
Advertising Law in the Electronic Media

Advertising income is essential to the very existence of the electronic media. This type of revenue has been benefiting the television sector for many years. However, even TV advertising evolves in accordance with new technical possibilities created by digitisation, for example, and the accompanying changes in viewer expectations. At first, the Internet was largely free from advertising. However, its importance as a mass medium and market place is now such that it is an extremely lucrative branch of the advertising industry. Between January and March 2005, EUR 78 million was invested in online advertising in Germany alone. The Internet offers more technically advanced possibilities than television. However, it is more difficult to regulate... if such regulation is desired or desirable in the first place.

Advertising is integrated into the common market economy in various ways: TV advertising slots are sold and programmes broadcast in different member states. Advertising agencies market their campaigns right across Europe, while Internet advertising can sometimes reach a global audience.

As a commercial form of communication, advertising is fundamentally protected by the freedom of expression enshrined in Art. 10 of the European Convention on Human Rights ("advertising freedom"). It is regulated by laws restricting advertising freedom. EC law in particular contains numerous provisions. This edition of *IRIS plus* deals with these provisions, which have evolved into a dense network of regulations. It also supplements the previous edition of *IRIS plus* from more than just a geographical perspective.

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A. Introduction

Advertising plays a key role in the European economy. This article therefore describes the measures taken by the EU to regulate it, examining advertising law in the electronic media, a particularly fascinating field because of the rapid rate of technological development. After an introduction to the general aspects of advertising regulation, chapter B provides an overview of existing and proposed directives and regulations. Chapter C deals with selected topics such as misleading advertising, information requirements and product-related advertising restrictions. The interaction between the various regulatory instruments is described using these examples. Finally, chapter D looks at new forms of advertising and illustrates how the existing legal framework may be applied with a degree of flexibility.

The EU legislature regulates advertising in the electronic media in accordance with the case-law of the Court of Justice of the European Communities (ECJ) as part of the system of fundamental freedoms. These freedoms cover in particular the protection of international trade in goods and services. A whole range of provisions in the individual member states may be applicable to cross-border advertising. This in turn has an effect on the production of Europe-wide advertising. For example, an advertisement sold to broadcasters in all the member states for them to disseminate independently must comply with the requirements of the broadcasting country concerned. Individual member states have their own restrictions in areas such as the protection of minors.

On the one hand, advertising is considered to be a service. National laws may not therefore restrict the freedom to provide such a service. However, restrictive legislation may be adopted under certain conditions, ie if it serves to protect the public interest, is not disproportionate to the intended objective¹ and does not go beyond what is necessary to achieve that objective.² The ECJ has consistently held that the integrity of trade and protection of consumers represent imperative reasons of public interest capable of justifying restrictions on the freedom to provide services.³

However, the freedom to provide services is only relevant to advertising restrictions if they do not in reality fall under the freedom of movement of goods.⁴ According to Articles 28 and 30 of the EC Treaty, quantitative restrictions on imports and measures having equivalent effect are prohibited. Advertising bans or restrictions concerning a particular product can also affect trade between member states and therefore represent measures having an equivalent effect.⁵ The latter are trade measures taken by the member states that are capable of indirectly or directly, actually or potentially hindering intra-Community trade. Advertising restrictions imposed by member states must therefore be measured against the freedom of movement of goods. However, the ECJ limited this rule when it noted that non-discriminatory "selling arrangements" were not likely to hinder the free movement of goods and could not therefore be considered a measure having equivalent effect pursuant to Art. 30 of the EC Treaty.⁶ Selling arrangements include rules governing where and when goods are sold, but not those concerning the characteristics of the product concerned. They also include regulations on particular selling methods (e.g. sale of tobacco products only in certain shops).⁷ Furthermore, they must apply to all traders operating within the national territory and affect in the same manner, in law and in fact, the marketing of domestic products and of those from other member states.⁸ As a rule, state-imposed advertising restrictions are concerned with "selling arrangements" and therefore with the free movement of goods.⁹

The principles developed by the ECJ are frequently reflected in EC directives and regulations. The resulting harmonisation or standar-

disation of national advertising rules can lead to the restriction of advertising. In EC law also, such restrictions are always viewed in terms of the public interest, necessity and proportionality. If the member states are given scope in which to implement directives, the measures they take must also comply with the basic freedoms and conditions for the justification of the restrictions they impose.

Current EC law includes, on the one hand, sector-specific rules that apply particularly to television or information society services. There are also product-related provisions concerning advertising for alcohol or medicinal products, for example (the so-called vertical approach). On the other hand, there are also general rules that, in principle, apply to all types of media and products (horizontal approach).¹⁰

All these rules share the same basic principles: in order to create the internal market, obstacles caused by differences in member states' domestic legislation must be removed. In parallel, the protection of consumers from misleading or aggressive advertising should be paramount. This should be achieved by means of the greatest possible transparency and appropriate advertising restrictions. The separation of advertising and programme content, the labelling of advertising and the ban on surreptitious advertising form the basic principles of this process.

One aspect that is meant to promote freedom to provide services is the country of origin principle, which is enshrined in some advertising regulations. It means that the member states must ensure that service providers are only subject to the provisions of their home country where matters governed by EC law are concerned. Additional controls in the receiving country are therefore prohibited.

In contrast, according to the principle of the relevant market enshrined in international competition law, it is the regulations in the country where the goods or services are sold that apply.

New initiatives are currently being proposed or adopted in order to harmonise and standardise advertising regulations. Proposals are on the table for a Sales Promotions Regulation and an Unfair Commercial Practices Directive. The latter was formally approved by the EU Competitiveness Council on 18 April 2005, whereas the Regulation has not yet been finally agreed.

In the following study of EC law relevant to advertising, both these instruments are included as far as possible so that the currently evolving system of advertising law for the electronic media can be considered alongside existing provisions.

B. Legal Framework

I. Unfair Commercial Practices Directive¹¹

The aim of this very recent legal instrument relevant to advertising is to standardise member states' legal provisions on unfair commercial practices, including misleading and aggressive advertising. The Directive is based on the notion that the member states' divergent general clauses and legal principles should be replaced by a Europe-wide prohibition. Article 5 of the Directive therefore contains a general clause on the prohibition of unfair commercial practices. A list of banned "sharp" practices (e.g. the unauthorised use of quality marks or falsely claiming that a product can cure illnesses) annexed to the Directive shows clearly what is prohibited and enables companies to explore other avenues. In this way, an advertising campaign can

target consumers in Poland and Spain without the risk of measures being taken in one country because of competition law infringements. This should also create greater legal certainty for consumers with regard to commercial communications that do not originate in their home country.¹²

1. Development

A decisive factor behind the draft Directive was the Commission Green Paper on Consumer Protection¹³ and the Follow-up Communication to the Green Paper.¹⁴ These established the need for a reform of consumer protection law.

Since the Commission's Proposal for a Directive of 18 June 2003¹⁵, the text has been amended several times. The original country of origin clause was removed, while the Council Common Position, for example, added the possibility for member states to apply stricter provisions for a certain period of time. In its second reading by the Parliament, the text was again amended in several places and a legislative resolution was passed on 24 February 2005.¹⁶ The Commission and Council have now accepted all the amendments,¹⁷ which means that a final version is now in place. Following its official approval by the Competitiveness Council on 18 April 2005,¹⁸ the Directive can now enter into force once it has been published in the Official Journal.

2. Scope

The Directive applies only to relations between businesses and consumers (*Business to Consumer - B2C*). As far as relations between businesses are concerned (*Business to Business - B2B*), the Directive on misleading and comparative advertising applies.¹⁹

The Unfair Commercial Practices Directive deals with all kinds of commercial practices directly related to influencing consumers' transactional decisions in relation to products (not services) (recital 7).

The practical scope of the Directive excludes Community and national rules on the protection of intellectual property rights, health and safety aspects of products, taste and decency and contract law (recital 9). Although rules in these areas differ enormously in the individual member states, they are not expected to be harmonised on cultural grounds.²⁰

Further limits on harmonisation are imposed by the fact that, according to the 7th recital, full account should be taken of the context of the individual case, particularly in applying the general clauses.

3. Degree of Harmonisation

According to Article 3.5, member states may, for six years following the Directive's entry into force, continue to apply more restrictive provisions within the field covered by the Directive. The words "continue to" were only introduced in more recent amendments. This means that national provisions must already be in place when the Directive is adopted, i.e. at the end of the procedure defined in Art. 251 of the EC Treaty. Article 4.1 of the original draft contained the country of origin principle. Many doubts were expressed concerning this principle, with some people fearing that it would disadvantage consumers. This provision was therefore removed.²¹ In the Commission's view, this step was also justifiable because of the extensive harmonisation that the Directive would achieve, particularly as the general clauses would mean that national provisions were roughly the same anyway.

Article 4 still provides that member states may neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by the Directive. In other words, the fields of consumer protection and unfair commercial practices may no longer be used as general reasons to justify restrictions of basic freedoms, at least not insofar as binding rules are set out in the Directive.

4. Relationship to Other Legal Instruments

According to Article 3.4 of the Unfair Commercial Practices Directive, other Community rules regulating specific aspects of unfair commercial practices take precedence. These include, for example, the "Television without Frontiers" Directive²² and the E-Commerce Directive.²³

II. Proposal for a Regulation Concerning Sales Promotions in the Internal Market²⁴

Sales promotions are a popular form of commercial communication and include, for example, discounts or competitions. It must be made clear to consumers what conditions are attached to their participation, what the offer is actually worth and what effect the sales promotion has on the price.

The ECJ ruled in the 1982 Oosthoek judgment²⁵ that restrictions on special sales promotions can restrict the volume of imports and therefore hinder the free movement of goods. So far, this area has been largely unregulated. The E-Commerce Directive, however, sets out information requirements concerning sales promotions.

On 2 October 2001, the European Commission (DG Internal Market) adopted a Proposal for a Regulation concerning sales promotions in the Internal Market.²⁶ On 25 October 2002, in the light of the consultations and opinions of the Council and Parliament, an amended proposal was presented and submitted to the Council and Parliament.²⁷ On 13 May 2004, the Presidency of the Council proposed a compromise version,²⁸ which was examined by the Permanent Representatives Committee on 17 September 2004.²⁹ The nature of the legal instrument remains a contentious issue. Other important points for debate are Art. 3 of the Proposal for a Regulation, which contains a clause on the freedom to provide services and the free movement of goods, as well as in relation therewith Article 3 a, which allows for a temporary derogation. The Regulation is expected to come into force on 1 July 2006. The information below is based on the latest proposal of the Council Presidency of 13 May 2004 and the various points of discussion.³⁰

1. Scope

The Regulation is meant to apply to all forms of commercial communication linked to sales promotions and is not restricted to certain media. According to the definition in Art. 2 (b), sales promotions include the offer of a discount, free gift, premium or a promotional contest or game. Games or contests included in the editorial content of the media are not promotional games according to recital 10, which means that they are excluded from the scope of the Regulation (e.g. crosswords forming part of the editorial content).

2. Regulation as a Form of Legal Instrument

The decision to issue a regulation, which must be directly applied in the member states, appears surprising in the light of the Commission's other legal instruments in the consumer protection field. All other instruments in this area are directives, including the text concerning unfair commercial practices prepared in parallel to the Regulation. In the Commission's view, a regulation is the most appropriate and efficient instrument for tackling in a targeted manner a limited number of issues. As far as sales promotions are concerned, it believes that a regulation is necessary to ensure price transparency while also guaranteeing full legal security. Others believe that a directive would be more appropriate.³¹ This would make it possible to better take into account the different national legislations and would allow for greater flexibility.

3. Mutual Recognition Principle

Art. 3.1 prohibits certain national restrictions on sales promotions. The principle of mutual recognition contained in Art. 3.2 applies to rules outside the scope of these particular restrictions. In other words, a member state cannot prohibit a legitimate advertisement for a discount promotion from another member state that is not covered by the Regulation. This applies even if the advertisement or promotion is illegal under the national law of the first member state. However, mutual recognition only applies to sales promotions. General advertising restrictions (e.g. for ethical or health reasons, or the protection of minors) are not covered.³²

There is still no consensus on the wording and exact content of Art. 3 bis, which allows member states, on a case by case basis, to take measures to derogate from Art. 3.2. According to Art. 3 bis, para. 3,

this article is only applicable for three years. Measures which disregard the principle of mutual recognition are subject to certain conditions. For example, they must be essential in order to protect public order or consumers, provided such protection is not already guaranteed under Community law. As far as the time-limit on the derogation is concerned, some people think the period should be longer while others think it should be shorter.

4. Relationship to Other Community Law Instruments

According to recital 13, the Regulation does not affect existing Community rules on the use and communication of sales promotions (such as the Directive on misleading and comparative advertising, the "Television without Frontiers" Directive and the E-Commerce Directive).

The relationship between the Unfair Commercial Practices Directive and the Sales Promotions Regulation was addressed in the 7th recital of the initial draft Directive. This stated that the requirements of the Regulation should be taken into account in the evaluation of whether a sales promotion was unfair. However, since the Directive will soon come into force while agreement on the Regulation seems a long way off, the reference to the latter instrument has been removed from the latest version. At present, there is no clear boundary between the Directive and the Regulation. On the one hand, recital 13 of the Regulation states that the Directive should not be affected by the Regulation. On the other, under Art. 3 of the Directive, the Regulation must take precedence over the Directive where certain specific aspects are concerned. This point will therefore need to be clarified before the Regulation is finally adopted.

III. Directive on Misleading and Comparative Advertising

The Directive on misleading advertising was adopted in 1984 and amended in 1997, when comparative advertising was added. The Directive sets out objective minimum criteria to be used to determine whether an advertisement is misleading. It describes the conditions in which comparative advertising is admissible. It is not media-specific and covers all forms of advertising.

The Directive currently protects consumers, persons carrying on a trade, business, craft or profession, and the general public. Once the Unfair Commercial Practices Directive enters into force, the Directive on misleading and comparative advertising will only protect businesses in their relations with each other. This is because a general legal framework for consumer protection is to be created and the inclusion of B2B would have made the introduction of a new legal instrument more complicated.

Since this article is written from the perspective of the imminent entry into force of the Unfair Commercial Practices Directive, the Directive on misleading and comparative advertising should be considered in the version it will take once the new Directive comes into force.

1. Member States' Freedom to Legislate

Under Art. 7 of the Directive, member states are not precluded from adopting stricter provisions with regard to misleading advertising. Whether the same also applies to comparative advertising was disputed until the ECJ's ruling in the Pippig Augenoptik/Hartlauer³³ case. It was argued that Art. 7.2 stipulated that Art. 7.1 did not apply to comparative advertising as far as the comparison was concerned. However, Art. 3a para. 1a stated that comparative advertising was permitted if it was not misleading according to Art. 7.1. Therefore, stricter national provisions on comparative advertising were admissible.

According to the Pippig Augenoptik judgment, however, it is clear that this conclusion is flawed. The ECJ explained that the aim of the Directive was to harmonise the conditions of the use of comparative advertising in the member states.³⁴ Therefore, the lawfulness of comparative advertising should be assessed solely in the light of the criteria laid down by the Community legislature. Stricter national provisions on protection against misleading advertising could not therefore

be applied to comparative advertising as regards the form and content of the comparison.³⁵

2. Relationship to Other Community Law Instruments

The Directive is more general than sector-specific instruments (such as the "Television without Frontiers" Directive) and, where necessary, supplements their provisions. If media-specific rules differ on themes covered by the Directive, the former take priority over those contained in the Directive on misleading and comparative advertising (Art. 7).

IV. E-Commerce Directive

The E-Commerce Directive, which contains fundamental provisions governing electronic commerce, covers advertising on the Internet and on-demand services, for example. It applies to all electronic media except television.

In recital 18, commercial communication is explicitly mentioned as an information society service. According to Art. 2 (f), it includes 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.

1. Country of Origin Principle

The country of origin principle is enshrined in Art. 3 of the Directive. This lends itself to electronic commerce, which is mainly conducted via the Internet, because websites can be accessed anywhere in the world. Businesses would find it virtually impossible to adhere to the rules of every single country.

The country of origin principle applies to the "coordinated field", which is defined in Art. 2 (h) as the requirements laid down in member states' legal systems applicable to information society service providers or information society services. According to this broad definition, it is irrelevant whether the requirements are general or specific to the information society. Art. 2 (i) specifies that requirements that are applicable to advertising are included in the coordinated field. In other words, the country of origin principle applies to all member states' advertising regulations that are applicable to information society services, regardless of whether they are harmonised by the Directive or not. Recital 21 mentions requirements relating to on-line advertising as an example of those covered by the coordinated field. It goes on to state that the coordinated field does not cover member states' legal requirements relating to goods (e.g. safety standards, labelling obligations).

Derogations from the country of origin principle are found in Art. 3.4. Restrictions may therefore be imposed in the receiving country if, for example, they are necessary for the protection of consumers, provided they are proportionate to that objective.

Further derogations from the country of origin principle and Art. 3.2 are mentioned in the Annex and include the freedom of the parties to choose the law applicable to their contract and the permissibility of unsolicited e-mail advertising. This derogation prevents spammers from establishing themselves in a country with less stringent rules in order to reach consumers in other member states.

Recital 21 stipulates that the scope of the coordinated field is without prejudice to future harmonisation relating to information society services and to future legislation adopted at national level in accordance with Community law. If this rule did not exist, the country of origin principle would automatically apply to the provisions of all Community law instruments relating to information society services, since such provisions would also belong to the coordinated field.

2. Relationship to Other EC Legal Instruments

According to recital 29, the Directive is meant to supplement the law applicable to information society services and should not affect other Directives relevant to commercial communication.

The Directives on misleading and comparative advertising and on medicinal products for human use³⁶, for example, therefore apply without restriction to information society services (recital 11).

Recital 65 expressly states that the Commission should, if need be, make specific additional proposals to guarantee consumer protection in the information society. This suggests that new consumer protection measures, including in particular the Unfair Commercial Practices Directive and the Sales Promotions Regulation, should apply in addition to the E-Commerce Directive.

V. “Television without Frontiers” Directive

The “Television without Frontiers” Directive harmonises certain television activities, such as (in Chapter IV) television advertising, including sponsorship and teleshopping. Since the Directive was adopted in 1989 and amended in 1997, forms of TV advertising have evolved very rapidly and continue to do so. For this reason, the revision of the Directive in order to take new technologies into account has been under discussion for some time. In 2004, the Commission published an Interpretative Communication³⁷ which, as well as commenting on general issues relating to the Directive’s advertising provisions, dealt explicitly with aspects of their application to new forms of advertising (see also chapter D).

1. Broadcasting Country Principle

A fundamental principle of the “Television without Frontiers” Directive is the broadcasting country principle, which is a specific expression of the country of origin principle. According to Art. 2.1, the broadcasting state must ensure that all television broadcasts transmitted under its jurisdiction comply with national and European law. In principle, the retransmission of all TV programmes within the Community should not be restricted. Consequently, the member states must ensure freedom of reception and may not restrict the transmission of TV programmes on their territory for reasons that fall within the fields coordinated by the Directive. However, since this coordination only applies to television activities in their real sense, the Directive does not preclude application of national rules with the general aim of consumer protection provided that they do neither involve secondary control of television broadcasts nor introduce a second level of control of TV programmes in addition to the control that the broadcasting member state must carry out.³⁸

2. Freedom of Member States

According to Article 3, the Directive merely lays down minimum requirements and therefore makes provision for member states to require television broadcasters under their jurisdiction to comply with more detailed or stricter rules in the areas covered by the Directive.

VI. Product-Specific Rules

1. Directive on the Community Code Relating to Medicinal Products for Human Use³⁹

The Medicinal Products Directive contains rules on advertising for medicinal products. It covers all media (unlike the provisions governing advertising for medicinal products contained in the “Television without Frontiers” Directive) and lays down conditions and restrictions for the advertising of medicinal products (see Title VIII for more details).

2. Tobacco

Directive 2003/33/EC on the advertising and sponsorship of tobacco products more or less prohibits all advertising for tobacco. This Directive regulates advertising for tobacco products in all media except television, i.e. including information society services (Art. 1.1 (c)). An application to have the Directive nullified is currently pending before the European Court of First Instance.⁴⁰ The plaintiff, a medium-sized publishing company, is basing its case, *inter alia*, on freedom of expression in relation to the right to commercial communication. It remains to be seen how the Court of First Instance will assess the weighting of the various fundamental rights given by the Directive.

3. Other Measures

Various other Community legal instruments and measures contain further provisions concerning advertising restrictions for certain products.

The European Commission has even announced that it will, in certain circumstances, ban advertising for unhealthy foods aimed at children. It believes such measures are necessary in case the food industry fails to introduce suitable self-regulatory mechanisms by the beginning of 2006.⁴¹

At present, there is no specific directive or regulation on alcohol advertising. On 5 June 2001, the European Council adopted a “Recommendation on the drinking of alcohol by young people, in particular children and adolescents”,⁴² which recommends that the member states support self-regulation by the alcohol industry in order to ensure advertising for alcohol is not aimed at children and adolescents.

C. Impact of Legal Instruments on Advertising

Legal instruments often contain rules that appear to duplicate or even contradict each other. It is often difficult to see how they relate to one another. Which Directive applies in relation to the separation of advertising and content on the Internet, for example? Does the Unfair Commercial Practices Directive also apply to advertising infringements on television? The following chapter describes a selection of situations using some important examples.

I. Prohibited and Restricted Commercial Practices

All advertising regulations are aimed at ensuring that consumers and competitors are not harmed by “unfair practices”. Prohibitions and restrictions on certain commercial practices are enshrined in all the legal instruments described. By dividing them into general rules (1), the prohibition of misleading and aggressive advertising (2 and 3) and restrictions on comparative advertising (4), the provisions of individual instruments are compared and their relationship to one another explained.

1. General Rules

An explicit ban on unfair commercial practices in general is enshrined in the general clause set out in Art. 5.1 of the Unfair Commercial Practices Directive. According to Art. 5.2 of the Directive, a commercial practice is unfair if it is contrary to the requirements of professional diligence, i.e. honest market practice (Art. 2 (h)). This is meant to ensure that the general clause does not cover commonly used commercial practices.

In order to be considered “unfair”, a commercial practice must also significantly affect the behaviour of the consumer. The notion of the average consumer described by the ECJ is therefore crucial. In order to create a clear link with future ECJ case-law, the Directive does not itself define the “average consumer”, but merely refers instead to the ECJ in recital 18. In contrast, Art. 5.3 stipulates that advertising aimed at particularly vulnerable groups of consumers (e.g. children) should be assessed from the perspective of the average member of that group. Advertising freedom is protected insofar as exaggerated statements or statements which are not meant to be taken literally are still allowed.

The general ban on unfair commercial practices is also meant to combat practices that cannot be described as misleading or aggressive under the terms of the Directive. Since the Unfair Commercial Practices Directive applies to all media, infringements of the rules on transmission time contained in the “Television without Frontiers” Directive, for example, may also constitute breaches of the general clause.

2. Misleading Advertising

Alongside the general prohibition on misleading advertising, the principle of separation between advertising and programme content, as well as information requirements relating to commercial communications should also be considered as an expression of the ban on misleading practices.

a. General Ban on Misleading Practices

A general, cross-media ban on misleading practices in the B2C field is enshrined in Art. 6 of the Unfair Commercial Practices Directive.

It states that a commercial practice is misleading if – whether through correct or false information – it is likely to deceive the consumer in relation to certain elements and cause him to take a decision

that he would not have taken otherwise. A practice is misleading, for example, if it deceives the consumer in relation to the nature of the product, its geographical origin, the results to be expected from its use, the price or the manner in which the price is calculated (Art. 6 (a) to (g)). This rule on misleading practices refers to the content of the advertising rather than to its form. Banner advertising on the Internet would therefore be assessed under the E-Commerce Directive with respect to whether it was recognisable as advertising and under the Unfair Commercial Practices Directive with respect to whether the consumer might be misled by its content.

As far as B2B is concerned, Art. 3 of the Directive on misleading and comparative advertising sets out criteria and a non-exclusive list of examples of how to determine whether advertising is misleading. All features of the advertisement must be taken into account, including the characteristics of goods or services, particularly their availability, uses, quantity and price, as well as characteristics of the advertiser, such as its identity, awards or distinctions.

b. Information Requirements

Certain information requirements in relation to commercial communication are imposed on the basis that a well-informed consumer is less likely to be misled.

The Unfair Commercial Practices Directive contains no direct information requirements. Only if a misleading omission is made (Art. 7) can the failure to fulfil information requirements included in other Directives be described as misleading.

Nevertheless, under Art. 7 of the Unfair Commercial Practices Directive, a different yardstick may be used to decide whether an information requirement has not been met, depending on the means of communication. For example, an SMS advertisement cannot contain as much information as advertising on a website. In any case, the required information must be made available to consumers, even if by some other means. With SMS advertising, for example, they may be able to call a toll-free number. In the case of an invitation to purchase, information must be provided concerning the main characteristics of the product, the identity of the trader, the price and the arrangements for payment and delivery. A similar provision is found in the Proposal for a Regulation concerning Sales Promotions (see below).

Art. 7.5 in connection with Annex II to the Unfair Commercial Practices Directive (with a non-exclusive list of information requirements) refers specifically to the E-Commerce Directive. Information requirements relating to commercial communications laid down in the Directive are essential. If they are not met, a misleading omission may result.

Provisions concerning the transparency of advertising are contained in the second part of the E-Commerce Directive. Art. 5 sets out general information requirements. Articles 5 and 6 stress that these requirements apply in addition to other information requirements established by Community law. The Distance Contracts Directive⁴³ is not affected by the transparency requirements.⁴⁴

The Proposal for a Regulation concerning Sales Promotions (Art. 4 and Annex) also lays down comprehensive information requirements for promoters in relation to sales promotions. If the Regulation were to come into force, the existing provisions on sales promotions would not be affected. Therefore, if the Directives contained different rules, the existing provisions would prevail.

According to the Annex to the Regulation, the information provided in relation to any sales promotion should include the price and any additional costs, the name and address of the promoter, the start date of the promotion, and either the end date or the available stock.

Detailed information requirements concerning discounts and premiums are also contained in the Annex.

Under Art. 4.2 of the Regulation, the information requirements are relaxed somewhat. Depending on the means of communication, not all the information needs to be directly included in the advertisement. Rather, it is sufficient for the necessary information to be made available to the consumer directly before the goods are purchased. This provision is similar to the rule contained in the Unfair Commercial Practices Directive. If both legal instruments come into force, the scope of the Regulation will be limited to sales promotions, while the Directive will apply to all other advertising practices.

The Regulation duplicates the E-Commerce Directive, for example, insofar as both state that the advertiser must be clearly identifiable (Art. 6 (a) E-Commerce Directive). The Regulation requires the name and address of the company responsible for a sales promotion, while Art. 5 of the E-Commerce Directive requires the name of the service provider, the address where it is established and information that allows it to be contacted rapidly. If sales promotions are advertised on the Internet, the E-Commerce Directive applies. This follows from the principle of subsidiarity respected by the Regulation, as mentioned in recital 13a. Likewise Art. 3 (c) of the Directive on misleading and comparative advertising recognises that identity information can be misleading. The Unfair Commercial Practices Directive contains a corresponding provision.

The "Television without Frontiers" Directive contains no general provisions on misleading practices. The Unfair Commercial Practices Directive and the Directive on misleading and comparative advertising fill in any gaps in this area. In the *De Agostini* case, the ECJ ruled that the member states may take measures against misleading TV advertising.⁴⁵

c. Separation Requirement

According to No. 11 of the Annex to the Unfair Commercial Practices Directive, advertising disguised as information is a commercial practice that is in all circumstances considered unfair. It is unfair if editorial content is used to promote a product without this being made clear in the content or by images or sounds clearly identifiable by the consumer. However, owing to specific rules in the "Television without Frontiers" and E-Commerce Directives, this provision does not apply to electronic media.

No. 11 of the Annex to the Unfair Commercial Practices Directive makes it clear that the "Television without Frontiers" Directive is not affected. Art. 10 of the "Television without Frontiers" Directive contains specific rules on the separation of advertising and programme content on television.

According to Art. 3.4 of the Unfair Commercial Practices Directive, in the case of conflict between the Directive's provisions and other Community rules regulating specific aspects of unfair commercial practices, the latter should prevail. The need for separation is also stated in the E-Commerce Directive, where Art. 6 (a) stipulates that commercial communication should be clearly identifiable as such. This special rule applies to the information society services sector.

In this connection, "hyperlinks" can be difficult to evaluate. For example, they may be included in editorial articles and lead directly to a particular company's homepage with just one click of the mouse. Depending on the context in which such a link appears and what kind of content it leads to, this can constitute surreptitious advertising. Problems can also arise from so-called banner advertising on the Internet. For example, if a banner looks like a computer error message but, when clicked on in an attempt to close the window, leads to a company's homepage, it is not clearly identifiable as advertising.

Art. 6 of the E-Commerce Directive contains further provisions on the identifiability and transparency of promotional offers (discounts, premiums, gifts), competitions and games. It is left to the member states to decide whether to allow such forms of advertising, since the Directive does not attempt to harmonise domestic laws in this field.

3. Aggressive Advertising

The Unfair Commercial Practices Directive is the first Community instrument to deal expressly with aggressive commercial practices. Art. 8 states that a commercial practice is aggressive if, by harassment or coercion, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice and thereby causes him to take a decision that he would not have taken otherwise. According to the examples given in Annex 1, it includes making persistent and unwanted solicitations by telephone, fax or e-mail (No. 23) or direct exhortations to children to persuade their parents or other adults to buy advertised products for them.

4. Comparative Advertising

In the B2C sector, comparative advertising can also be misleading. This is regulated in the Unfair Commercial Practices Directive. Art. 6.2

implies that, depending on the individual circumstances, comparative advertising that might create confusion may be regarded as misleading.

With regard to B2B, comparative advertising may involve the use of a competitor's trade mark, exploitation of its reputation or disparagement. In the opinion of the ECJ, the definition of comparative advertising set out in Art. 2.2 (a) is a broad definition aimed at covering all its forms.⁴⁶ Under Art. 3a, comparative advertising is, as far as the comparison is concerned, admissible as long as certain conditions are met. For example, it must not be misleading within the meaning of the Directive and it must compare goods or services meeting the same needs or intended for the same purpose. It must compare one or more material, relevant, verifiable and representative features of the goods or services, which may include price.

II. Advertising Restrictions

The structure of advertising is also subject to certain restrictions. There is therefore a framework into which all forms of advertising must fit. A distinction can be made between restrictions of time and of content. Time restrictions are mainly designed to protect consumers from too much advertising. Content-related restrictions are primarily meant to protect minors or to protect consumers in general from dangerous products (tobacco, alcohol).

1. Time

The only advertising time restrictions are found in the "Television without Frontiers" Directive. This is because of the linear nature of broadcasting. Art. 18 of the Directive limits the duration of advertising on an hourly and daily basis. This was commented on in the Interpretative Communication, which explains that, as far as the hourly restrictions are concerned, broadcasters can decide for themselves whether to base the calculation on a natural clock hour or an overlapping clock hour. Also the concepts of "day" and "daily transmission time" are unclear. They refer to a programming day, which can begin at 05.00 in the morning, while programmes broadcast at 00.30 can still count as part of the previous programming day.

2. Content

There are many Community law provisions concerning content restrictions, eg with regard to certain products (tobacco, alcohol, medicines) or the protection of children and adolescents.

a. Protection of Minors

As already discussed in relation to the concept of "consumer" (see above), children and adolescents are considered to be a group in particular need of protection. This is why they are mentioned in virtually every legal instrument in one form or another and member states are often able, when implementing a Directive, to adopt stricter national rules for the protection of children and adolescents.⁴⁷ In addition, it is common in this field for industries to take self-regulatory measures, which according to the Directives should be supported at Community level.

Art. 16 of the "Television without Frontiers" Directive contains special rules on the protection of minors in television advertising. For example, minors should not be directly exhorted to buy a product or service, nor should they be encouraged to persuade their parents to purchase a particular product for them.

The E-Commerce Directive does not contain any similar rules for the Internet. General provisions such as those in the Unfair Commercial Practices Directive must therefore be consulted.

Under the general clause contained in the Unfair Commercial Practices Directive, cases of misleading or aggressive advertising aimed at young people may also be dealt with in accordance with their particular need for protection.

Art. 5 of the Proposal for a Regulation on Sales Promotions draws attention to the protection of children and adolescents. Promoters must ensure that children cannot participate in a competition or game without the prior consent of their legal guardian. Free gifts or premiums may not be offered to children if they represent any kind of danger to the child's health.

b. Product-Related Restrictions

aa. Medicinal Products

Restrictions on advertising for medicinal products are specifically imposed in the Directive on the Community code relating to medicinal products for human use⁴⁸.

"Advertising of medicinal products" is defined in Art. 86 of the Medicinal Products Directive. This is necessary because, in the medicinal field in particular, not all information is necessarily considered as advertising. In the "Doc Morris" case, the ECJ ruled that the Internet presentation of a pharmacy should be classified as "advertising to the general public" for the purposes of the Directive if individual medicines are described with their product name, prescription status, package size and price and at the same time it is possible to order these medicines on-line.⁴⁹

Misleading advertising for medicinal products is prohibited under Art. 87.3, while Art. 87.1 states that medicines may not be advertised if they are not authorised under Community law. According to Art. 88.1 (a), they may not be advertised if they are only available on prescription. However, Art. 88.2, in contrast to para. 1, allows advertising for medicinal products which, by virtue of their composition and purpose, can be used without the intervention of a doctor, with the advice of a pharmacist if necessary. In the "Doc Morris" case, the ECJ accepted that a national rule prohibiting advertising for the sale by mail order of non-prescription medicinal products that were otherwise only available in pharmacies was incompatible with Art. 88.2.

Recital 42 expressly states that the provisions of the Directive on misleading and comparative advertising also apply to medicinal products. Art. 7 of this Directive is particularly significant, since it allows member states to ban comparative advertising of goods or services prohibited under national legislation.

Recital 44 refers to the "Television without Frontiers" Directive and states that the principle enshrined therein that television advertising of medicinal products that are available only on medical prescription in the member states within whose jurisdiction the broadcaster is located should be prohibited, should be extended to other media. The provisions on TV advertising contained in the "Television without Frontiers" Directive prevail over, but are supplemented by, the Medicinal Products Directive.

bb. Tobacco

All tobacco advertising on television is banned under Art. 13 of the "Television without Frontiers" Directive.

As far as information society services are concerned, Art. 3.2 of the Tobacco Advertising Directive provides that advertising and promotional measures for tobacco products should be intended exclusively for professionals in the tobacco trade. It is to be assumed from this that Internet sites of tobacco companies - especially if they are fairly low-key - are not considered as advertising. However, tobacco firms have to respect certain obligations, particularly concerning the protection of minors.

The provisions of the Proposal for a Regulation on Sales Promotions are not meant to apply to sales promotions for tobacco products.

cc. Alcohol

TV advertising and teleshopping for alcohol are limited under Art. 15 of the "Television without Frontiers" Directive. Alcohol advertising is permissible if it is not specifically aimed at minors and does not create the impression that alcohol makes people particularly successful or attractive.⁵⁰

There are no provisions of this kind in the other legal instruments. The protection of children and adolescents from alcohol is meant to be achieved mainly by means of self-regulation (see above).

D. Prospects

Advertising law in the electronic media develops according to the needs created by technological advances. It is impossible to predict exactly what forms of advertising will emerge in the coming years. Rather than looking into the future, we should consider briefly how the



current legal framework has dealt with new forms of advertising that already exist. This shows that a certain flexibility is possible without resorting to the lengthy process of amending legislation.

New forms of advertising are mainly emerging in the television sector. They include virtual advertising where, for example, advertising boards in football stadiums are superimposed with other advertisements.⁵¹ In telepromotions, live shows, usually game shows, are interrupted so that certain products can be advertised by the presenters. The admissibility and scope of split-screen advertising is currently a particular topic of debate.

New forms of advertising are not necessarily incompatible with the existing legislative framework, in particular the "Television without Frontiers" Directive. However, the ban on surreptitious advertising and the separation of advertising and programme content can be problematic. It is often difficult to say whether transmission time rules are still practicable. Forms of advertising are treated very differently from one member state to the next, which the Commission believes is due to varying interpretations of the Directive.

Interactive advertising represents an interface between advertising on television and in information society services. On the Internet, advertising is omnipresent for the user, but even so it must be clearly separated from other content. On television, interactivity is based on the possibility for the viewer to send information directly to the broad-

caster via a return channel. According to the Commission, the information received and transmitted through interactive television is classified as an on-demand information society service which lies outside the scope of the "Television without Frontiers" Directive.

However, the problem with interactive television advertising is that the viewer enters the interactive environment from a linear programme by clicking on an icon on the screen, for example. The programme in which the icon is embedded and the icon itself must therefore meet the general requirements of the "Television without Frontiers" Directive. In order to be separate from the programme content, the icon must appear in an advertising context which is clearly distinct from the programme itself. Viewers must also be informed optically and acoustically that they are entering a commercial, interactive environment. When they click on the interactive link, they must not be taken directly to pages that contravene the provisions of Articles 12 - 16 of the "Television without Frontiers" Directive.

The general principles can therefore be applied to new forms of advertising either directly or after interpretation. However, the more the different media converge, the harder it becomes to evaluate and allocate particular forms of advertising to a specific medium (as we have seen already with interactive advertising on television). For that reason, it would be easier to apply the law if horizontal advertising rules were given priority,⁵² since the interaction of the various levels is clearly a complex matter.

- 1) ECJ, judgment of 26 April 1988, C-352/85 (Bond van Adverteerders, Rec. 1988, 2085) para. 36.
- 2) ECJ, judgment of 22 January 2002, C-390/99 (Canal Satellite Digital, Rec. 2002, I-6087) para. 33.
- 3) See, for example, ECJ, judgment of 25 July 1991, C-288/89 (Collectieve Antennevoorziening Gouda, Rec. 91, I-4007), para. 14.
- 4) See ECJ, judgment of 24 March 1994, C-275/92 (Schindler, Rec. 1994, I-1039) para. 22.
- 5) ECJ, judgment of 11 July 1974, case 8/74 (Dassonville, Rec. 1974, 837) para. 5.
- 6) ECJ judgment of 24 November 1993, C-267/91 and C-268/91 (Keck and Mithouard, Rec. 1993, I-6097) para. 15-17.
- 7) ECJ, judgment of 15 December 1993, C-292/92 (Hünemann, Rec. 1993, I-6787) para. 21, 22; judgment of 2 June 1994 C-401/92 and C-402/92 (Tankstation 't Heuvske and Boermans, Rec. 1994, I-2199) para. 12-14.
- 8) ECJ, judgment of 9 July 1997, C-34/95 to C-36/95 (De Agostini, Rec. 1997, I-3843) para. 40.
- 9) Schmittmann in Loitz, Arnold et al. (ed.): "Handbuch des Rundfunkwerberechts", Carl Heymanns Verlag, Cologne, Berlin etc. 2004, p. 45.
- 10) See Kabel, "Swings on the Horizontal", IRIS plus 2003-8.
- 11) Referred to in this chapter as the "Directive"; since the final version was not available at the time of writing, the version of the Council Common Position of 15 November 2004 (OJ C 38 E/01 of 15 February 2005) is used here, in conjunction with the Parliament's amendments of 24 February 2005 (P6_TA-PROV(2005)0048). Since 10 May 2005, the final version of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market has been available at: <http://register.consilium.eu.int/pdf/en/05/st03/st03616.en05.pdf>
- 12) EU document MEMO 05/64, "Questions and answers on the proposed Unfair Commercial Practices Directive", Brussels and Strasbourg, 24 February 2005, available at: http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/index_de.htm
- 13) Commission document of 2 October 2001, "Green Paper on European Union Consumer Protection", COM (2001) 531.
- 14) Commission document of 11 June 2002, "Follow-up Communication to the Green Paper on EU Consumer Protection", COM (2002) 289.
- 15) Commission document of 18 June 2002, "Proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive)", COM (2002) 356 final.
- 16) European Parliament Legislative Resolution on the proposal for a European Parliament and Council directive concerning unfair business-to-consumer commercial practices in the Internal Market of 24 February 2005; available at: <http://www2.europarl.eu.int/omk/sipade2?PUBREF=//EP//TEX>
- 17) Opinion of the Commission on the European Parliament's amendments of 15 March 2005, COM (2005) 96 final, available at: http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/acte_en.pdf
- 18) Council press release of 21 April 2005, available at: http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/misc/84629.pdf
- 19) Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ L 250 of 19 September 1984, p. 17) as amended by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising (OJ L 290 of 23 October 1997 pp. 18-23); hereinafter: "Directive on misleading and comparative advertising".
- 20) Recital 6 of the Directive on misleading and comparative advertising.
- 21) Communication from the Commission to the European Parliament concerning the common position of the Council of 16 November 2004 (2004) 753 final, available at: http://europa.eu.int/eur-lex/lex/LexUriServ/site/de/com/2004/com2004_0753de01.pdf.
- 22) 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 (OJ L 298 of 17 October 1989, p.23) as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (OJ L 202 of 30 July 1997, p. 60); hereinafter: "Television without Frontiers" Directive.
- 23) 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 (OJ L 178 of 17 July 2000, pp. 1-16); hereinafter: "E-Commerce Directive".
- 24) Commission document of 2 October 2001, "Proposal for a European Parliament and Council Regulation concerning sales promotions in the Internal Market", COM (2001)546 final; hereinafter: "Sales Promotions Regulation" or "Regulation".
- 25) ECJ, judgment of 15 December 1982, C-286/81 (criminal proceedings against Oosthoek's Uitgeversmaatschappij, Rec. 1982, pp. 4575 - 4590), para. 15.
- 26) Commission document of 2 October 2001, "Proposal for a European Parliament and Council Regulation concerning sales promotions in the Internal Market", COM (2001)546 final.
- 27) See footnote 25.
- 28) Report by the Permanent Representatives Committee for the Council, 13 May, Council document no. 9474/04.
- 29) Report by the Permanent Representatives Committee for the Council, 18 September 2004, "Amended proposal for a European Parliament and Council Regulation concerning sales promotions in the Internal Market - political agreement", Council document no. 12498/04.
- 30) See the following Council documents: no. 12261/04 of 14 September 2004, No. 12498/04 of 17 September 2004; No 14402/04 of 11 November 2004.
- 31) Council document no. 9229/04 of 10 May 2004, "Preparation of the Council meeting (competitiveness) on 18 May 2004 - Amended proposal for a European Parliament and Council Regulation concerning sales promotions in the Internal Market - political agreement", p. 3.
- 32) Commission Proposal for a Regulation on sales promotions, 15 January 2002 (2001/0227 (COD), p. 28.
- 33) ECJ, Pippig Augenoptik/Hartlauer judgment, op.cit..
- 34) ECJ, Pippig Augenoptik/Hartlauer judgment, op.cit., para. 43.
- 35) ECJ, Pippig Augenoptik/Hartlauer judgment, op.cit., para. 44.
- 36) Directive 2001/83/EC of 6 November 2001 on the Community code relating to medicinal products for human use (OJ L 311 of 28 November 2001, p. 67); hereinafter "Medicinal Products Directive".
- 37) C (2004) 1450 of 23 April 2004, Commission Interpretative Communication on certain aspects of the provisions on televised advertising in the "Television without Frontiers" Directive, available at http://europa.eu.int/comm/avpolicy/legis/key_doc/legispdffiles/1450_de.pdf
- 38) ECJ, De Agostini judgment, see footnote 8, para. 34.
- 39) Directive 2001/83/EC of 6 November 2001, see footnote 36.
- 40) European Court of First Instance, T-310/03 (Kreuzer Medien, application OJ EC C 289 of 29 November 2003) p. 27.
- 41) See report in MMR Aktuell 3/2005, p. XX.
- 42) Council Recommendation 2001/458/EC of 5 June 2001 on the drinking of alcohol by young people, in particular children and adolescents, OJ EC L 161 of 16 June 2001, p. 28.
- 43) Directive 97/7/EC of the European Parliament and of the Council on the protection of consumers in respect of distance contracts of 17 February 1997, (OJ EC 1997 L 144, p. 19).
- 44) Recital 29 E-Commerce Directive.
- 45) See ECJ, De Agostini judgment, op.cit..
- 46) See ECJ, judgment of 25 October 2001, C-112/99 (Toshiba Europe, Rec. 2001, I-7945), para. 30, 31.
- 47) See, for example, Art. 3.4 (a) (i) of the E-Commerce Directive.
- 48) Directive 2001/83/EC of 6 November 2001, see footnote 36.
- 49) ECJ judgment of 11 December 2003, C-322/01 (Doc Morris), para. 44.
- 50) Regarding ECJ judgment of 13 July 2004, C-318/00 (Bacardi, Rec. 2003, I-905) concerning the TV advertising ban in France, see Scheuer/Strothmann, Sport as Reflected in European Media Law - Part II, IRIS plus 2004-6.
- 51) See ECJ, Bacardi judgment, op.cit.
- 52) See the overview of individual provisions in the relevant Directives in Kabel op.cit., IRIS plus 2003-8, p. 6.