders International v. the United Kingdom*¹⁴²) as well as the broadcasting of religious advertising (*Murphy v. Ireland*¹⁴³).

Regarding commercial communications, the ECtHR dealt in *Sigma Radio Television Ltd. v. Cyprus*¹⁴⁴ a.o. with the question of whether the imposition of more stringent obligations to a private broadcaster versus a public service broadcaster constitutes discrimination according to Article 14 of the European Convention on Human Rights. In the case at hand, the applicant complained that the public service broadcaster CyBC did not have to pay a licence fee and that, at the material time, it was not monitored by the CRTA and subjected to fines. The Court explained that discrimination, for the purposes of both Article 14 of the Convention and Article 1 of Protocol No. 12 to the Convention

means treating differently, without an objective and reasonable justification, persons in relevantly similar situations. However, not every difference in treatment will amount to a violation of these provisions. It must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment and that this distinction is discriminatory.

The ECtHR noted that, given “the differences in the legal status and the applicable legal frameworks and the different objectives of private stations and the CyBC in the Cypriot broadcasting system, it cannot be said that they are in a comparable position for the purposes of Article 14 of the Convention”.

In the cases of *Bohlen v Germany*¹⁴⁵ and *Ernst August von Hannover v. Germany*¹⁴⁶ the ECtHR decided that there had been no reason for the domestic authorities to interfere with the freedom of commercial speech in order to protect the right of reputation and the

¹⁴¹ Judgment of the ECtHR of 11 December 2008, case of *TV Vest As & Rogaland Pensjonistparti v. Norway* (Application no. 21132/05), <http://hudoc.echr.coe.int/eng?i=001-90235>. See Voorhoof D., “European Court of Human Rights: Case of *TV Vest SA and Rogaland Pensjonistparti v Norway*”, IRIS 2009-3, <http://merlin.obs.coe.int/iris/2009/3/article1.en.html>.

¹⁴² Judgment of the ECtHR of 22 April 2013, case of *Animal Defenders International v. the United Kingdom* (Application no. 48876/08), <http://hudoc.echr.coe.int/eng?i=001-119244>. See Voorhoof D., “European Court of Human Rights: *Animal Defenders International v. the United Kingdom*”, IRIS 2013-6, <http://merlin.obs.coe.int/iris/2013/6/article1.en.html>.

¹⁴³ Judgment of the ECtHR of 10 July 2003, case of *Murphy v. Ireland* (Application no. 44179/98), <http://hudoc.echr.coe.int/eng?i=001-61207>. See Voorhoof D., “European Court of Human Rights: Case of *Murphy v. Ireland*”, IRIS 2003-9, <http://merlin.obs.coe.int/iris/2003/9/article3.en.html>.

¹⁴⁴ Judgment of the ECtHR of 21 July 2011, case of *Sigma Radio Television Ltd. v. Cyprus*, (Applications nos. 32181/04 and 35122/05), <http://hudoc.echr.coe.int/eng?i=001-105766>. See Voorhoof D., “European Court of Human Rights: *Sigma Radio Television Ltd. v. Cyprus*”, IRIS 2011-8, <http://merlin.obs.coe.int/iris/2011/8/article3.en.html>.

¹⁴⁵ Judgment of the ECtHR of 19 February 2015, case of *Bohlen v. Germany* (Application no. 53495/09), <http://hudoc.echr.coe.int/eng?i=001-152646> (in French only). See Voorhoof D., “European Court of Human Rights: *Bohlen and Ernst August von Hannover v. Germany*”, IRIS 2015-5, <http://merlin.obs.coe.int/iris/2015/5/article1.en.html>.

¹⁴⁶ Judgment of the ECtHR of 19 February 2015, case of *Ernst August von Hannover v. Germany*, Appl. No. 53649/09, <http://hudoc.echr.coe.int/eng?i=001-152254>. See Voorhoof D., “European Court of Human Rights: *Bohlen and Ernst August von Hannover v. Germany*”, IRIS 2015-5, <http://merlin.obs.coe.int/iris/2015/5/article1.en.html>.



right to their own names of two public persons referred to in humorous advertisements without their consent.

5.2. Court of Justice of the European Union

5.2.1. Audiovisual Media Services Directive¹⁴⁷

5.2.1.1. Definitions

The definitions of the Television without Frontiers (TVWFD) and the AVMSD concerning advertising have provided for some interesting legal wrangling over the years. The CJEU has had a fundamental role in clarifying the sometimes “creative” interpretations of national legislative and judiciary powers.

In *Sanoma v. Viestintävirasto*,¹⁴⁸ the CJEU clarified the definition of advertising regarding split-screens, sponsorship signs and so-called “black seconds”, that is, black images preceding and following each of the advertising spots. The CJEU provided the following answers to the questions referred by the Finnish *Korkein hallinto-oikeus* (Supreme Administrative Court):¹⁴⁹

- Article 19(1) AVMSD does not preclude national legislation under which a split screen that shows the closing credits of a television programme in one column and a list presenting the supplier’s upcoming programmes in the other, in order to separate the programme which is ending from the television advertising break that follows it, does not necessarily have to be combined with, or followed by, an acoustic or optical signal, provided that such a means of separation meets, in itself, the requirements set out in the first sentence of Article 19(1), a matter which is for the referring court to establish.
- Concerning Article 23(2) AVMSD, sponsorship signs shown in programmes other than the sponsored programme must be included in the maximum time for the broadcasting of advertising per clock hour.

¹⁴⁷ This subchapter includes both AVMSD and TVWFD related case law.

¹⁴⁸ Judgment of the CJEU (Fourth Chamber) of 17 February 2016, *Sanoma Media Finland Oy-Nelonen Media v. Viestintävirasto*, Case C-314/14, <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30d5d452caad59e24c0fbdd1a4a5166439f3.e34KaxiLc3qMb40Rch0SaxuSbxj0?text=&docid=174425&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=964488>.

¹⁴⁹ According to *Viestintävirasto* (Finnish Communications Regulatory Authority - FICORA), *Sanoma* was infringing the advertising rules of the Finnish TV and Radio Act. In this case, the *Korkein hallinto-oikeus* (Supreme Administrative Court) decided to stay the proceedings and referred three questions to the Court for a preliminary ruling. See Alén-Savikko A., “Court of Justice of the European Union: Court rules on TV advertising in the context of Finnish approaches to “split screens” and “black seconds””, IRIS 2016-4, <http://merlin.obs.coe.int/iris/2016/4/article5.en.html>



- If a member state has not made use of the power to lay down a stricter rule than that established by Article 23(1) AVMSD, as not only not precluding ‘black seconds’ which are inserted between the various spots of a television advertising break or between that break and the television programme which follows it from being included in the maximum time for the broadcasting of television advertising per clock hour which that article sets at 20%, but also as requiring their inclusion.

In *European Commission v Kingdom of Spain*,¹⁵⁰ the CJEU explained that certain types of advertising broadcast on Spanish television channels, such as advertorials, telepromotion spots, sponsorship credits and micro-ads, fall within the scope of the concept of advertising spots and are therefore subject to the restrictions on broadcasting time laid down in Article 18(2) TVWFD. Under Spanish law at the time, these particular forms of advertising fell outside the 12 minutes per hour limit and were subject to a different limit of 17 minutes per hour instead.¹⁵¹

In *KommAustria v. ORF*,¹⁵² the CJEU clarified the distinction between the definitions of ‘teleshopping’ and ‘television advertising’ included in Article 1 of the TVWFD.¹⁵³ The CJEU ruled that a televised prize game:¹⁵⁴

- is covered by the definition given by Article 1(f) TVWFD of teleshopping if that broadcast or part of a broadcast represents a real offer of services having regard to the purpose of the broadcast of which the game forms part, the significance of the game within the broadcast in terms of time and of anticipated economic effects in relation to those expected in respect of that broadcast as a whole and also to the type of questions which the candidates are asked;
- is covered by the definition given by Article 1(c) TVWFD of television advertising if, on the basis of the purpose and content of that game and the circumstances in which the prizes to be won are presented, the game consists of an announcement which seeks to encourage viewers to buy the goods and services presented as prizes to be won or seeks to promote the merits of the programmes of the broadcaster in question indirectly in the form of self-promotion.

¹⁵⁰ Judgment of the CJEU of 24 November 2011, *European Commission v Kingdom of Spain*, Case C-281/09, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CJ0281:EN:HTML>.

¹⁵¹ See van Lent E., “*European Commission v Kingdom of Spain*”, IRIS 2012-1, <http://merlin.obs.coe.int/iris/2012/1/article3.en.html> and Angelopoulos Ch., “Advocate General Gives Opinion on the Definition of Advertising”, IRIS 2011-5, <http://merlin.obs.coe.int/iris/2011/5/article4.en.html>. See also Section 3.3.1. of this publication.

¹⁵² Judgment of the CJEU (Fourth Chamber) of 18 October 2007, *KommAustria v. ORF*, Case C-195/06, <http://curia.europa.eu/juris/document/document.jsf?docid=70372&doclang=en>.

¹⁵³ See also Mastroianni R., Arena A., “European Court of Justice: Do Prize Games on Television Constitute “Teleshopping” or “Television Advertising”?”, IRIS 2008-1, <http://merlin.obs.coe.int/iris/2008/1/article2.en.html>.

¹⁵⁴ In *KommAustria v. ORF* the CJEU defined a televised prize game as “...a broadcast or part of a broadcast during which a television broadcaster offers viewers the opportunity to participate in a prize game by means of immediately dialling a premium rate telephone number, and thus in return for payment...”



In *RTL Television GmbH v Niedersächsische Landesmedienanstalt für privaten Rundfunk*,¹⁵⁵ the CJEU ruled that films made for television which provide, from their conception, for breaks for the insertion of advertising are covered by the term 'films made for television' in Article 11(3) TVWFD. In the case of the 'series' exception included in Article 11(3) TVWFD, the connections linking episodes of a series must relate to the content of the films concerned, such as, for example, the development of the same story from one episode to another or the reappearance of one or more characters in different episodes.¹⁵⁶

In *RTI and others v Ministero delle Poste e Telecomunicazioni*,¹⁵⁷ the CJEU ruled that Articles 1(1)b) and 18 TVWFD mean that the expression 'forms of advertisements such as direct offers to the public' in Article 18 TVWFD is used in the context of the Community rules simply as an example. Consequently, it may also cover other forms of promotion, such as 'telepromotions' which, like 'direct offers to the public', require more time than spot advertisements on account of their method of presentation. The CJEU also clarified that Article 17(1)(b) TVWFD permits the insertion of the sponsor's name or logo at times other than the beginning and/or the end of the programme.¹⁵⁸

5.2.1.2. Advertising limits

In *Sky Italia Srl v. Autorità per le Garanzie nelle Comunicazioni*,¹⁵⁹ the CJEU ruled that Article 4(1) AVMSD, as well as the principle of equal treatment and Article 56 TFEU, do not preclude, in principle, a national rule which lays down shorter hourly television advertising limits for pay-TV broadcasters than those set for free-to-air broadcasters, provided that the principle of proportionality is observed, which is a matter for the referring court to assess. The CJEU found decisive that the financial interests of pay-TV broadcasters are different from those of free-to-air broadcasters. Whereas the former generate income from subscription fees, the latter finance themselves either by generating income from television advertising, or by other sources of financing. Also, from a consumer protection perspective, free-to-air television viewers were in an objectively different situation in comparison to pay-tv viewers, who "have a direct commercial relationship with their broadcaster and pay to enjoy television programmes". The CJEU held that, in balancing the interests of viewers and broadcasters, the Italian legislation

¹⁵⁵ Judgment of the CJEU (Fifth Chamber) of 23 October 2003, Case C-245/01, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001CJ0245:EN:PDF>.

¹⁵⁶ See Mastroianni R., "New Decision on the Interpretation of the "Television Without Frontiers" Directive", IRIS 2003-10, <http://merlin.obs.coe.int/iris/2003/10/article2.en.html>.

¹⁵⁷ Judgment of the Court (Sixth Chamber) of 12 December 1996, *Reti Televisive Italiane SpA (RTI) (C-320/94)*, *Radio Torre (C-328/94)*, *Rete A Srl (C-329/94)*, *Vallau Italiana Promomarket Srl (C-337/94)*, *Radio Italia Solo Musica Srl and Others (C-338/94)* and *GETE Srl (C-339/94) v Ministero delle Poste e Telecomunicazioni*, Joined Cases C-320/94, C-328/94, C-329/94, C-337/94, C-338/94 and C-339/94, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61994CJ0320&from=EN>.

¹⁵⁸ See also Mastroianni R., "Interpretation of advertising and sponsorship rules of the 'Television without Frontiers' Directive", IRIS 1997-1, <http://merlin.obs.coe.int/iris/1997/1/article9.en.html>.

¹⁵⁹ Judgment of the CJEU (Second Chamber) of 18 July 2013, *Sky Italia Srl v. Autorità per le Garanzie nelle Comunicazioni*, Case C-234/12, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=139746&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=857282>



could set different advertising limits for pay-tv and free-to-air broadcasters without infringing the principle of equal treatment.¹⁶⁰

In *ARD v PRO Sieben*,¹⁶¹ the CJEU explained that Article 11(3) TVWFD prescribes the gross principle, that is, in order to calculate the 45-minute period for the purpose of determining the number of advertising interruptions allowed in the broadcasting of audiovisual works, the duration of the advertisements must be included in that period. However, according to Article 11(3) TVWFD, in conjunction with Article 3(1) TVWFD, member states may prescribe the net principle for advertisements which may be inserted during programmes, that is, in order to calculate that period, the duration of the advertisements must be excluded, on condition, however, that those rules are compatible with other relevant provisions of Community law. The CJEU further explained that nothing in the EU Treaty precluded the application of the net principle.¹⁶²

5.2.1.3. Stricter rules

In *Bacardi v TF1 and others*,¹⁶³ the CJEU explained that the first sentence of Article 2(2) TVWFD does not preclude the prohibition of television advertising for alcoholic beverages marketed in a member state, in the case of indirect television advertising resulting from the appearance on screen of hoardings visible during the retransmission of bi-national sporting events taking place in the territory of other member states. This kind of indirect television advertising is not to be classed as 'television advertising' within the meaning of Articles 1(b), 10 and 11 TVWFD. Also Article 59 of the EC Treaty (now, after amendment, Article 49 EC) does not preclude the said prohibition.¹⁶⁴

¹⁶⁰ On 29 October 2015 the Constitutional Court ruled that the contentious provision was in full accordance with the Italian Constitution. See *Corte costituzionale* (Constitutional Court), judgment no. 210 of 29 October 2015,

<http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2015&numero=210>.

See also Apa E., Bisceglia F., "Italy: Constitutional Court rules that shorter hourly advertising limits for pay-TV broadcasters are not in breach of Italian Constitution", IRIS 2016-1,

<http://merlin.obs.coe.int/iris/2016/1/article20.en.html>.

¹⁶¹ Judgment of the CJEU (Sixth Chamber) of 28 October 1999, *Arbeitsgemeinschaft Deutscher Rundfunkanstalten (ARD) v PRO Sieben Media AG*, Case C-6/98,

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d5b13be721129043ad917afb9848738f9a.e34KaxiLc3eQc40LaxqMbN4PaxiOe0?text=&docid=44816&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=306351>.

¹⁶² See also Scheuer A., "Court of Justice of the European Communities Sees the Grossed-Up Principle as Settled in TV Directive", IRIS 1999-10, <http://merlin.obs.coe.int/iris/1999/10/article5.en.html> and Cappello M., Mastroianni R., "Advocate General Jacobs Opts for the Gross Principle", IRIS 1999-7,

<http://merlin.obs.coe.int/iris/1999/7/article8.en.html>.

¹⁶³ Judgment of the CJEU (Grand Chamber) of 13 July 2004, *Bacardi France SAS v. Télévision Française 1 SA (TF1), Groupe Jean-Claude Darmon SA, GiroSport SARL*, Case C-429/02, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=49387&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=313424>.

¹⁶⁴ See also Mastroianni R., "Court of Justice of the European Communities: Ruling on the Bacardi Case", IRIS 2004-9, <http://merlin.obs.coe.int/iris/2004/9/article2.en.html> and Mastroianni R., "Court of Justice of the European Communities: Opinion of First Advocate General in Cases C-262/02 and C-429/02", IRIS 2004-4, <http://merlin.obs.coe.int/iris/2004/4/article2.en.html>.



In *Société d'Importation Édouard Leclerc-Siplec v. TF1 Publicité S.A. & M6 Publicité S.A.*,¹⁶⁵ the CJEU explained that neither Articles 30, 85, 86, 5 and 3(f) of the Treaty nor the Television without Frontiers Directive preclude Member States from prohibiting, by statute or by regulation, television broadcasters established on their territory from broadcasting advertisements for the distribution sector.¹⁶⁶

5.2.1.4. Jurisdiction

In *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB and TV-Shop i Sverige AB* (joined cases),¹⁶⁷ the CJEU ruled that the TVWFD does not preclude a member state from taking, pursuant to general legislation on the protection of consumers against misleading advertising, measures against an advertiser in relation to television advertising broadcast from another member state, provided that those measures do not prevent the retransmission, as such, in its territory of television broadcasts coming from that other member state.

On a proper construction of Article 30 of the EC Treaty, a member state is not precluded from taking measures against an advertiser in relation to television advertising, provided that those provisions affect in the same way, in law and in fact, the marketing of domestic products and of those from other member states, are necessary for meeting overriding requirements of general public importance or one of the aims laid down in Article 36 of the EC Treaty, are proportionate for that purpose, and those aims or overriding requirements could not be met by measures less restrictive of intra-Community trade.

On a proper construction of Article 59 of the EC Treaty, a member state is not precluded from taking, on the basis of provisions of its domestic legislation, measures against an advertiser in relation to television advertising. However, it is for the national court to determine whether those provisions are necessary for meeting overriding requirements of general public importance or one of the aims stated in Article 56 of the EC Treaty, whether they are proportionate for that purpose and whether those aims or overriding requirements could be met by measures less restrictive of intra-Community trade.

Finally, according to the CJEU the TVWFD precludes the application to television broadcasts from other member states of a national rule which provides that

¹⁶⁵ Judgment of the CJEU (Sixth Chamber) of 9 February 1995, *Société d'Importation Édouard Leclerc-Siplec v. TF1 Publicité S.A. & M6 Publicité S.A.*, Case C-412/93, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61993CJ0412&from=EN>.

¹⁶⁶ See also van Loon A., "French Restrictions on Televised Advertising Not Contrary to European Legislation", IRIS 1995-3, <http://merlin.obs.coe.int/iris/1995/3/article9.en.html>.

¹⁶⁷ Judgment of the CJEU of 9 July 1997, *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB and TV-Shop i Sverige AB*, Joined Cases C-34/95, C-35/95 and C-36/95, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61995CJ0034&from=EN>.



advertisements broadcast in commercial breaks on television must not be designed to attract the attention of children under 12 years of age.¹⁶⁸

5.2.1.5. Surreptitious advertising

In *Eleftheri Tileorasi v. Ethniko Simvoulío Radiotileorasis*,¹⁶⁹ the CJEU ruled that Article 1(d) TVWFD is to be interpreted as meaning that the provision of payment or of consideration of another kind is not a necessary condition for establishing the element of intent in surreptitious advertising. According to the CJEU, a different interpretation of Article 1(d) could deprive the prohibition of surreptitious advertising of its effectiveness, given the difficulty, or even the impossibility, in certain cases of proving that there has been provision of payment or of consideration of another kind for advertising which nevertheless displays all the characteristics of surreptitious advertising.

5.2.2. Tobacco Advertising Directive

In *Germany v. European Parliament and Council of the European Union*,¹⁷⁰ the CJEU dismissed the action brought by Germany challenging the Directive on Tobacco Advertising.¹⁷¹ On 9 September 2003, Germany brought an action before the Court of Justice of the European Communities seeking the annulment of Articles 3 and 4 of the Tobacco Advertising Directive.¹⁷² Germany contended in particular that those prohibitions could not be adopted on the basis of Article 95 of the EC Treaty.¹⁷³ The CJEU held that the conditions warranting

¹⁶⁸ Kabel J.J.C., “Court of Justice of the EC: Three Swedish TV Cases Interpreting the ‘Television without Frontiers’ Directive”, IRIS 1997-8, <http://merlin.obs.coe.int/iris/1997/8/article7.en.html>.

¹⁶⁹ Judgment of the Court (Third Chamber) of 9 June 2011, *Eleftheri tileorasi AE ‘ALTER CHANNEL’ et Konstantinos Giannikos v Ipourgos Tipou kai Meson Mazikis Enimerosis et Ethniko Simvoulío Radiotileorasis*, Case C-52/10, <http://curia.europa.eu/juris/document/document.jsf?docid=85130&doclang=en>. See de Beer K., “Court of Justice of the European Union: *Eleftheri Tileorasi v. Ethniko Simvoulío Radiotileorasis*”, IRIS 2011-8, <http://merlin.obs.coe.int/iris/2011/8/article5.en.html>.

¹⁷⁰ See judgment of the CJEU of 12 December 2006, *Germany v Parliament and Council*, Case c-380/03, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=66366&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=140460>.

¹⁷¹ The Directive was adopted by the European Parliament and the Council of the European Union following the annulment by the Court of Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products. See also Mastroianni, R., “Court of Justice of the European Communities: Annulment of the Tobacco Advertising Directive”, IRIS 2000-9, <http://merlin.obs.coe.int/iris/2000/9/article5.en.html> and Mastroianni R., “European Court of Justice: Advocate General Opts For Annulment of EC Directive on the Advertising and Sponsorship of Tobacco Products”, IRIS 2000-8, <http://merlin.obs.coe.int/iris/2000/8/article2.en.html>.

¹⁷² These articles prohibit (i) the advertising of tobacco products in the press and other printed publications, in information society services and in radio broadcasts and (ii) the sponsorship of radio programmes by tobacco companies. Only publications intended for professionals in the tobacco trade and publications from non-member countries which are not principally intended for the Community market are exempted.

¹⁷³ This article authorises the Community to adopt measures for the approximation of national provisions which have as their object the establishment and functioning of the internal market.



the choice of Article 95 EC as legal basis were in fact met. Disparities between national rules on advertising and sponsorship in respect of tobacco products justified intervention by the Community legislature. The CJEU also found that the contested articles of the Directive had as their object the improvement of the conditions for the functioning of the internal market. Also since the conditions for recourse to Article 95 EC were met, the selection of that legal basis cannot be called into question by the fact that public health protection may have prompted the choices made by the Community legislature when adopting the Directive. As a matter of fact, the Community was required by the Treaty to ensure a high level of human health protection, and the express prohibition of any harmonisation of member states' legislation in that health field does not exclude harmonising measures adopted on another basis from having an impact on human health protection. The CJEU also rejected the argument that the contested provisions were disproportionate and observed that the prohibitions leave journalistic freedom of expression unimpaired and do not exceed the limits of the discretion accorded to the Community legislature.¹⁷⁴

5.2.3. Misleading and Comparative Advertising Directive¹⁷⁵

In *Lidl Belgium v. Etablissements Franz Colruyt*,¹⁷⁶ the CJEU made the following points concerning the Directive on misleading and comparative advertising (MCAD):

- The condition under which comparative advertising is permissible that is laid down by Article 3a(1)(b) MCAD must be interpreted as not precluding comparative advertising from relating collectively to selections of basic consumables sold by two competing chains of stores in so far as those selections each consist of individual products which, when viewed in pairs, individually satisfy the requirement of comparability laid down by that provision.
- Article 3a(1)(c) MCAD must be interpreted as meaning that the requirement, laid down by that provision, that the advertising 'objectively compares' the features of the goods at issue does not signify, in the event of comparison of the prices of a selection of comparable basic consumables sold by competing chains of stores or of the general level of the prices charged by them in respect of the range of comparable products which they sell, that the products and prices compared, that is to say both those of the advertiser and those of all of his competitors involved in the comparison, must be expressly and exhaustively listed in the advertisement.

¹⁷⁴ See also Weißenborn N., "Court of Justice of the European Communities: Tobacco Advertising Ban", IRIS 2007-2, <http://merlin.obs.coe.int/iris/2007/2/article4.en.html> and Weißenborn N., "Court of Justice of the European Communities: Advocate General's Opinion in Case C-380/03 (Tobacco Advertising Directive)", IRIS 2006-7, <http://merlin.obs.coe.int/iris/2006/7/article4.en.html>.

¹⁷⁵ This subchapter includes case law related to both the current and the 1984 and 2006 versions of the MCAD.

¹⁷⁶ Judgment of the CJEU of 19 September 2006, *Lidl Belgium V. Etablissements Franz Colruyt*, Case C-356/04, <http://curia.europa.eu/juris/document/document.jsf?docid=64423&doclang=en>.



- Article 3a(1)(c) MCAD must be interpreted as meaning that the following constitute, for the purposes of that provision, ‘verifiable’ features of goods sold by two competing chains of stores:
 - the prices of those goods;
 - the general level of the respective prices charged by such chains of stores in respect of their selection of comparable products and the amount liable to be saved by consumers who purchase such products from one rather than the other of those chains, in so far as the goods in question do in fact form part of the selection of comparable products on whose basis that general price level has been determined.
- Article 3a(1)(c) MCAD must be interpreted as meaning that a feature mentioned in comparative advertising satisfies the requirement of verifiability laid down by that provision, in cases where the details of the comparison which form the basis for the mention of that feature are not set out in the advertising, only if the advertiser indicates, in particular for the attention of the persons to whom the advertisement is addressed, where and how they may readily examine those details with a view to verifying, or, if they do not possess the skill required for that purpose, to having verified, the details and the feature in question as to their accuracy.
- Article 3a(1)(a) MCAD must be interpreted as meaning that comparative advertising claiming that the advertiser’s general price level is lower than his main competitors’, where the comparison has related to a sample of products, may be misleading when the advertisement:
 - does not reveal that the comparison related only to such a sample and not to all the advertiser’s products,
 - does not identify the details of the comparison made or inform the persons to whom it is addressed of the information source where such identification is possible, or
 - contains a collective reference to a range of amounts that may be saved by consumers who make their purchases from the advertiser rather than from his competitors without specifying individually the general level of the prices charged, respectively, by each of those competitors and the amount that consumers are liable to save by making their purchases from the advertiser rather than from each of the competitors.¹⁷⁷

In *Pippig Augenoptik GmbH & Co. KG v. Hartlauer Handelsgesellschaft mbH*,¹⁷⁸ the CJEU made the following points concerning the Directive on misleading and comparative advertising (as amended):

- Article 7(2) MCAD precludes the application to comparative advertising of stricter national provisions on protection against misleading advertising as far as the form

¹⁷⁷ See also Steijger L., “Court of Justice of the European Communities: Legality of Collective Comparative Advertising”, IRIS 2006-10, <http://merlin.obs.coe.int/iris/2006/10/article7.en.html>.

¹⁷⁸ Judgment of the European Court of Justice of 8 April 2003, *Pippig Augenoptik GmbH & Co. KG v. Hartlauer Handelsgesellschaft mbH, Verlassenschaft nach dem verstorbenen Franz Josef Hartlauer*, Case C- 44/01, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=48187&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=754629>.



and content of the comparison is concerned, without there being any need to establish distinctions between the various elements of the comparison, that is to say statements concerning the advertiser's offer, statements concerning the competitor's offer and the relationship between those offers.

- Article 3a(1)(a) MCAD must be interpreted as meaning that, whereas the advertiser is in principle free to state or not to state the brand name of rival products in comparative advertising, it is for the national court to verify whether, in particular circumstances, characterised by the importance of the brand in the buyer's choice and by a major difference between the respective brand names of the compared products in terms of how well known they are, omission of the better-known brand name is capable of being misleading.
- Article 3a(1) MCAD does not preclude compared products from being purchased through different distribution channels.
- Article 3a MCAD does not preclude an advertiser from carrying out a test purchase with a competitor before his own offer has even commenced, where the conditions for the lawfulness of comparative advertising set out therein are complied with.
- A price comparison does not entail the discrediting of a competitor, within the meaning of Article 3a(1)(e) MCAD either on the grounds that the difference in price between the products compared is greater than the average price difference or by reason of the number of comparisons made. Article 3a(1)(e) of Directive 84/450, as amended, does not prevent comparative advertising, in addition to citing the competitor's name, from reproducing its logo and a picture of its shop front, if that advertising complies with the conditions for lawfulness laid down by Community law.¹⁷⁹

5.3. Overview at member state level

The IRIS Merlin database¹⁸⁰ of the European Audiovisual Observatory lists more than 220 national court cases¹⁸¹ and more than 150 decisions of regulatory bodies¹⁸² concerning advertising. Making a summary of all these cases would go beyond the scope of this publication; nevertheless, the following tables provide what we consider to be the highlights among them in the last 5 years.

¹⁷⁹ See also Hoes S., "Court of Justice of the European Communities: Judgment on Misleading and Comparative Advertising", IRIS 2003-5, <http://merlin.obs.coe.int/iris/2006/10/article7.en.html>.

¹⁸⁰ The IRIS Merlin database (<http://merlin.obs.coe.int/index.php>) allows you to perform a personalised search of all the articles ever published in the IRIS newsletter (<http://merlin.obs.coe.int/newsletter.php>), as well as the numerous additional articles that have been added to the database, by inputting your chosen text, date, topic, country, organisation and/or reference.

¹⁸¹ As of June 2017. All articles are available at: <http://bit.ly/2xdlBi4>.

¹⁸² As of June 2017. All articles are available at: <http://bit.ly/2xWXuTW>.



For a comprehensive overview of the most significant national case law and decisions of regulatory bodies in relation to commercial communications over the period 2012 to 2017, please refer to Tables 5 and 6 in the Annex to this publication.



6. State of play

Following a complex REFIT exercise¹⁸³ and an extensive impact assessment¹⁸⁴ of all possible options as to the need for a revision of the AVMSD, the European Commission tabled a proposal for a revised AVMSD in May 2016. At the time of drafting this report, the debate had already been fed with various amendments from the co-deciding institutions, but the revision process has not yet been concluded.¹⁸⁵

6.1. The revision proposal of the European Commission

The main announced objective of the revision of the AVMSD rules concerning commercial communications was to reduce the burden on TV broadcasters while maintaining those rules seeking to protect the most vulnerable. The main modifications proposed by the Commission¹⁸⁶ are the following:

- maintain the strict 20% limit on advertising time, while giving broadcasters more flexibility as to when advertisements can be shown,
- allow more flexibility in the use of product placement and sponsorship,
- encourage the adoption of self- and co-regulation tools for the existing rules seeking to protect the most vulnerable (alcohol advertising, fatty food, minors, etc.).

¹⁸³ European Commission, Ex-post REFIT evaluation of the Audiovisual Media Services Directive 2010/13/EU, <https://ec.europa.eu/digital-single-market/en/news/ex-post-refit-evaluation-audiovisual-media-services-directive-201013eu>.

¹⁸⁴ European Commission, Impact assessment accompanying the Proposal for an updated Audiovisual Media Services Directive, <https://ec.europa.eu/digital-single-market/en/news/impact-assessment-accompanying-proposal-updated-audiovisual-media-services-directive>.

¹⁸⁵ To follow the state of the art of the revision process of the Procedure file Procedure 2016/0151/COD, see the European Parliament's Legislative observatory, [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2016/0151\(COD\)&l=en](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2016/0151(COD)&l=en) and also the EUR-Lex, http://eur-lex.europa.eu/procedure/EN/2016_151.

¹⁸⁶ European Commission, Proposal for a directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, COM(2016) 287 final, 25 May 2016, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2016:0287:FIN>.



6.2. The amendments proposed by the European Parliament and the Council

The opinion expressed by the European Parliament on 10 May 2017¹⁸⁷ and the General Approach adopted by the Council on 24 May 2017¹⁸⁸, after a year of intense discussions, are, to a certain extent, both aimed at reducing the degree of flexibility set by the Commission in its proposal.

Three main changes were proposed by the co-decision institutions as will be described in the following sections.

The first area where significant amendments have been tabled concerns definitions and general principles and in particular the self-regulatory solution for commercial communications for “junk food” (high in fat, salt and sugar - HFSS), with a specific requirement on the need to achieve a higher level of protection.¹⁸⁹

Secondly, with regard to the rules applicable to advertising and teleshopping, in addition to proposing a ban on advertising and product placement for tobacco, electronic cigarettes and alcohol in children’s TV programmes and video-sharing platforms, the Parliament and the Council have requested that more stringent limitations be introduced with regard to quantitative limits, on the assumption that the Commission’s proposal was too permissive to broadcasters in terms of flexibility.

Thirdly, there was a strong debate concerning the rules applicable to product placement, where the Parliament and the Council have asked for some more stringent rules after the Commission’s proposal reverted the ban into a general permission, unless member states decided otherwise, in particular by re-introducing the prohibition of undue prominence.

6.2.1. Definitions and general principles (Articles 1 and 9 AVMSD)

Table 7 included in the Annex to this publication gives an overview of the ongoing revision process with regard to the provisions concerning definitions and the generally

¹⁸⁷ European Parliament, Resolution on the proposal for a directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, 10 May 2017, <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A8-2017-0192&language=EN>.

¹⁸⁸ Council of the European Union, General approach on the proposal for a directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, 24 May 2017, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_9691_2017_INIT&from=EN.

¹⁸⁹ For further details see Section 4.2.2.1. of this publication.



applicable rules. It should be noted that, apart from the notion of sponsorship, where Parliament and Council amendments are also seeking to cover video-sharing platforms, all the others remain basically unchanged.

Essentially, the main modifications affect the area of the self-regulatory codes to be applied to the so-called HFSS food where the main issue seems to concern the subject responsible for encouraging their adoption—if only the member states or also the European Commission—and their nature, that is to say, if they should be national codes or Union codes.

6.2.2. Advertising and teleshopping (Articles 19-24 AVMSD)

The main issue in relation to advertising and teleshopping during the debate has concerned the quantitative amount of advertising allowed per each clock hour:

- Whereas the Commission's proposal has limited the 20% hourly limit to the period between 07:00 and 23:00,
- the European Parliament has preferred to go back to a general limit of 20% per clock hour; however member states would be allowed to define a prime time window of a maximum of four consecutive hours where the 20% limit is calculated on the whole window;
- the Council has adhered to the Commission's proposal of introducing a pre-defined time selection but envisaged two windows (between 06:00 and 18:00 and between 18:00 and 00:00) instead of one where the 20% average limit applies, leaving the rest of the day without a quantitative restriction per hour.

Table 8 in the Annex to this publication gives an overview of the on-going revision process with regard to the provisions concerning advertising and teleshopping.

6.2.3. Sponsorship and product placement (Articles 10 and 11 AVMSD)

In the case of sponsorship, the envisaged changes by all three institutions express a light touch approach, being limited to a) issues concerning the explicit reference, or not, to the fact that sponsorship should not be of a promotional nature and b) to the introduction of electronic cigarettes within the scope.

With regard to product placement, the changes proposed by the Commission are quite radical. The current ban is reverted, which implies that the opt-out approach is replaced by an opt-in solution, whereby member states may introduce stricter rules if they so wish, but, as a principle, product placement is allowed, exception made for a limited positive list of programmes where it is prohibited: news and current affairs, consumer affairs, religious programmes and children's programmes (or aimed primarily at children). The main point of disagreement between the co-deciding institutions concerns the ban on



undue prominence, which the Commission would like to lift, and the Parliament and the Council to keep.

Table 9 in the Annex to this publication gives an overview of the ongoing revision process with regard to the provisions concerning sponsorship and product placement.

6.3. Next steps

The procedure that applies to the revision of the AVMSD is the Ordinary Legislative Procedure, formerly called co-decision procedure, whereby all three institutions act jointly and on an equal footing.

At the moment of drafting the present report, the first reading has been concluded and the institutions are now involved in interinstitutional negotiations (so-called “trilogues”) that have become standard practice for the adoption of EU legislation.¹⁹⁰ The aim of these trilogues is to agree on a common text, which can happen at any time, but will most likely occur at the end of 2017 or the start of 2018.¹⁹¹

¹⁹⁰ The trilogues are of an informal nature and are regulated by a Code of conduct for negotiating in the context of the Ordinary Legislative Procedures, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+RULES-EP+20130521+ANN-21+DOC+XML+V0//EN&language=EN&navigationBar=YES>.

¹⁹¹ European Parliament, Legislative train schedule, <http://www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-audiovisual-media-framework>.



7. Annexes

Table 2. Transposition of rules on product placement (PP) (Article 11(2)-(4) AVMSD

	Product placement prohibited by programmes	Product placement prohibited by type of broadcaster	Product placement prohibited by product	No derogations for props and prizes
AT	no stricter rules	regional TV	tobacco, medicinal products, spirits	no stricter rules
BE (Fl)	no stricter rules	public service broadcaster	tobacco, medicinal products	children's programmes in PSB
BE (Fr)	TV news	no stricter rules	tobacco, medicinal products	children's programmes, news programmes
BE (Ger)	no stricter rules	no stricter rules	tobacco, medicinal products	no stricter rules
BG	news, religious programmes	PSB with derogations for films and series	tobacco, medicinal products	news programmes
CY	max. 3 min in films, 1 min in series, sports and light entertainment	no stricter rules	tobacco, medicinal products, toys	children's programmes
CZ	no stricter rules	no stricter rules	tobacco, medicinal products	no stricter rules
DE	narrow definition of "light entertainment" programmes	no stricter rules	tobacco, medicinal products	news, current affairs, consumer, children's, religious programmes
DK	nationally produced programmes	no stricter rules	tobacco, medicinal products	no stricter rules
EE	no stricter rules	no stricter rules	tobacco, medicinal products	children's programmes
ES	more detailed rules of "significant value"	no stricter rules	tobacco, medicinal and harmful products (health, environment)	children's programmes
FI	more detailed on the definition of "product placement"	no stricter rules	tobacco, medicinal products	children's programmes
FR	only on TV and in cinematographic films and music video clips	no stricter rules	tobacco, medicinal products, alcohol, baby food, weapons	no stricter rules



	Product placement prohibited by programmes	Product placement prohibited by type of broadcaster	Product placement prohibited by product	No derogations for props and prizes
GR	no stricter rules	no stricter rules	tobacco, medicinal products, and any other cases where TV advertising is prohibited	no stricter rules
HR	no stricter rules	no stricter rules	tobacco, medicinal products	no stricter rules
HU	news, political, official events, religious, children's programmes - ("children" - up to 14)	no stricter rules	tobacco, medicinal products	news, political, official events, religious programmes
IE	no stricter rules	no stricter rules	tobacco, medicinal products, devices and services or cosmetic treatments and services	no stricter rules
IT	no stricter rules	no stricter rules	tobacco, medicinal products	no stricter rules
LT	no stricter rules	no stricter rules	tobacco, medicinal products	children's and news programmes
LU	no stricter rules	no stricter rules	tobacco, medicinal products	no stricter rules
LV	no stricter rules	no stricter rules	tobacco, medicinal products	no stricter rules
MT	no stricter rules	no stricter rules	tobacco, medicinal products, alcohol, gambling at watershed	children's programmes
NL	no stricter rules	public service broadcaster	tobacco, medicinal products, alcohol at watershed	children's programmes ("children" - up to 12)
PL	more detailed rules on producers or sellers of PP	no stricter rules	tobacco, medicinal products	children's programmes
PT	any PP liable to prejudice minors (e.g. unhealthy food)	no stricter rules	tobacco, medicinal products	children's programmes + detailed rules re. props & "significant commercial value"
RO	no stricter rules	no stricter rules	tobacco, medicinal products	no stricter rules
SE	no stricter rules	no stricter rules	tobacco, medicinal products, alcohol	no stricter rules
SI	no stricter rules	no stricter rules	tobacco, medicinal products, alcohol	no stricter rules
SK	("children" - up to 12)	no stricter rules	tobacco, medicinal products	no stricter rules



	Product placement prohibited by programmes	Product placement prohibited by type of broadcaster	Product placement prohibited by product	No derogations for props and prizes
UK	stricter rules on PP for nationally produced programmes	no stricter rules	tobacco, medicinal products, alcohol, baby milk, fatty food, gambling (in UK produced programmes)	children's programmes

Source: AVMSDatabase, European Audiovisual Observatory, Strasbourg, France and Annex 6 – Implementation of the provisions on commercial communications at national level, Ex-post REFIT evaluation of the Audiovisual Media Services Directive 2010/13/EU, 25 May 2016, SWD(2016) 170 final.

Table 3. Transposition of the 12-minutes rule

	Stricter rule for 12-minute limitation	Legal basis	Article 23(1) AVMSD	Article 23(2) AVMSD
AT	YES for PSB	Federal Act on Audiovisual Media Services (AMD-G) - consolidated 30.07.2015 - § 45; Federal Act on the Austrian Broadcasting Corporation (ORF-G) - consolidated 13.08.2015 - § 14	20% max. time of advertisement and teleshopping per hour; Max. 42 min. per day per channel on a yearly average.	shall not apply to self-promotion by TV channels; announcements by the Austrian Broadcasting Corporation (ABC) of programmes (and derived materials) on its channels supporting such programmes; product placement; advertising for cinematographic works (co)financed by ABC.
BE (Fl)	NO	Flemish community - Act on Radio and Television Broadcasting - Consolidated 12 August 2014 - Art. 81 §§ 2. and 3	20% max. time of advertisement and teleshopping per hour.	shall not apply to self-promotion by TV channels, sponsorship or product placement.
BE (Fr)	NO but stricter for teleshopping and non-linear services	Audiovisual media services decree - consolidated 29 January 2015 - Art. 20	20% max. time of advertisement and teleshopping per hour; 20% length of the programme for non-linear services; No teleshopping on PSB and local channels; 3 hours max. of teleshopping per day.	Virtual advertising and product placement are not included.
BE (Ger)	NO	Decree on Radio Broadcasting and Cinema Presentations - consolidated 2 March 2015 - Art. 15 § 1	20% max. time of advertisement and teleshopping per hour.	shall not apply to self-promotion by TV channels, sponsorship or product placement.
BG	YES for PSB	Radio and Television Act - Consolidated version of 24 December 2014 - Art.	12 minutes max. of advertisement and teleshopping per hour; For	shall not apply to self-promotion by TV channels; promotion of European



	Stricter rule for 12-minute limitation	Legal basis	Article 23(1) AVMSD	Article 23(2) AVMSD
		89 (1) and 90	PSB: 15 min. per day and 4 min. per hour + one third of total advertising between 19:00 and 22:00 over a period of 24 hours; For regional channels: 6 min. per hour.	works; charity appeals and public-benefit causes.
CY	NO	Law on Radio and Television Stations - Art. 34. (1)	20% max. time of advertisement and teleshopping per hour.	shall not apply to self-promotion by TV channels, sponsorship or product placement.
CZ	NO	Act 231/2001 on Radio and Television Broadcasting and on amendment to other acts - Consolidated 21 April 2010 - § 50. (2)	advertisements on radio and television may occupy a maximum of 15% of individual licensee's daily broadcast and max. 12 minutes per hour. Teleshopping included in the time limit and submitted to a specific limit of 1 hour per day,	shall not apply to self-promotion by TV channels; sponsorship or product placement; to any public service announcements or announcements in favour of generally beneficial objectives broadcast free of charge, or to charity appeals broadcast free of charge.
DE	YES for PSB	Interstate Treaty on Broadcasting and Telemedia - consolidated 1 September 2017 - Article 16 (3) and Article 45 (1)	20% max. time of advertisement and teleshopping per hour. For PSB: max. 20 min. (annual average) of total advertising time for ARD and ZDF on working days. Sponsoring and product placement not included in the limit. No advertising on Sunday and public holidays and after 8 p.m.	shall not apply to self-promotion by TV channels; sponsorship or product placement; to any public service announcement and charity appeals broadcast free of charge, and mandatory references by law.
DK	YES for all types of channels	Order on advertising and sponsorship - consolidated 21 June 2013 - § 6 (1); The Radio and Television Broadcasting Act - consolidated 6 May 2010 - § 75. (1)	12 minutes max. of advertisement and teleshopping per hour.	n/a
EE	NO	Media Service Act - Consolidated 22 May 2013 - § 29. (1); Decree No. 109 - Article 23 3.	12 minutes max. of advertisement and teleshopping per hour.	shall not apply to self-promotion by TV channels, sponsorship or product placement.
ES	NO but more details on telepromotion	General Law No 7/2010 of 31 March on Audiovisual Media - consolidated 1 May 2015 - Article 14 1. and Article 15 1	12 minutes max. of advertisement and teleshopping per hour.	shall not apply to sponsorship and product placement. Telepromotion shall also be excluded from the calculation where an individual telepromotion announcement clearly lasts longer than an advertisement and where the telepromotion as a whole does not exceed 36 minutes per day, or 3



	Stricter rule for 12-minute limitation	Legal basis	Article 23(1) AVMSD	Article 23(2) AVMSD
				minutes per clock hour.
FI	NO	Information Society Code - consolidated 18 September 2015 - 222 §	12 minutes max. of advertisement and teleshopping per hour.	shall not apply to self-promotion by TV channels; sponsorship or product placement; ideological and social advertising; teleshopping windows.
FR	YES for channels covering areas of 10 million inhabitants and for PSB	Law n° 86-1067 of 30 September 1986 on the Freedom of communication - consolidated 16 October 2015 - Art. 15 V. of Decree n°92-280 du 27 mars 1992	Limits fixed in individual agreements as follows: for terrestrial broadcasters in areas with more than 10 million inhabitants: max. 9 min. per hour on average and 12 min. per hour; for areas with up to 10 million inhabitants and those with scarce resources assigned by the CSA: as fixed individually within the limit of max. 12 min. per hour; for local channels, average of 12 min. per hour and 15. max per hour; no advertising between 8 p.m. and 6 a.m. on PSB	n/a
GR	NO	Presidential Decree No. 109 of 5 November 2010- Article 23 1	20% max. time of advertisement and teleshopping per hour.	shall not apply to self-promotion by TV channels and ancillary products directly derived from those programmes and for other activities of the broadcaster and those of affiliated enterprises operating in media (information or otherwise); information and entertainment services via the Internet; the production and distribution of music and/or audiovisual works; technical training for service in the above disciplines; announcements of social interest; sponsorship announcements; and product placements.
HR	NO	The Electronic Media Act - Consolidated 8 July 2011 - Art. 32 (1)	12 minutes max. of advertisement and teleshopping per hour / 10 min. per hour in children's programmes	shall not apply to self-promotion by TV channels, sponsorship or product placement.
HU	NO	Act CLXXXV of 2010 on Media Services and Mass Communication - Consolidated 1 July 2015 - 35. § (1) and (3)	12 minutes max. of advertisements per hour, including split screen advertisements, virtual advertisements and the promotion of the programmes of other media services; max. 3 hours per	shall not apply to self-promotion by TV channels, sponsorship or product placement.



	Stricter rule for 12-minute limitation	Legal basis	Article 23(1) AVMSD	Article 23(2) AVMSD
			day for teleshopping windows, not including the transmission time of the thematic media service broadcasting primarily teleshopping or teleshopping windows.	
IE	YES for all types of channels	Broadcasting Act - consolidated 1 December 2014 - 43.(1) (b) / General Commercial Communications Code, BAI? March 2017	The regulatory Authority shall fix the maximum period allowed in a given hour for the transmission of advertisement and teleshopping material. 18% max. of advertising and teleshopping of the total broadcast day / 12 min. max. per hour.	shall not apply to self-promotion by TV channels, sponsorship or product placement.
IT	YES for free-to-air, pay-tv and PSB	Audiovisual Media Services Code - Consolidated 13 August 2015 - Art. 38		shall not apply to self-promotion by TV channels, sponsorship or product placement.
LT	NO	Law on the Provision of Information to the Public - Consolidated 21 May 2015 - Art. 39 11. 3)	20% max. per hour of television advertising and teleshopping.	shall not apply to self-promotion by TV channels; sponsorship or product placement.
LU	NO	Grand-ducal regulation of 24 June 2008, amending the grand ducal regulation of 5 April 2001, which sets the rules for advertising, sponsoring, teleshopping and self-promotion in programs that come under the jurisdiction of Luxembourg in accordance with the modified European directive: "Television without frontiers" - Art. 6 (1) and (2)	20% max. per hour of television advertising and teleshopping.	shall not apply to self-promotion by TV channels, sponsorship or product placement.
LV	YES for PSB	Electronic Mass Media Law - Section 42. (1)	20% max. per hour of television advertising and teleshopping. 10% max. per hour in PSB.	shall not apply to self-promotion by TV channels, sponsorship or product placement.
MT	NO	Broadcasting Act 350 - consolidated as latest amended in 2015 - Article 19 (2) 15	20% max. per hour of television advertising and teleshopping.	shall not apply to self-promotion by TV channels, sponsorship or product placement.
NL	YES for PSB	Act no 552 amending the Media Act 2008 and the Tobacco Act for the implementation of the Audio-Visual Media Services Directive - Art. 3.8 1	12 minutes max. of advertisement and teleshopping per hour.	n/a



	Stricter rule for 12-minute limitation	Legal basis	Article 23(1) AVMSD	Article 23(2) AVMSD
PL	NO	Broadcasting Act - Consolidated 12 October 2012 - Art. 16. 3	12 minutes max. of advertisement and teleshopping per hour.	shall not apply to self-promotion by TV channels, sponsorship or product placement, identification of commercial communications required by law, including the identification of sponsors.
PT	YES for conditional access TV services	Television Law no. 8/2011 - Article 40 1	Max. 10% within a 2-hours' time limit in conditional access TV programmes and 20% per hour in free-to-air TV, whether unrestricted or subject to subscription.	shall not apply to self-promotions, telepromotions and blocks of teleshopping, and do not apply to the promotion of associated products, including where not directly related to the programmes of the television operators.
RO	YES for PSB	The Audiovisual Law - consolidated 22 November 2009 - Art. 35 (1)	20% max. per hour of television advertising and teleshopping / 12 min. max per hour / 8 min. max for PSB.	shall not apply to self-promotion by TV channels, sponsorship or product placement.
SE	NO	The Radio and Television Act - consolidated 17 June 2010 - Chapter 8, Section 1 and 16	12 minutes max. of advertisement and teleshopping per hour.	shall not apply to self-promotion by TV channels.
SI	NO	Audiovisual Media Services Act (ZAVMS) - Art. 32 (1)	12 minutes max. of advertisement and teleshopping per hour.	shall not apply to self-promotion by TV channels; sponsorship or product placement (i.e. products specially designed to provide listeners or viewers with all the benefits of these programmes or interaction with them).
SK	YES for PSB	Act 308/2000 on Broadcasting and Retransmission and on the amendment of Act No. 195/2000 on Telecommunications - consolidated 3 February 2015 - § 36 (2)	20 % max. per hour (12 min.). Max. 8 min. per hour for PSB between 7.00 p.m. and 10.00 p.m.	shall not apply to self-promotion by TV channels, sponsorship or product placement.
UK	YES for PSB and other channels	Ofcom's Code on the Scheduling of Television Advertising - 4.	12 minutes max. of advertisement and teleshopping per hour as average (9 min. max of which for TV advertising); 7 min. per hour max. for PSB as an average per day; average of 8 min. per hour between 6 pm and 11 pm; on other channels.	shall not apply to channels exclusively comprised of self-promotional content. On those channels comprising both self-promotional and other content, the self-promotional content will be treated as advertising, and will be subject to the limits on advertising set out in paragraph 4(b)(i).

Source: AVMSDatabase, European Audiovisual Observatory, Strasbourg, France and Annex 6 – Implementation of the provisions on commercial communications at national level, Ex-post REFIT evaluation of the Audiovisual Media Services Directive 2010/13/EU, 25 May 2016, SWD(2016) 170 final





Table 4. EU mapping of SR/CR schemes in the advertising sector

	Self-regulatory (SR) system	Self-regulatory organisation (SRO)	Codes
AT	<p>There are several relevant SR/CR schemes in place concerning CC. These include the Österreichische Werberat (Austrian Advertising Council) that was founded in 1974 and represents the industry, the agencies and the media with a view to stimulate the advertising industry to SR. (www.werberat.at)</p>	<p>The Austrian Advertising Council (AAC) is the SRO responsible for implementing SR in the sector and handling complaints from the general public and competitors. The Council continuously monitors the code and uses “soft sanction measures” such as naming, shaming and blaming. Companies that adhere to quality criteria promoted in the Code can receive from the AAC a “Pro-Ethics Seal”.</p>	<p>The “Ethik-Kodex der Werbewirtschaft (Advertising Industry Ethics Code) (updated in 2012) aims at correcting abuses in CC (discriminations, breach of human dignity or misleading CC). Annexes to the Code include the Code of Conduct of the Austrian broadcaster regarding inappropriate audiovisual CC with children’s programmes and food (HFSS) (2010), the “Communication Code of the Austrian Brewing Industry” (2007). The Code applies to CC in TV broadcasts, ODAVMS and all other media.</p>
BE	<p>The regulatory system in Flanders and Wallonia can be described as statutory regulation with some elements of SR/CR. The “<i>Conseil de la Publicité - Raad voor de Reclame</i>” (Advertising Council) was set up in 1967 by associations representing the advertisement sector. The role of the Council is to promote, valorise and defend CC and its role in economic development. The members cover 95% of the advertisement market in Belgium. The Belgian Advertising Council Code consists of a general code (based on the ICC) and several specific codes, e.g. on alcoholic beverages and food. (www.conseildelapublicite.be)</p>	<p>The enforcement of all the SR/CR codes is carried out by the “<i>Jury d’Ethique Publicitaire - Jury voor Eerlijke Praktijken inzake Reclame</i>” (Advertising Ethics Jury, JEP). The JEP is the SRO of the advertising sector, set up in 1974 by the Advertising Council, whose mission is to verify the compliance of CC with the advertising codes and legislation. In 2008, the JEP set up an appeal body to deal with complaints. The JEP comprises representatives of various stakeholders such as industry and civil society and also collaborates with public advisory and regulatory bodies such as the Audiovisual Media Council, the Council of Youth, the Consumers’ Council and the Federal Ministry of Public Health. (www.jep.be)</p>	<p>The general code used by the JEP is the ICC Code, as amended in 2012. Other sectorial or inter-sectorial codes are also used, such as: the covenant on advertising and marketing of alcoholic beverages; the advertising code for foods (Fevia); the advertising code for motor vehicles, components and accessories (Febiac); the advertising code for cosmetic and hygiene products (Detic); the code for ethics in funds collections (AERF code); the code of ethic and responsible advertising of enterprises organising lottery; the code of ethics for telecommunications; the code of environmental advertising.. The Code applies to CC in TV broadcasts, ODAVMS and all other media.</p>



	Self-regulatory (SR) system	Self-regulatory organisation (SRO)	Codes
BG	In Bulgaria, the practice of SR/CR is generally limited. The "Radio and Television Act" (RTA) requires the Bulgarian media service operators to comply with more detailed national (ethical) codes of conducts and the decisions of the National Council for Self-Regulation (NCSR), which is the independent body for self-regulation in the advertising sector. It was founded by advertisers, agencies and the media. (http://www.nss-bg.org/en/). Furthermore, there are also self-regulatory schemes operational within sectoral branches as part of the NCSR Code, the National Ethics Rules for Advertising and CC in Bulgaria. (www.nss-bg.org)	The NCSR creates, revises and ensures the voluntarily application of ethical standards and good practices in the sector, with the aim to provide protection to consumers and ensure fair competition. It counts with an Ethical Committee, an Appeal Committee, a Post Monitoring Committee, an Expert Group for Code Interpretation, as well as other working structures, in order to achieve these objectives.	The National Ethics Rules for Advertising and CC (the "Code"), based on the ICC Code, was adopted by the NCSR in 2009. The Code promotes responsibility and good practices in advertising and CC. It enhances public confidence in CC, encourages to respect privacy and consumer preferences, with special responsibility concerning CC to children. Specific products (food and drink, alcoholic beverages, gambling, etc.) are also covered by the Code. The NCSR regularly revises the provisions of the Code and adopts regulations for its implementation. The Code covers CC in TV broadcasts, ODAVMS and all other media.
CY	In Cyprus, the practice of SR/CR is generally limited. The Cyprus Advertising Regulation Organisation (CARO) is a SRO set up by advertisers, agencies and the media as an independent non-profit body with the aim to ensure that advertisement are legal, decent, honest and truthfully in keeping with the Cyprus Advertisement Code. (www.fed.org.cy)	CARO handles complaints from consumers, competitors and other interested parties. It consists of two levels of audit committees: the Primary and the Secondary Communications Control Committee, composed of representatives from the industry and the wider social sphere. Both Committees have the possibility to request the withdrawing / stopping of an advertising spot or to modify it in order to comply with the Cyprus Code of Communication Ethics.	The Cyprus Code of Communication Ethics came into force in 2012. It sets out the rules of professional ethics and ethical conduct that must be observed by advertisers, agencies and SMEs. The Code was drafted by CARO and accepted by its members. It is based on the ICC code and applies to all forms of advertising and communication for products or services. In addition to the Code, specialized branches have been created to focus on issues that concern consumers, e.g. advertising and kids; food and non-alcoholic beverages; promotional actions; alcoholic beverage; beer. The Code applies to CC in TV broadcasts, ODAVMS and all other media.
CZ	In the Czech Republic, SR/CR is generally widely spread. The "Rada pro reklamu" (Advertising Standards Council, RPR) was set up in 1995 as a non-governmental, non-profit organisation by advertising agencies, media and advertisers for the purpose of maintaining the ethics of promotion, particularly advertising and enforcing the SR of advertising. Based on membership of the RPR, organisations voluntarily commit to adhere to the Code of Advertising Practice issued by the RPR. Non-members can also choose to adhere to the Code on a voluntary basis. (www.rpr.cz).	The RPR handles complaints for non-compliance with the Code of Ethics. It can initiate a decision-making process against a specific advertisement. It can also act at its own initiative if it becomes convinced that an advertisement may be in violation of the Code. In the case of non-compliance, naming, shaming and blaming is the general type of sanction applied. If the law has been violated, the case is passed on for legal sanctions to the Trade Licensing Office. The RPR has created a preventive system, the "Copy Advice system", which offers advertisers a pre-assessment to an upcoming advertising campaign before it runs,	The Code of Advertising Practice (Kodex reklamy) was adopted in 1995 by the RPR. Based on the ICC Code, it sets out the rules of professional ethics and ethical conduct that must be observed by advertisers, agencies and the media. In its latest version of 2007, the Code includes two main parts: one with general principles and the second part with specific rules. The Code applies to CC in TV broadcasts, ODAVMS and all other media.



	Self-regulatory (SR) system	Self-regulatory organisation (SRO)	Codes
DE	The German self-regulatory system has two advertising standards organisations: the German Advertising Standards Council (Deutscher Werberat, DW) deals with issues of taste, decency, and social responsibility, whereas the Competition office (Wettbewerbszentrale) handles issues of unfair commercial practices by applying unfair competition law. (www.wettbewerbszentrale.de and www.werberat.de)	The DW is responsible for monitoring, complaints handling and enforcement. However, in cases where a breach of law is suspected, the case is passed on to the responsible public authorities. The DW gathers 42 organisations of advertisers, the media, advertising agencies, the advertising professions and research establishments represented by the German Advertising Federation (ZAW). DW promotes responsible practices in CC and provides a mechanism for conflict settlement between the public and commercial advertisers. It also draws up voluntary codes of conduct for advertising, particularly to sensitive areas.	The Code of Conduct of the DW (Verhaltensregeln des Deutschen Werberat, VDW) consists of a general code and several codes for specific products or themes (e.g. CC of alcoholic beverages, children, gambling, etc.). The VDW focuses on advertisers taking the responsibility for ensuring good standards in advertising. It applies to all sectors of industry and all media forms (TV broadcasts, ODAVMS and all other media).
DK	In Denmark the practice of SR/CR is rather limited. Both the Consumer Ombudsman and the Press Council offer guidance in respect of laws. The Consumer Ombudsman (DCO) deals with matters concerning the interests of consumers, thus regulating advertising under the Marketing Act, and has the authority to draft guidelines in cooperation with industry and consumer organisations. The Press Council is an independent public tribunal dealing with complaints about mass media and press ethics according to the Danish Media Liability Act. (www.consumerombudsman.dk)	The DCO handles specific complaints and cases of a wider public importance on advertising. It does not handle individual disputes between consumers and traders, but it can negotiate settlements on behalf of consumers. The DCO issues guidelines on specific or general marketing issues on a regular basis, and traders can obtain an advance indication on the legality of planned advertising actions. It is legally entitled to bring judicial actions on behalf of complainants, request the police to initiate investigation and prosecution to bring a charge against a trader, issue interim injunctions and collective redress actions on behalf of groups of consumers.	There are different guidelines and guidances that interpret the legislation under DCO's supervision, such as the Code of Responsible Food Marketing Communication (2008) (<i>Forum for fødevarereklamer</i>), which is a voluntary code established by the Forum for Food Advertising. The Code of Practice for Marketing of Alcoholic Beverages (2000) (<i>Alkoholreklamenævnet</i>), drafted by the industry and consumer organisations with support of the relevant ministries and administered by the Alcohol Commercial Council. The Codes apply to CC in TV broadcasts, ODAVMS and all other media.
EE	Practices of SR/CR are limited in Estonia, as there are only a few SR/CR schemes in place. An example of these is the Responsible commercial communication policy in children's programmes. This policy was implemented by the Association of Estonian Broadcasters (AEB). They ensure that members of the AEB refrain from broadcasting CC that invite children to the excessive consumption of food or the consumption of unhealthy food, during and around programmes that are aimed at children. Additionally, there are developments in the area of advertising of alcoholic beverages on popular TV shows.	The Association of Estonian Broadcasters (AEB) initiated and developed in 2012 the "Responsible commercial communication policy in children's programmes". AEB is responsible for monitoring the scheme. This is only carried out when needed, namely based on consumer complaints. When actors do not comply with the code naming, shaming and blaming is the type of enforcement used as a consequence.	The "Responsible commercial communication policy in children's programmes" (<i>Vastutustundlik reklaampoliitika lastesaadetes</i>) was adopted in 2012 by the AEB. In accordance with the scheme, the members of the AEB refrain from broadcasting audiovisual commercial communications which invite children (younger than 12 years) to excessive consumption of foods which are not suitable for children, during and around programmes meant for children. The objective of this scheme is that there should be none of these commercials between and around children programmes. The rules apply to CC in TV broadcasts only.
ES	The practice of SR/CR in Spain is well established. Furthermore, several SR codes are in place for regulating CC.	The SRO in the advertising field is the Association for Self-regulation of Commercial Communication (Asociación para la Autorregulación de la Comunicación Comercial, AUTOCONTROL).	The Advertising Code of Conduct (Código De Conducta Publicitaria de AUTOCONTROL) was developed in 1996 by AUTOCONTROL. Its main objective is to establish the ethical rules that apply to all CC



	Self-regulatory (SR) system	Self-regulatory organisation (SRO)	Codes
		The monitoring process includes a voluntary prior control based on the issuing of Copy Advice, a complaints resolution system and ruling of the Advertising Jury, and a sample based monitoring activities where all advertisements in a given sector or during a given period are checked. The decisions of the Advertising Jury for non-compliance with the Code are binding for its members and include "name and shame".	and implementing principles of honesty, fairness and truthfulness. The Code constitutes a general advertising code of conduct, with some 26 sub-agreements and 14 sectoral agreements (including medicinal products, beer, spirits, Prevention of Obesity and Health (also known as the Paos Code), videogames, toys, gambling activities, perfumes and cosmetics.. The Code covers CC in TV broadcasts, ODAVMS and all other media.
FI	Finland has two advertising standards organisations, both of which are run by the Finnish Chamber of Commerce. The Council of Ethics in Advertising (Mainonnan eettinen neuvosto, MEN) handles ethical issues in advertisements, and the Board of Business Practice (Liiketalautakunta, LTL) deals with business-to-business disputes about unfair commercial practices. The MEN issues statements on whether an advertisement or advertising practice is ethically acceptable and deals with issues like discrimination, decency and social responsibility. Issues concerning misleading or comparative advertising are dealt with by the LTL. (http://kauppakamari.fi)	The Finnish SRO for CC was set up in the 1980s and renamed as MEN in 2001. Its secretariat was placed in the Central Chamber of Commerce. The Board of MEN handles complaints, makes statements and remarks of its own initiative. Moreover, it stimulates the advertising sector to follow ethical guidelines of the ICC Code. In addition, LTL was set up in 1937 to promote self-regulation and to prevent unfair competition and illicit trade practices. The LTL seeks to provide companies with a rapid and effective procedure to settle disputes about unfair trade practices. The LTL applies Consolidated ICC Code as such.	The Ethical Code of the Council of Ethics in Advertising (Eettinen Koodi neuvoston Mainonnan eettinen) was issued in the 1980s, based on the ICC Code. The Code covers CC in TV broadcasts, ODAVMS and all other media.
FR	In France, audiovisual CC are structured by SR/CR through the professional regulatory authority for advertising (Autorité de Régulation Professionnelle de la Publicité, ARPP). Once a broadcaster has received its license from the state regulator (Conseil Supérieur de l'Audiovisuel, CSA), the ARPP (known as the BVP until 2008), is responsible for monitoring the content of advertisements on its SR/CR scheme. (www.arpp.org)	The mission of the ARPP is to maintain high standards in terms of legal, honest and truthful advertising, which is in interest of both the consumers and the advertisers. The rules of the ARPP are enforced by the ARPP itself and the Jury of Advertising Ethics (Jury de Déontologie Publicitaire, JDP). In the case of no changes to the advertisement in question, naming, shaming and blaming can be decided upon by the JDP and carried out by the ARPP. In practice, the ARPP can also enlist the cooperation of the CSA, though this is not formally stated in the SR scheme.	The ARPP Rules consist of five categories of codes and guidance documents: general recommendations on advertising (6 supplementary codes to the ICC Code); thematic recommendations (9 codes, including a code on advertising aimed at children); sectoral recommendations (26 sectoral codes); recommendations for support (3 codes); and doctrine sheets (4 sheets). In 2011, the ICC Code was taken up by the ARPP to harmonise and simplify the many SR rules for CC. The Rules covers CC in TV broadcasts, ODAVMS and all other media.



	Self-regulatory (SR) system	Self-regulatory organisation (SRO)	Codes
GB	<p>The regulation of CC in audiovisual and on-demand media in the UK are carried out through a system of statutory as well as SR/CR. The regulation of CC is under the direct responsibility of the Advertising Standards Authority (ASA), which under the provisions of the Communications Act (2003), is given regulatory powers by the state regulator – the Office of Communication (Ofcom).</p>	<p>The ASA for Broadcast (ASA (B)) and the Broadcast Committee of Advertising Practices (BCAP) are the two main bodies responsible for broadcast advertising regulation, which is implemented through the BCAP Code. On the other hand, the ASA and the Committee of Advertising Practice (CAP) are in charge of regulating CC in on-demand 'TV-like' media through the CAP code. The two Committees are responsible for writing the codes, while the ASA has enforcement powers. In order for Ofcom to monitor the system, ASA reports regularly on pre-agreed Key Performance Indicators. Complaints are generally handled by ASA. It has produced a set of procedures governing the handling and resolution of complaints.</p>	<p>The principles of the BCAP Code are that advertisements should not mislead or cause serious or widespread offence or harm, especially to children or the vulnerable. Both the CAP and the BCAP Codes (the Advertising Codes) contain sections specifically related to specific products (alcohol, food, medicine, e-cigarettes, gambling, etc).</p>
GR	<p>CC are strongly regulated by the Greek government. The SR/CR scheme for CC includes two industry specific codes as part of its annexes. The SRO responsible for implementing them is the Advertising Self-Regulation Council, which works in close cooperation with the Secretariat General of Information and Communication and an independent administrative authority, the National Council for Radio and Television (NCRT), which includes among its committees an Ethics Committee that reviews the quality of programs and considers complaints by citizens. (www.see.gr)</p>	<p>The Council does not carry out monitoring activities regarding the achievement of the Code's objectives. However, it monitors specific aspects such as the compliance rate with its decisions and rulings regarding non-compliant CC. Any complaint must be referred to the Council which then informs the parties involved if they are found to be in breach of the scheme. The complaints are then submitted to a First Degree Committee which takes decisions. A Second Degree Committee exists for appealing. Following the decision of the First and/or the Second Degree Committee, the company withdraws the advertisement. Failure to abide with the decision leads to the incursion of penalties provided by law, which are imposed by the NCRT.</p>	<p>The Hellenic Advertising and Communication Code (the general code) (2003) governs the content and presentation of advertisements and it applies to all industries and media forms (TV broadcasts, ODAVMS and all other media). The Hellenic Association of Brewers created its own self-regulation scheme, in close cooperation with the Council, and by consulting the existing guidelines set by Brewers of Europe. The Hellenic Association of Brewers' Self-Regulation for CC represents the brewers' industry code of conduct (annex to the general code) which is aimed at both the social responsibility of brewers, and at deterring imprudent alcohol consumption.</p>
HR	<p>In general, the practice of SR/CR is limited in Croatia. The HURA is the Croatian Association of Communications Agencies. The HURA took the initiative to develop the Advertising Code in 2010. Related laws are the Electronic Media Act, the Media Act, the Croatian Radio Television Act, the Food Act, and the Consumer Protection Act.</p>	<p>The Assembly of the HURA is responsible for monitoring the implementation of the Code. In other words, the HURA is responsible for enforcing the scheme. The type of enforcement that is commonly used is naming, shaming and blaming. Other types of enforcement are the withdrawal of the disputed spots and public fines. As a rule, sanctioned parties implement the decisions of the body imposing the sanction, namely the HURA Court of Honour.</p>	<p>HURA's Advertising Code came into force in 2010. It serves as a collection of standards and recommendations to the companies participating in CC. By accepting the Code, HURA recommends its members and other market operators to apply its general rules and practices and its minimum standards. The HURA took the initiative to develop the scheme and is the code owner. The Code applies to CC in TV broadcasts, ODAVMS and all other media.</p>



	Self-regulatory (SR) system	Self-regulatory organisation (SRO)	Codes
HU	<p>In general SR/CR is widely spread in Hungary. The current media law offers the possibility for SROs to receive a mandate for legal enforcement on defined areas (i.e. on-demand AVMS and products of on-line and printed media - traditional TV services not included -). In order to gain this authority they must enter into a contract with the Hungarian Media Council. Currently four SROs have signed such a contract: the Advertising Self-Regulatory Board, the Association of Hungarian Electronic Broadcasters, the Association of Hungarian Content Providers and the Association of Hungarian Publishers. (www.ort.hu)</p>	<p>The Advertising Self-Regulatory Board, together with the Hungarian Advertising Association, has a leading role in developing and modifying the Hungarian Code of Advertising Ethics. However, the Advertising Self-Regulatory Board can only regulate on-demand AVMS, printed media and other online media as part of the co-regulatory agreement.</p>	<p>The Hungarian Code of Advertising Ethics (Magyar Reklámetikai Kódex) was established in 1981 and regularly revised since then. The Code covers CC in TV broadcasts, ODAVMS and all other media. It is currently accepted by 22 Hungarian organisations and contains general regulations and special rules on advertisements (slimming products, healthcare products, cosmetic products, food, alcoholic beverages, and vehicles), as well as for advertisements published on digital devices. Based on the ICC Code, the main purpose of the Code is to provide professional and ethical norms for those engaged in advertising activities in Hungary.</p>
IE	<p>The Advertising Standards Authority for Ireland (ASAI) is the independent SRO set up in 1981 and financed by the advertising industry to promote the highest standards of marketing communications (advertising, promotional marketing and direct marketing). The SRO "On-Demand Audiovisual Services Group" (ODAS) is also in charge of setting rules and principles (the ODAS Code) that concern CC in on-demand AVMS and of monitoring their implementation. (www.asai.ie and www.bai.ie)</p>	<p>The objective of the ASAI is to ensure that all CC are 'legal, decent, honest and truthful'. The ASAI responds to and monitors consumer complaints regarding CC. The Complaints Committee reviews at least once a year the number of complaints dealt with by the Secretariat. A CC which is in breach of the ASAI Code must be withdrawn or amended. On the other hand, the ODAS is responsible for monitoring the implementation of its Code of Conduct on several aspects related to on-demand AVMS, including CC (but also protection of minors, promotion of works). The ODAS meets regularly to review developments and to review the complaints received.</p>	<p>ASAI issued the Code of Standards for Advertising and Marketing Communications after consultation with the industry. This general code covers CC in TV broadcasts, ODAVMS and all other media. It includes product specific sub-codes (e.g. foods and non-alcoholic beverages, alcohol, etc.) Alcohol is regulated further by the alcohol industry which set up a supplementary code to the ASAI Code. This voluntary, supplementary scheme, the Alcohol Marketing, Communications and Sponsorship Code of Practice, is monitored by the industry as well. In relation to ODAVMS, the ODAS Code of Conduct also contains high level principles that member organisations are obliged to adopt. ODAS also handles the complaints.</p>



	Self-regulatory (SR) system	Self-regulatory organisation (SRO)	Codes
IT	<p>The SR/CR schemes in CC have been in place for a long period of time and were established prior to the AVMSD. The Consumer Code has a standard that formally recognizes the existence of voluntary, autonomous SROs. Furthermore, this norm allows for the possibility to ask to suspend proceedings before authorities pending the ruling of the SRO. In the field of CC, the Institute for Advertising Self-Regulation (Istituto dell'Autodisciplina Pubblicitaria - IAP) is just one of the possible means for SR. Because of its history and representativeness, it has become a "natural" interlocutor for Italy's Antitrust Authority.(www.iap.it)</p>	<p>The IAP handles complaints received against CC for non-compliance with the Code. A review board of the IAP investigates the complaint and takes a final decision except for in more complex cases. The more complex cases are forwarded to the Jury. The IAP review board uses naming, shaming and blaming as a sanction for companies in breach of the Code. The IAP can ask for a change of the content or the removal of the advertising material.</p>	<p>The Code of Marketing Communication (Codice di Autodisciplina della Comunicazione Commerciale) is the SR scheme which was put in place in 1966 following the initiative by the industry. The Code aims at ensuring that CC is conducted as a service to the public with due consideration to the potential influence it may have on consumers. It is binding for all its members. The Code covers CC in TV broadcasts, ODAVMS and all other media. Some product categories are highlighted in the Code, including alcoholic beverages, cosmetics and hygiene products, food supplements and health foods, physical and aesthetic treatments, as well as medicinal products.</p>
LT	<p>The regulatory culture regarding CC is generally quite legislation-oriented in Lithuania. However, there is one main relevant SR/CR scheme in place, which is related to the AVMS Directive. The Lithuanian Code of Ethics Advertising was set up by the Lithuanian Advertising Bureau (SRO) and it aims to promote ethical advertising in Lithuania. (www.lrb.lt)</p>	<p>The Lithuanian Advertising Bureau (Lietuvos reklamos biuras) was set up by advertising agencies, media and advertisers in 2006. The Advertising Bureau conducts monitoring and publishes reports on its activities and handles complaints. The main sanctions are naming and shaming, and where this is not sufficient, formal warnings or the removal of the offending advertisement from the media platform in question.</p>	<p>The Lithuanian Ethics Code of Advertising (Lietuvos reklamos etikos kodeksas) is based on the ICC Code. It was established in 2011 by the Lithuanian Advertising Bureau, with the aim to develop the advertising sector and to improve the institutional basis for ethical SR in advertising management, fair competition, ensuring consumer protection and the general public interest against the negative impact of advertising. It covers CC in television broadcasts, on-demand AVMSD and all other media.</p>
LU	<p>In Luxembourg, many sectors are directly regulated by the government. The Council for advertising (Conseil de la Publicité, CPL) established a Deontological Code in 2009, regulating advertising in all types of services (e.g. audiovisual, radio, other media), with specific sections on children, alcohol and health products, etc. CPL counts between 70 and 80 members, from broadcasters, industry associations and advertising agencies. The Code's application is carried out by the Commission for ethical advertising (Commission pour l'Ethique en Publicité, CLEP), which holds nine members elected by the CPL.</p>	<p>The CPL and CLEP are SROs. They do not have the power to enforce the Code, and the CLEP cannot sanction breaches. The CLEP receives complaints from the general public as well as from NGOs, and addresses them by contacting the broadcasters and asking them to modify or remove the advertising material. If the party refuses to do so, the CLEP can involve the media, telling them to refuse or suspend the content, although in practice they have never had to resort to this.</p>	<p>The CPL elaborated the Deontological Code of Advertising in Luxembourg with the aim of maintaining and improving consumer trust in the industry, the communication sector and the market in general. The Code was revised in 2015 so as to take online behavioural advertising into account. The Code covers CC in television broadcasts, on-demand AVMSD and all other media.</p>
LV	<p>Practices of SR/CR are very limited in Latvia, as there are no specific schemes in place. Audiovisual media are regulated by the national "Electronic Mass Media Law" which covers audiovisual media, as well as radio and to some extent the internet.The</p>	n/a	n/a



	Self-regulatory (SR) system	Self-regulatory organisation (SRO)	Codes
	responsible body for the implementation and monitoring of the law is The National Electronic Mass Media Council, which is a public authority. (http://eucam.info/news-on-alcohol-marketing/latvia/)		
MT	There is no specific SR/CR in place in Malta in relation to CC.	n/a	n/a
NL	In the Netherlands SR/CR play a prominent role in the legislative framework.	The Dutch Advertising Code Authority (Stichting Reclame Code) is the SRO that promotes responsible advertising aimed at ensuring the reliability and credibility of advertising. The codes serve as instruments to achieve the goals set. The compliance system is monitored by the Dutch Advertising Code Authority. The chairman, the Advertising Code Committee and the Board of Appeal of the Dutch Advertising Code Authority are responsible for the handling of complaints. For television, the effective sanction is to remove the CC from television. Furthermore, decisions are made public on the website of the Advertising Code Authority.	The Dutch Advertising Code (Nederlandse Reclamecode) was developed in the 1970s by the advertising industry based on the ICC Code. It contains rules and standards for ethics in advertising (not misleading, not gratuitously offensive, etc.). Specific codes were developed later for certain products and services: related to social responsibility (alcohol, food, environmental claims); for the way in which advertising is disseminated; and industry specific codes. The Dutch Advertising Code is a general code for all advertisements, not only via audiovisual media.
PL	The core element of the SR/CR system in Poland is the general Code of Ethics in advertising developed by the Union of Associations Advertising Council. Other specific codes were developed later by the SRO, trade organisations and public authorities for specific products (e.g. CC on HFSS aimed at children).	The Union of Associations Advertising Council (Związek Stowarzyszeń Rada Reklamy) consists of several associations representing the advertising industry. The main mechanisms within the SR/CR scheme are: the complaints handling process (conducted by the Committee of Advertising Ethics), and the monitoring of the complaints. The Committee is responsible for the enforcement. In case of breaches of the Code rules, the Committee requests the advertisers to change the advertisements with the aim of remedying the infringement. In addition, in 2015, public authorities, enterprises (the 6 largest Polish TV broadcasters), trade organisations developed a new scheme on CC related to HFSS food and drinks aimed at children.	The Code of Ethics in Advertising (Kodeks Etyki Reklamy) is applicable to all kinds of advertisement and sponsorship practices, regardless of the media channel used (press, audiovisual media etc.). In 2015, the Rada Reklamy developed the "Television Broadcasters' Agreement on the rules of distributing Advertisements and Sponsor Recommendations regarding foodstuffs or beverages containing ingredients whose presence in excess amounts in the daily diet is not recommended". This code regulates CC on food aimed at minors on television broadcast only.



	Self-regulatory (SR) system	Self-regulatory organisation (SRO)	Codes
PT	<p>SR/CR is widely spread in Portugal. SR/CR in the field of CC concerns the Code of Conduct of the Civil Institution for Self-discipline of the Media (ICAP), including specific codes for, amongst others, advertisements of foods and beverages directed at children, and alcoholic beverages.</p>	<p>The Civil Institution for Self-discipline of the Media (Instituto Civil de Autodisciplina da Comunicação Social, ICAP) is the SRO in the field of CC. It mainly receives complaints from actors from the industry and from individuals. Furthermore, it provides ex-ante Copy Advices to advertisers. Conflict resolution is carried out by an Ethics Jury (EJ). Individual entities such as consumer associations and companies may present a complaint against a CC. The EJ may require the amendment of the advertisement in question, or the removal of the campaign. The EJ can also use naming, shaming and blaming, and membership suspension or exclusion.</p>	<p>The ICAP conduct code (Código de conduta do ICAP) has been developed by industry and trade organisations. The main objectives of the Code are to prevent misconduct and abuses in advertising, show responsible and good practices, strengthen public trust and promote ethical principles. The Code applies to CC in TV broadcasts, ODAVMS and all other media.</p>
RO	<p>The national regulator for the audiovisual sector is the National Audiovisual Council of Romania (CNA). The CNA encourages the sector to adopt self-regulatory measures. The Romanian Advertising Council (RAC) is the independent non-governmental organisation involved in self-regulation of advertising. The CNA and RAC have signed a protocol to be able to discuss complaints and to come to the right decisions in line with legislation.</p>	<p>The Romanian Advertising Council (RAC) is the independent SRO in advertising. It was created in 1999 and includes 70 members from the industry sectors, associations and advertising agencies. The RAC developed the Code of Advertising Practice. It handles complaints for non-compliance with the Code from consumers and industry members through its Ethics Committee. Sanctions range from naming and shaming to membership exclusion.</p>	<p>One of the most important SR codes for audiovisual CC is the RAC Code of Advertising Practice (Codul de practica in publicitate) (1999). The RAC code sets a common basis for advertising rules, promoting good behaviour amongst media companies across the sector. The code contains general rules of conduct and specific rules for specific products (e.g. beer, alcohol, HFSS for children, cosmetics). It covers TV broadcasting, cinema, radio, printed material, packaging, online and telephone communications. Another relevant code is the Deontological Code (Cod Deontologic), developed by the Romanian Association for Audiovisual Communications (ARCA) (commercial broadcasters), although it does not focus specifically on CC.</p>
SE	<p>The Swedish SR/CR system is based on the Consumer Ombudsman, who is responsible for monitoring the content of advertisements on television and on-demand TV, and carries out the regulation regarding advertisements directed at children.</p>	<p>The Swedish Advertising Ombudsman (Reklamombudsmannen, RO) is an industry SRO set-up to monitor CC as a supplement to the existing legal regulations. The objectives of the RO are to provide the general population, businesses, authorities and other organisations information and guidance in ethical questions regarding marketing; to provide copy advice to the funders of the foundation; to take part in public debates and information events which regard ethics in marketing; to take part in obvious cases to judge if a marketing practice is compatible with the rules of RO; in all other cases refer complaints to the RO jury for review; to make presentations of cases for the RO jury.</p>	<p>The monitoring by the RO applies to CC in TV broadcasts, ODAVMS and all other media.</p>



	Self-regulatory (SR) system	Self-regulatory organisation (SRO)	Codes
SI	<p>The practice of SR/CR has been well-established in Slovenia in the advertising field, particularly before 2000 and its adhesion to the EU followed by the need to transpose legal acts into national law. The Slovenian Code of Advertising Practice (SCAP) was developed by Slovenian Chamber of Advertising (Slovenska oglaševalska zbornica- SOZ) and comes as a complement to national laws to regulates the whole advertising space, including CC and the protection of minors.</p>	<p>The SOZ issued the SCAP in 2009, following the first general advertising code adopted in 1994. The SOZ collects comments from its members, follows the legislation, and monitors the implementation of the Code through the work of the Advertising Arbitration Court (AAC). The AAC handles complaints concerning compliance of CC with the Code and imposes measures in accordance with its Rules of procedure. Sanctions used are naming, shaming and blaming, judicial sanctions and public appeal to withdraw or suspend the CC. The AAC has no legislative power and its decisions have no legal consequences.</p>	<p>The SCAP is a voluntarily adopted document, which explicitly mentions alcoholic beverages, tobacco products, medical products and devices, food and non-alcoholic beverages, health and beauty products, motor vehicles, gambling, and including political advertising. The SCAP applies to CC in TV broadcasts, ODAVMS and all other media. In addition, a National RTV Code was adopted in 2000 by the national Radio and Television Company, which sets ethical criteria for advertisements for PSB. Private TV broadcasting providers of linear and non linear services must adopt their own internal codes of advertising which do not conflict with the relevant laws or the SCAP.</p>
SK	<p>The Slovakian advertising market has been self-regulating since 1995 by means of the Slovak Advertising Standards Council, which was established by clients, advertising agencies, and the media for the purpose of enforcing SR of advertising. Through their membership with the Council, members commit voluntarily to the Ethics Code of Advertising Practice. Non-members have the chance to voluntarily adhere to this Code in an informal manner.</p>	<p>The Slovak Advertising Standards Council (Rada pre reklamu, RPR) primary goal is to maintain the ethics of promotion and advertising in particular. For the purpose of achieving this goal the Code of Ethics for advertising was implemented. The Slovak Advertising Standards Council is only authorised to initiate a decision-making process in compliance with its Rules of Procedure. The sanction used in cases of non-compliance is naming, shaming and blaming. If there is a violation, the case can be handed over to legal action.</p>	<p>The Ethics Code of Advertising Practice (Etický kodex reklamnej praxe) (1995) was developed by public authorities, enterprises, trade organisations and other interest groups. The Code applies to CC in TV broadcasts, ODAVMS and all other media.</p>

Source: European Audiovisual Observatory elaboration on publicly available documents.



Table 5. Case law 2012-2017

Country	Article in IRIS Merlin	Summary of the decision	Link to decision
AT			
BE			
BG			
CY	IRIS 2017-6/9	In a pretrial decision the Supreme Court rejected on 5 April 2017 a request by the House of Representatives of the Republic to seek the opinion of the Court of Justice of the European Union (CJEU) on a number of pretrial questions related to media issues. The Court found that the questions were formulated in a generic manner, while in the application of the House of Representatives, the reason(s) the interpretation of the CJEU was sought were not precisely determined as requested by the rules of pretrial reference. Moreover, “the formulation of the questions refers and seeks the opinion of the ECJ on the compatibility of national law with the Convention, not solely an interpretation of articles of the Convention”. This would constitute a claim for “the enforcement by the Court (ECJ) of the proposed law on the facts [...] in a non-acceptable manner”.	LINK
CZ			
DE	IRIS 2016-8/10	A broadcaster is in breach of the ban on surreptitious advertising if it fails to identify advertising content in one of its programmes when the purpose of the programme does not provide sufficient justification for this.	LINK
	IRIS 2016-5/10	If a chocolate biscuit is too highly praised in a TV show, this constitutes prohibited product placement.	LINK
	IRIS 2016-5/9	Advertising for virtual products in an online role-playing game should not necessarily be regarded as a direct invitation to children to buy the items. There was, the Court said, no breach of competition law as the advertising messages in the game were not aimed specifically at minors but at all players.	
	IRIS 2016-1/6	A bumper introducing a block of commercials and linked to a programme announcement was in breach of the rules on separating TV programmes from advertising.	LINK
	IRIS 2015-8/11	The repeated appearance of a logo during a television programme constituted illegal surreptitious advertising.	LINK
	IRIS 2015-3/8	The transmission of advertising spots on a regional basis on a national television channel was not a breach of broadcasting law.	LINK
	IRIS 2015-2/10	The advertising slogan for a mobile phone tariff, “Immer Netz ... hat der Netzer” (the network never fails the networker), was not a misleading statement for the purposes of Article 5(1)(1) of the Act against Unfair Competition concerning the essential characteristics of a service.	LINK
	IRIS 2014-10/8	An advertisement for video game accessories, written in language likely to appeal to children, represented an unlawful exhortation to children to purchase and therefore infringed Article 3(3) of the Act against unfair competition.	LINK
	IRIS 2014-9/14	The depiction of a brand of beer before and after the live broadcast of a football match on the SAT.1 television channel did not constitute unlawful product placement for the purposes of Article 7(7)(3) of the Inter-State Broadcasting Agreement.	LINK
	IRIS 2014-7/11	An insert used to introduce a commercial break infringed rules on the	LINK



Country	Article in IRIS Merlin	Summary of the decision	Link to decision
		separation of TV programmes and advertisements because it contained a programme announcement.	
	IRIS 2014-3/12	Linking a competition to the sale of sweets in a television advertisement was admissible, provided the diligence requirement set out in Article 3(2)(3) of the Unfair Competition Act did not apply, since the advertisement was aimed not only at minors.	LINK
	IRIS 2013-10/18	A broadcaster licensed to broadcast programmes nationwide was not permitted to replace the advertising on its channel with different regional advertisements. This was not covered by the national broadcasting licence under the terms of Article 20a of the Inter-State Broadcasting Agreement.	LINK
	IRIS 2013-9/12	Advertising using a double of a famous person can be inadmissible even if there is no similarity between the facial features and external appearance of the double and the famous person. The famous person may be recognisable thanks to other details that characterise the person concerned.	LINK
	IRIS 2013-8/14	Prohibition for a software firm from advertising game accessories sold in connection with an online role-playing game.	LINK
	IRIS 2012-2/13	Prominent figures who advertise investment funds that ultimately fail can, in some circumstances, be liable for losses suffered by investors. This particularly applies to advertisers who refer to their specialist knowledge in advertising for investment products.	LINK
DK			
EE			
ES			
FI			
FR	IRIS 2017-4/16	Anyone may refer a failing on the part of an operator to the national audiovisual regulatory body (Conseil Supérieur de l'Audiovisuel - CSA) with a view to the CSA ordering it to comply with its obligations.	LINK
	IRIS 2012-9/22	Wine-themed broadcaster infringes the law's ban on any direct or indirect propaganda in favour of alcoholic beverages on television services and sees therefore its licence cancelled.	LINK
GB			
GR			
HR			
HU			
IE			
IT	IRIS 2016-1/20	The Constitutional Court ruled that Article 38(5) of Legislative Decree no. 177/2005 (Consolidated Text of the audiovisual and radio media services) as amended in 2010, which states that pay-TV channels are subject to hourly advertising limits shorter than those which apply to free-to-air broadcasters, is in full accordance with the Italian Constitution.	LINK
LT			
LU			
LV			
MT	IRIS 2012-5/33	Administrative sanction by the Broadcasting Authority was in breach of the principle of natural justice <i>nemo iudex in causa propria</i> - no person	



Country	Article in IRIS Merlin	Summary of the decision	Link to decision
		may be a judge in his/her own cause.	
NL	IRIS 2015-10/26	On 30 September 2015, the District Court of Midden-Nederland sent a preliminary reference to the CJEU, containing the following question: does “communication to the public”, within the meaning of Article 3(1) of Directive 2001/29/EC, include providing access to copyright-protected material by media players using “add-ons”?	LINK
	IRIS 2013-4/23	Electronically-added advertisements displayed with games results, so-called “scribes”, (i.e., promotional expressions) are not allowed under the Dutch Media Act.	
	IRIS 2013-3/22	Public-service broadcaster fined for infringing the principle of non-commerciality by being servant to the profits of commercial third parties and by acting in conflict with the sponsor rules for public service broadcasters.	LINK
PL			
PT			
RO			
SE	IRIS 2012-1/41	No legally significant indication in the TV commercials that there were additional conditions surrounding a refund offer is an unfair marketing practice.	
SI			
SK	IRIS 2014-6/33	Broadcaster violated the rules on advertising by inserting two advertising breaks within one 30 minute period of a film.	LINK
	IRIS 2014-5:Extra	Broadcaster fined for failing the obligation to broadcast only fair teleshopping.	
	IRIS 2013-8/35	Broadcaster fined for exceeding the advertising time limit of 12 minutes per broadcasting hour.	
	IRIS 2013-3/28	Broadcaster fined for broadcasting more than 12 minutes of advertising in one hour (spots that altogether lasted 11 minutes and 59 seconds and film trailer of 19 sec.)	
	IRIS 2013-1/36	Remuneration for advertising is not limited to cash payment, a “media partnership” fully qualifies as a form of “similar consideration” for TV advertising.	

Source: European Audiovisual Observatory's IRIS Merlin Database: <http://merlin.obs.coe.int>

Table 6. Decisions of regulatory bodies 2012-2017

Country	Article in IRIS Merlin	Summary of the decision	Link to decision
AT	IRIS 2014-2/5	Selling advertising slots does not constitute an act of sponsorship, as long as there is no connection between the content of the commercial communication and that of the on-demand service.	LINK
	IRIS 2013-10/9	The optical labelling of split-screen advertising on television deemed “misleading” when it appears on the screen part devoted to the editorial programme instead of the part dedicated to displaying the advertising.	LINK



Country	Article in IRIS Merlin	Summary of the decision	Link to decision
	IRIS 2013-2/10	Promotional sponsor references constitute advertising and must therefore be separated from programme material.	LINK
	IRIS 2012-7/9	The Federal Communications Board (BKS) ruled that a broadcaster had not infringed the ban on sponsorship of news programmes and political information programmes as no influence was being exerted by a third-party advertiser.	
	IRIS 2012-2/8	The Federal Communications Board commented on the character of sponsor logo walls and sew-on badges worn by experts in sports broadcasts and ruled that unlawful product placement had taken place	LINK
BE	IRIS 2016-9/9	A sponsoring statement may not directly encourage consumption or contain a message which directly promotes the purchase of goods or services.	
	IRIS 2015-6/7	Five broadcasters warned for non-compliance with stricter rules on commercial communication of sugary products (the display of the image of a toothbrush in a clear and contrasting manner during the full length of the commercial message).	
	IRIS 2015-6/6	Providing clothing to TV anchors falls within the definition of sponsoring when accompanied by a message mentioning the clothing sponsor. Broadcaster fined for displaying a sponsor's logo during a children's programme.	
	IRIS 2015-5/5	Rules on the minimum duration of the label operating the distinction between editorial and commercial content clarified by the regulator.	LINK
	IRIS 2014-9/9	A chat space considered to be a teleshopping programme as it consisted solely of the sale of screen space, and should be clearly recognisable and distinguishable from editorial content. A television presenter urging viewers to participate in an online gambling game is qualified as teleshopping. A sponsorship message should not emphasise the advantages of a commercial product.	
	IRIS 2013-6/8	A news report should be labelled as self-promotion as it did not promote the programme in an informative way.	
	IRIS 2013-3/10	The several displays of a product's logo and of a brand during an interview should be labelled as product placement	
	IRIS 2012-8/11	The Flemish regulator finds a commercial broadcaster guilty of sponsoring a news and current affairs programme.	
	IRIS 2012-5/7	Advertising breaks interrupting the broadcasting of an animated movie, which is not defined as a "children's programme", do not violate advertising rules.	
	IRIS 2012-4/11	Displaying the logo of a product and violating the limits of acceptable attention directed at that product infringes product placement provisions by giving undue prominence to the product.	
	IRIS 2012-4/10	Displaying a commercial banner inviting viewers to interact with the programme by sending an SMS does not infringe teleshopping provisions.	
	IRIS 2012-3/10	Public broadcaster infringed the rules on commercial communication for referring to a sports event sponsored by a trademark (Jupiler Pro League), as the the logo and the name were visually displayed.	



Country	Article in IRIS Merlin	Summary of the decision	Link to decision
BG	IRIS 2016-4/7	Advertiser fined for an advertising campaign with the slogan "The best from Bulgaria. The best from Europe", which was considered to be "misleading".	
	IRIS 2015-8/5	Stronger consumer protection can only be provided through self-regulation with regard to the advertising of products intended to solve physiological and hygienic problems.	LINK
	IRIS 2015-5/6	Broadcaster penalised for broadcasting an advertisement in higher sound volume than the rest of the programmes.	LINK
	IRIS 2012-1/12	The Bulgarian Commission on the Protection of Competition imposed a penalty after a consumer's notice on misleading advertising messages.	LINK
CY			
CZ			
DE	IRIS 2016-7/14	Separation of advertising from other content must be "unambiguous", says the Commission on Licensing and Supervision (ZAK).	LINK
	IRIS 2015-1/13	The German Federal Constitutional Court asked for clarification of the notion of "excessive depiction" of a product before and after a live broadcast with regard to the rules on product placement.	
	IRIS 2014-9/15	Advertisements infringed youth protection rules for ignoring watersheds or failing to announce and adequately label age classifications.	LINK
	IRIS 2014-6/14	Virtual product placement is not prohibited as long as it is embedded in the programme in a "natural" and non "artificial" way.	
	IRIS 2012-6/16	The Licensing and Monitoring Commission (ZAK) rules against the broadcast of advertising for a sports betting provider under the ban on television advertising for public gambling services.	
DK			
EE			
ES	IRIS 2015-7/9	Service providers fined for broadcasting the same advertising spot simultaneously on several channels within the same broadcasting group.	
FI			
FR	IRIS 2016-10/11	Regulator orders broadcaster to stop cross-promoting another TV channel of the same media group.	
	IRIS 2013-10/22	Public broadcaster served an official warning by the media regulatory authority for having promoted books by the companies' presenters.	LINK
GB	IRIS 2017-6/18	Broadcaster fails to ensure sufficient distinction between advertising and editorial content for inviting viewers to visit a website.	LINK
	IRIS 2017-4/22	Providing technical information for the coverage of sports events should not be used to promote the information provider - hence credits should be "brief and secondary".	LINK
	IRIS 2017-3/16	On-screen graphics detailing pricing and product information do not fulfil the obligation of clear separation between advertising and editorial content.	LINK
	IRIS 2016-5/19	New rules prohibiting the advertising and sponsorship of e-cigarettes following the implementation of the EU Tobacco Products Directive.	LINK
	IRIS 2015-9/15	Broadcaster breached rules by allowing current affairs programmes to be	LINK



Country	Article in IRIS Merlin	Summary of the decision	Link to decision
		sponsored.	
	IRIS 2015-2/20	A simple acknowledgement in the description box of a YouTube video does not meet the labelling obligations for advertisements – “not sufficient to make the commercial nature of the videos clear”.	LINK
	IRIS 2015-1/23	New “socially responsible” rules on the marketing of e-cigarettes introduced by the UK co-regulatory bodies, the Committee of Advertising Practice and the Broadcast Committee of Advertising Practice.	
	IRIS 2014-8/24	A current affairs programme becomes promotional for giving undue prominence to a business service without editorial justification.	
	IRIS 2014-4/18	Advertising using an image of a naked body “likely to cause serious or widespread offence” when broadcast “during programmes of particular appeal to children”.	
	IRIS 2013-9/16	Regulator rejects complaint where a broadcaster refused to carry an advertisement for a rival service.	
	IRIS 2013-6/22	Advertisement found to be “not socially responsible” for encouraging people to borrow money.	
	IRIS 2013-6/21	Broadcasting licensee fined for failing to clearly identify the presence of product placement during a programme.	
	IRIS 2013-4/15	Ofcom reports 11 cases of sponsorship credits that infringed the provisions of the Broadcasting Code for containing advertising messages or calling the viewers to action.	LINK
	IRIS 2012-10/15	The United Kingdom’s Advertising Standard Authority rules against a broadcaster for an advertisement that might cause prejudicial views against the gypsy and traveller community and for depicting a child in a sexualised way	LINK
	IRIS 2012-5/23	The Advertising Standards Authority (ASA) upholds a complaint against an advertisement accompanied by a claim “as seen on TV” for being misleading.	
GR			
HR	IRIS 2012-10/16	The Council for Electronic Media imposes fines on Croatian Broadcasters for not complying with some provisions of the Electronic Media Act implementing the AVMS Directive with regard to advertising spots and teleshopping.	LINK LINK
HU			
IE	IRIS 2017-4/24	“I want to get cancer” in a cancer charity’s advertisement likely to cause distress to viewers.	LINK
	IRIS 2017-2/22	The Advertising Standards Authority of Ireland (ASAI) upholds complaints against a television alcohol advertisement featuring a sports star.	LINK
	IRIS 2017-1/21	“You’re not popular...you’re easy” and other advertising slogans found to be “causing grave offence”.	LINK
	IRIS 2016-10/18	A broadcaster shall not broadcast an advertisement which is directed towards a political end.	LINK
	IRIS 2016-8/22	“Do you wanna feel? It’s nice and warm”. Complaints over “offensive and sexist” motoring advertisement rejected.	LINK
	IRIS 2016-6/16	Advertisement containing the claim “Best built cars in the world” is misleading.	LINK
IT			



Country	Article in IRIS Merlin	Summary of the decision	Link to decision
LT			
LU			
LV			
MT			
NL	IRIS 2016-1/27	Broadcaster fined because of commercial interference concerning sponsorship practices where frequent references were made to the goods or services of the relevant sponsor.	LINK
	IRIS 2015-5/28	Broadcaster fined for exercising “commercial influences on children” for devoting attention to gifts in a news show and on a special website.	LINK
	IRIS 2015-1/31	Broadcaster fined for exceeding the maximum advertising time of 12 minutes per broadcasting hour.	LINK
PL	IRIS 2017-5/29	Advertisement found to be “anti-competitive” for failing to sufficiently inform customers that the price would be increased after the promotional period.	LINK
PT			
RO	IRIS 2016-4/24	Recommendation on the correct use of the Romanian language in commercial communications with regard to the significant impact on the public, especially on minors.	LINK
	IRIS 2013-6/29	The draft proposal obliging media service providers to install and display on screen a counter for TV advertising rejected by the National Audiovisual Council (CNA).	LINK
	IRIS 2012-2/32	The National Council for Electronic Media issued sanctions against several Romanian broadcasters for breaching the rules with regard to the maximum limit of advertising per broadcasting hour.	
SE	IRIS 2015-2/31	The Swedish Broadcasting Authority submits a formal request to the British regulator urging broadcasters under the latter’s jurisdiction to comply with the Swedish rules banning commercial communication of alcoholic beverages.	
	IRIS 2012-6/32	The Swedish Broadcasting Commission (GRN) imposed a financial fine on a broadcaster for giving an undue commercial promotion to a product.	
SI			
SK	IRIS 2015-6/36	TV advertisement for a sexual nutrition product does not fall under the protection of minors’ labelling obligation as it did not contain any explicit visual or acoustic sexual content.	LINK
	IRIS 2015-6/35	TV advertisements featuring comparative advertising with the products of a rival company do not breach the Code of Advertising Practice.	LINK
	IRIS 2013-5/39	Broadcaster fined for failing to inform the public about the existence of product placement in its programme and for giving undue prominence to the product in question.	

Source: European Audiovisual Observatory’s IRIS Merlin Database: <http://merlin.obs.coe.int>



Table 7. Revision process on definitions and general principles (Articles 1 and 9 AVMSD)

Current AVMSD 2010/13/EU ¹⁹²	Commission proposal 25 May 2016 ¹⁹³	EP amendments 10 May 2017 ¹⁹⁴	Council Gen. Approach 23 May 2017 ¹⁹⁵
Art. 1(1)h Audiovisual commercial communication means...	No amendment	No amendment	No amendment
Art. 1(1)i Television advertising means...	No amendment	No amendment	No amendment
Art. 1(1)j Surreptitious audiovisual commercial communication means...	No amendment	No amendment	No amendment
Art. 1(1)k 'sponsorship' means any contribution made by public or private undertakings or natural persons not engaged in providing audiovisual media services or in the production of audiovisual works, to the financing of audiovisual media services or programmes with a view to promoting their name, trademark, image, activities or products;	No amendment	(k) 'sponsorship' means any direct or indirect contribution made by public or private undertakings or natural persons not engaged in providing audiovisual media services, video-sharing platform services or user-generated videos or in the production of audiovisual works, to the financing of the audiovisual media services, or the video-sharing platform services, or the user-generated videos or the programmes with a view to promoting their name, trademark, image, activities or products;	(k) 'sponsorship' means any direct or indirect contribution made by public or private undertakings or natural persons not engaged in providing audiovisual media services, video-sharing platform services or user-generated videos or in the production of audiovisual works, to the financing of the audiovisual media services, or the video-sharing platform services, or the user-generated videos or the programmes with a view to promoting their name, trademark, image, activities or products;
Art. 1(1)l Teleshopping means...	No amendment	No amendment	No amendment
Art. 1(1)m 'product placement' means any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trademark thereof so that it is featured within a programme, in return for payment or for similar consideration;	No amendment	'product placement' means any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trademark thereof so that it is featured within a programme or a user-generated video , in return for payment or for similar consideration;	m) 'product placement' means any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trademark thereof so that it is featured within a programme or a user-generated video , in return for payment or for similar consideration;
Art. 9(1) ... a) audiovisual commercial communications shall be readily recognisable as such. Surreptitious audiovisual commercial communication	No amendment	a) audiovisual commercial communications shall be readily recognisable as such and distinguishable from editorial content; surreptitious audiovisual commercial communication	a) audiovisual commercial communications shall be readily recognisable as such and distinguishable from editorial content; surreptitious audiovisual commercial communication

¹⁹² <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32010L0013>.

¹⁹³ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2016:0287:FIN>.

¹⁹⁴ <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A8-2017-0192&language=EN>.

¹⁹⁵ http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_9691_2017_INIT&from=EN.



Current AVMSD 2010/13/EU ¹⁹²	Commission proposal 25 May 2016 ¹⁹³	EP amendments 10 May 2017 ¹⁹⁴	Council Gen. Approach 23 May 2017 ¹⁹⁵
shall be prohibited		shall be prohibited;	shall be prohibited;
Art. 9(1) ... d) all forms of audiovisual commercial communications for cigarettes and other tobacco products shall be prohibited;	No amendment	d) all forms of audiovisual commercial communications for cigarettes, electronic cigarettes and other tobacco products shall be prohibited;	d) all forms of audiovisual commercial communications for cigarettes, electronic cigarettes and other tobacco products, as well as for electronic cigarettes and refill containers covered by Article 20 of the Directive 2014/40/EU shall be prohibited;
Art 9(1) e) audiovisual commercial communications for alcoholic beverages shall not be aimed specifically at minors and shall not encourage immoderate consumption of such beverages;	No amendment	e) audiovisual commercial communications for alcoholic beverages shall not be aimed specifically at minors and shall not encourage immoderate consumption of such beverages;	e) audiovisual commercial communications for alcoholic beverages shall not be aimed specifically at minors and shall not encourage immoderate consumption of such beverages;
Art. 9(1) ... g) audiovisual commercial communications shall not cause physical or moral detriment to minors. Therefore they shall not directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity, directly encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, or unreasonably show minors in dangerous situations	No amendment	g) audiovisual commercial communications shall not cause physical or moral detriment to minors. Therefore they shall not directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity, directly encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, or unreasonably show minors in dangerous situations.	g) audiovisual commercial communications shall not cause physical or moral detriment to minors. Therefore they shall not directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity, directly encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, or unreasonably show minors in dangerous situations.
Art 9(2) Member States and the Commission shall encourage media service providers to develop codes of conduct regarding inappropriate audiovisual commercial communications, accompanying or included in children's programmes, of foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular those such as fat, trans-fatty acids, salt/sodium and sugars, excessive intakes of which in the overall diet are not recommended.	Member States and the Commission shall encourage the development of self- and co-regulatory codes of conduct regarding inappropriate audiovisual commercial communications, accompanying or included in programmes with a significant children's audience , of foods and beverages containing nutrients and substances with a nutritional or physiological effect, excessive intakes of which in the overall diet are not recommended, in particular fat, trans-fatty acids, salt or	Member States and the Commission shall encourage the development of self- and co-regulatory codes of conduct regarding inappropriate audiovisual commercial communications, accompanying or included in children's programmes , of foods and beverages containing nutrients and substances with a nutritional or physiological effect, excessive intakes of which in the overall diet are not recommended, in particular fat, trans-fatty acids, salt or sodium and sugars.	Member States are encouraged to use co-regulation and to foster self-regulation through codes of conduct as provided for in Article 4a(1) regarding inappropriate audiovisual commercial communications, accompanying or included in children's programmes , of foods and beverages containing nutrients, and substances with a nutritional or physiological effect, in particular fat, saturated fats, trans-fatty acids, salt or sodium and sugars, of which excessive intakes in the overall diet are



Current AVMSD 2010/13/EU ¹⁹²	Commission proposal 25 May 2016 ¹⁹³	EP amendments 10 May 2017 ¹⁹⁴	Council Gen. Approach 23 May 2017 ¹⁹⁵
	<p><i>sodium and sugars.</i></p> <p><i>Those codes should be used to effectively reduce the exposure of minors to audiovisual commercial communications of foods and beverages that are high in salt, sugars or fat or that otherwise do not fit national or international nutritional guidelines.</i></p> <p><i>Those codes should provide that the audiovisual commercial communications are not to emphasise the positive quality of the nutritional aspects of such foods and beverages. The Commission and ERGA shall encourage the exchange of best practices on self- and co-regulatory systems across the Union. Where appropriate, the Commission shall facilitate the development of Union codes of conduct.</i></p>	<p><i>Those codes shall aim to effectively reduce the exposure of children to audiovisual commercial communications for such foods and beverages.</i></p> <p><i>They shall aim to provide that such audiovisual commercial communications do not emphasise the positive quality of the nutritional aspects of such foods and beverages.</i></p>	<p><i>not recommended.</i></p> <p><i>Those codes shall aim to effectively limit the exposure of minors to audiovisual commercial communications of foods and beverages that are high in salt, sugars or fat or that otherwise do not fit national or international nutritional guidelines.</i></p> <p><i>Those codes shall also ensure that audiovisual commercial communications do not emphasise the positive quality of the nutritional aspects of such foods and beverages.</i></p>
	<p>Art. 9(3) <i>Member States and the Commission shall encourage the development of self- and co-regulatory codes of conduct regarding inappropriate audiovisual commercial communications for alcoholic beverages.</i></p> <p><i>Those codes should be used to effectively limit the exposure of minors to audiovisual commercial communications for alcoholic beverages.</i></p>	<p>Member States and the Commission shall encourage the development of self- and co-regulatory codes of conduct regarding inappropriate audiovisual commercial communications for alcoholic beverages.</p> <p><i>Those codes shall aim to effectively reduce the exposure of minors to inappropriate audiovisual commercial communications for alcoholic beverages.</i></p>	<p><i>Member States are encouraged to use co-regulation and to foster self-regulation through codes of conduct as provided for in Article 4a(1) regarding inappropriate audiovisual commercial communications for alcoholic beverages.</i></p> <p><i>Those codes shall aim to effectively limit the exposure of minors to audiovisual commercial communications for alcoholic beverages.</i></p>
	<p>Art. 9(4) <i>The Commission and ERGA shall encourage the exchange of best practices on self- and co-regulatory systems across the Union.</i> <i>If considered appropriate, the Commission shall facilitate the development of Union codes of conduct.</i></p>	<p>The Commission and the ERGA shall ensure the exchange of best practices on self- and co-regulatory systems across the Union. <i>Where necessary</i>, the Commission and the ERGA shall facilitate, <i>in cooperation with the Member States</i>, the development, <i>promotion and adoption</i> of Union codes of conduct.</p>	<p><i>The Commission shall encourage the exchange of best practices on self- and co-regulatory codes of conduct referred to in paragraphs 2 and 3.</i></p>



Current AVMSD 2010/13/EU ¹⁹²	Commission proposal 25 May 2016 ¹⁹³	EP amendments 10 May 2017 ¹⁹⁴	Council Gen. Approach 23 May 2017 ¹⁹⁵
			Art. 9(4)a <i>Member States and the Commission may foster self-regulation through Union codes of conduct referred to in Article 4a(2).</i>

Source: European Audiovisual Observatory elaboration on official EU documents.

Table 8. Revision process on advertising and teleshopping (Articles 19-24 AVMSD)

Current AVMSD 2010/13/EU ¹⁹⁶	Commission proposal 25 May 2016 ¹⁹⁷	EP amendments 10 May 2017 ¹⁹⁸	Council Gen. Approach 23 May 2017 ¹⁹⁹
Art. 19(1) Television advertising and teleshopping shall be readily recognisable and distinguishable from editorial content. Without prejudice to the use of new advertising techniques, television advertising and teleshopping shall be kept quite distinct from other parts of the programme by optical and/or acoustic and/or spatial means.	No amendment	Television advertising and teleshopping shall be readily recognisable and distinguishable from editorial content. Without prejudice to the use of new advertising techniques, television advertising and teleshopping shall be kept clearly distinct from other parts of the programme by optical and/or acoustic and/or spatial means.	Television advertising and teleshopping shall be readily recognisable and distinguishable from editorial content. Without prejudice to the use of new advertising techniques, television advertising and teleshopping shall be kept clearly quite distinct from other parts of the programme by optical and/or acoustic and/or spatial means.
Art. 19(2) Isolated advertising and teleshopping spots, other than in transmissions of sports events, shall remain the exception.	No amendment	Isolated advertising and teleshopping spots shall be admissible in sports events. Apart from sport events , isolated advertising and teleshopping spots shall be admissible subject to the conditions set out in Article 20(2) .	Isolated advertising and teleshopping spots, other than in transmissions of sports events, shall remain the exception.
Art. 20(1) (insertion rules)	No amendment	No amendment	No amendment
Art. 20(2) The transmission of films made for television (excluding series, serials and documentaries), cinematographic works and news programmes may be interrupted by television	The transmission of films made for television (excluding series, serials and documentaries), cinematographic works and news programmes may be interrupted by television	The transmission of films made for television (excluding series, serials and documentaries), cinematographic works and news programmes may be interrupted by television	The transmission of films made for television (excluding series, serials and documentaries), cinematographic works and news programmes may be interrupted by television

¹⁹⁶ <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32010L0013>.

¹⁹⁷ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2016:0287:FIN>.

¹⁹⁸ <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A8-2017-0192&language=EN>.

¹⁹⁹ http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_9691_2017_INIT&from=EN.



Current AVMSD 2010/13/EU ¹⁹⁶	Commission proposal 25 May 2016 ¹⁹⁷	EP amendments 10 May 2017 ¹⁹⁸	Council Gen. Approach 23 May 2017 ¹⁹⁹
advertising and/or teleshopping once for each scheduled period of at least 30 minutes. The transmission of children's programmes may be interrupted by television advertising and/or teleshopping once for each scheduled period of at least 30 minutes, provided that the scheduled duration of the programme is greater than 30 minutes. No television advertising or teleshopping shall be inserted during religious services	advertising and/or teleshopping once for each scheduled period of at least 20 minutes. The transmission of children's programmes may be interrupted by television advertising and/or teleshopping once for each scheduled period of at least 30 minutes, provided that the scheduled duration of the programme is greater than 30 minutes. No television advertising or teleshopping shall be inserted during religious services.	advertising and/or teleshopping once for each scheduled period of at least 30 minutes. The transmission of children's programmes may be interrupted by television advertising once for each scheduled period of at least 30 minutes, provided that the scheduled duration of the programme is greater than 30 minutes. The transmission of teleshopping shall be prohibited during children's programmes. No television advertising or teleshopping shall be inserted during religious services.	advertising and/or teleshopping once for each scheduled period of at least 30 minutes. The transmission of children's programmes may be interrupted by television advertising once for each scheduled period of at least 30 minutes, provided that the scheduled duration of the programme is greater than 30 minutes. The transmission of teleshopping shall be prohibited during children's programmes. No television advertising or teleshopping shall be inserted during religious services.
Art. 21 (medicinal products)	No amendment	No amendment	No amendment
Art. 22 ... a) it may not be aimed specifically at minors or, in particular, depict minors consuming these beverages ...	No amendment	No amendment	Art. 22(1a) ... a) it may shall not be aimed specifically at minors or, in particular, depict minors consuming these beverages ...
			Art. 22(1b) Audiovisual commercial communications for alcoholic beverages in on-demand audiovisual media services, with the exception of sponsorship and product placement, shall comply with the criteria in paragraph 1a
Art. 23(1) The proportion of television advertising spots and teleshopping spots within a given clock hour shall not exceed 20%.	The daily proportion of television advertising spots and teleshopping spots within the period between 7:00 and 23:00 shall not exceed 20%.	The daily proportion of television advertising spots and teleshopping spots shall not exceed 20%. Member States shall remain free to define a prime time window, the duration of which shall not exceed a period of four consecutive hours. Within such a prime time window, the proportion of television advertising spots and teleshopping spots shall not exceed 20%.	The proportion of television advertising spots and teleshopping spots within the period between 6:00 and 18:00 shall not exceed 20% of that period. The proportion of television advertising spots and teleshopping spots within the period between 18:00 and 00:00 shall not exceed 20% of that period.
Art. 23(2) Paragraph 1 shall not apply to announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived from those programmes,	Paragraph 1 shall not apply to: a) announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived from those programmes or with	a) self-promotional and cross-promotional announcements made by the broadcaster in connection with its own programmes and ancillary products and audiovisual	a) announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived from those programmes or with



Current AVMSD 2010/13/EU ¹⁹⁶	Commission proposal 25 May 2016 ¹⁹⁷	EP amendments 10 May 2017 ¹⁹⁸	Council Gen. Approach 23 May 2017 ¹⁹⁹
sponsorship announcements and product placements.	<i>programmes from other entities belonging to the same media group;</i> <i>(b) sponsorship announcements;</i> <i>(c) product placements.</i>	<i>media services</i> directly derived from those programmes or with programmes, <i>product and services</i> from entities belonging to the same <i>broadcasting</i> group; <i>(b) sponsorship announcements;</i> <i>(c) product placements.</i> <i>ca) public service announcements and charity appeals;</i> <i>cb) neutral frames used to distinguish between editorial content and audiovisual commercial communications, and between audiovisual commercial communications;</i>	<i>programmes from other entities belonging to the same media group;</i> <i>(b) sponsorship announcements;</i> <i>(c) product placements.</i> <i>ca) public service announcements and charity appeals;</i> <i>(ca) neutral frames used to distinguish between editorial content and audiovisual commercial communications, and between audiovisual commercial communications; television advertising or teleshopping spots, and between individual spots.</i>
Art. 24 (principle of separation)	No amendment	No amendment	No amendment
Art. 25 (application to advertising, teleshopping and self-promotion channels)	No amendment	No amendment	No amendment
Art. 26 (exclusion of national broadcasts)	No amendment	No amendment	No amendment

Source: European Audiovisual Observatory elaboration on official EU documents.

Table 9. Revision process on sponsorship and product placement (Articles 10 and 11 AVMSD)

Current AVMSD 2010/13/EU ²⁰⁰	Commission proposal 25 May 2016 ²⁰¹	EP amendments 10 May 2017 ²⁰²	Council Gen. Approach 23 May 2017 ²⁰³
Art. 10(1) ... b) they shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional	b) they shall not directly encourage the purchase or rental of goods or services, <i>in particular by making special promotional references to those goods or services;</i>	No amendment	b) they shall not directly encourage the purchase or rental of goods or services <i>in particular by making special promotional references to those goods or services;</i>

²⁰⁰ <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32010L0013>.

²⁰¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2016:0287:FIN>.

²⁰² <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A8-2017-0192&language=EN>.

²⁰³ http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_9691_2017_INIT&from=EN.



Current AVMSD 2010/13/EU ²⁰⁰	Commission proposal 25 May 2016 ²⁰¹	EP amendments 10 May 2017 ²⁰²	Council Gen. Approach 23 May 2017 ²⁰³
references to those goods or services.			
Art 10(2) Audiovisual media services or programmes shall not be sponsored by undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products.	No amendment	Audiovisual media services or programmes shall not be sponsored by undertakings whose principal activity is the manufacture or sale of cigarettes, electronic cigarettes and other tobacco products.	Audiovisual media services or programmes shall not be sponsored by undertakings whose principal activity is the manufacture or sale of cigarettes, electronic cigarettes and other tobacco products, as well as electronic cigarettes and refill containers covered by Article 20 of the Directive 2014/40/EU.
Art 10(3) (medicinal products)	No amendment	No amendment	No amendment
Art 10(4) News and current affairs programmes shall not be sponsored. Member States may choose to prohibit the showing of a sponsorship logo during children's programmes, documentaries and religious programmes.	No amendment	News and current affairs programmes shall not be sponsored. Member States may prohibit the sponsorship of children's programmes or content aimed primarily at children.	News and current affairs programmes shall not be sponsored. Member States may choose to prohibit the showing of a sponsorship logo during children's programmes, documentaries and religious programmes.
Art 11(1) (temporal scope)	No amendment	No amendment	No amendment
Art. 11(2) Product placement shall be prohibited.	Product placement shall be admissible in all audiovisual media services, except in news and current affairs programmes, consumer affairs programmes, religious programmes and programmes with a significant children's audience.	Product placement shall be admissible in all audiovisual media services, except in news and current affairs programmes, consumer affairs programmes, religious programmes and children's programmes or content aimed primarily at children.	Product placement shall be admissible allowed in all audiovisual media services, except in news and current affairs programmes, consumer affairs programmes, religious programmes and children's programmes or content aimed primarily at children.
Art 11(3) first part (derogations to ban)	Deleted	Deleted	Deleted
Art. 11(3) second part a) their content and, in the case of television broadcasting, their scheduling shall in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider.	No amendment	No amendment	a) their content and organization in a schedule, in the case of television broadcasting, or in a catalogue in the case of on-demand audiovisual media service, shall in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider;
Art. 11(3) second part b) they shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services.	they shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services	No amendment	they shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services;

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