



**Comparative study concerning the impact of control measures on
the televisual advertising markets in the EU Member States and
certain other countries**

IRELAND

LEGAL REPORT

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The Existing Audio-visual Regulatory and Self-Regulatory Framework in Ireland in light of Chapter IV¹ of Directive 89/552/EEC²

Introduction

- *Statutory Regulation of Television Advertising in Ireland*

Public broadcasting

Television broadcasting in Ireland is governed by the Broadcasting Authority Acts, 1960 to 2001. The Irish national public service broadcasting authority is known as Radio Telefís Éireann³ (“RTE”). RTE commenced national television broadcasting in 1961 and now operates two television channels, RTE 1 and Network 2. Telefís na Gaeilge or, as it is now known, TG4 was established in 1996 and is the national Irish language public service television broadcaster operating in Ireland. Its operation is governed by Part VI of the Broadcasting Act, 2001.

Public broadcast advertising (i.e. RTE and TG4) must comply with the following legislation:

- (a) Section 20 of the Broadcasting Authority Act, 1960⁴ (as amended) (RTE) and section 49 of the Broadcasting Act, 2001 (TG4);
- (b) The provisions of Articles 10 to 18 of the Directive as transposed in national law;
- (c) Codes drawn up and amended from time to time by the Minister for Communications, Marine and Natural Resources⁵ under Section 4 of the Broadcasting Act, 1990⁶;
- (d) Codes prepared by the Broadcasting Commission of Ireland under Section 19 of the Broadcasting Act, 2001; and

¹ The areas covered by this Report are television advertising, sponsorship, teleshopping and new advertising techniques.

² References in this Report to Directive 89/552/EEC of 3 October 1989 on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities shall be construed as Directive 89/552/EEC as amended by Directive 97/36/EC of 30 June 1997. (Hereafter “the Directive”). The Directive was transposed in Ireland by the European Communities (Television Broadcasting) Regulations, 1991 (S.I. 251 of 1991) as repealed and replaced by the European Communities (Television Broadcasting) Regulations 1999 (S.I. 313 of 1999).

³ By virtue of section 3 of the Broadcasting Authority (Amendment) Act 1966.

⁴ In section 20 of the Broadcasting Act, 1960 as amended, references to advertisements shall be construed as including references to teleshopping material (as defined in section 19 of the Broadcasting Act, 2001) by virtue of section 31 of the Broadcasting Act, 2001.

⁵ The functions of the Minister for Arts, Heritage, Gaeltacht and the Islands under certain enactments were transferred to the Minister for Communications, Marine and Natural Resources on 18 June 2002 by virtue of the Broadcasting (Transfer of Departmental Administration and Ministerial Functions) Order 2002 (S.I. 299 of 2002).

⁶ Section 4 of the Broadcasting Act, 1990 has now been repealed by section 3 of the Broadcasting Act, 2001. Section 19(17) of the 2001 Act however provides that pending the preparation of codes under sections 19(1)(b) and (c) of the 2001 Act, codes prepared under section 4 of the Broadcasting Act, 1990 shall continue in force.

- (e) Additional restrictions imposed by statute on various types of advertising. It is the duty of RTE and TG4 to ensure that advertising accepted complies with the law in all its forms.

The regulatory codes currently in place for public broadcasters are:

- (a) the Codes of Standards, Practice and Prohibitions in Advertising, Sponsorship and other forms of Commercial Promotion in Broadcasting Services, 1995 (as amended in 1999) (RTE and TG4); and
- (b) the RTE Sponsorship Guidelines, 1997 (RTE).

Section 4 of the Broadcasting Act, 1990 required the then Minister for Arts, Culture, Heritage and the Gaeltacht to draw up codes governing standards, practice and prohibitions in advertising, sponsorship and other forms of commercial promotion in broadcasting services. In 1995 the Minister, in exercise of her powers under section 4 of the Broadcasting Act 1990, published the Codes of Standards, Practice and Prohibitions in Advertising, Sponsorship and other forms of Commercial Promotion in Broadcasting Services (“the BCI Codes”).

The BCI Codes draw upon the earlier 1985 RTE Code of Standards for Broadcast Advertising⁷ and implement Chapter IV of the Directive. The BCI Codes were amended in 1999 to take account of the 1997 amendment of the Directive by Directive 97/36/EC. The BCI Codes apply to both public and independent broadcasters. By virtue of sections 18.5 and 18.8 of the BCI Codes, Parts I and II of the BCI Codes where they apply to advertising, also apply to teleshopping material.

RTE published a set of Sponsorship Guidelines (“the RTE Sponsorship Guidelines”)⁸ in 1997 which regulate the sponsorship of television programmes on RTE channels.

Independent broadcasting

The Radio and Television Act, 1988 provided for the establishment of the Independent Radio and Television Commission (IRTC), now known by virtue of the Broadcasting Act, 2001 as the Broadcasting Commission of Ireland (the “BCI”). The IRTC's function under section 4 of the 1988 Act was to arrange for the provision of, *inter alia*, a television programme service additional to the broadcasting services provided by RTE. TV3 signed a broadcasting contract with the IRTC in October 1997 and went on air in September 1998 as Ireland's first independent television broadcaster.

In the case of a television programme service contracted under the Radio and Television Act, 1988 (i.e. at present, TV3), all advertising must comply with the following legislation:

- (a) Section 10 of the Radio and Television Act, 1988 (as applicable to television programme service contracts by virtue of section 18(1) of the 1988 Act);

⁷ The 1985 RTE Code of Standards for Broadcast Advertising was created prior to the introduction of the Directive and applied solely to public broadcasting. Section 4(5) of the Broadcasting Act, 1990 provided that a code drawn up under section 4 of the Act superseded any existing code under section 18B(1)(e) of the Broadcasting Act, 1960 and the Radio and Television Act, 1988.

⁸ In 2002 RTE published Programme Makers' Guidelines for the purpose of assisting producers, directors, assistant producers, journalists, reporters, researchers and other in making programmes. These guidelines are stated to apply to “programme makers” and as such are not of direct relevance to the regulation of advertisements by RTE.

- (b) Codes drawn up and amended, from time to time by the Minister for Communications, Marine and Natural Resources under section 4 of the Broadcasting Act, 1990 (i.e. the BCI Codes);
- (c) The provisions of Articles 10 to 18 of the Directive; and
- (d) Additional restrictions imposed by statute on various types of advertising. It is the duty of the independent broadcaster (TV3) to ensure that advertising accepted complies with the law in all its forms.

The regulatory codes currently in place for independent broadcasters are the above mentioned BCI Codes.

The Broadcasting Act 2001: Expected New Codes

Section 19(1)(b) of the Broadcasting Act, 2001 provides that the BCI shall, upon the direction of the Minister for Communications, Marine and Natural Resources, prepare a code specifying standards to be complied with, and rules and practices to be observed, in respect of advertising, teleshopping material, sponsorship and other forms of commercial promotion employed in any broadcasting service. While no such Code has as yet been published, it is understood that the BCI will draft a new General Advertising Code towards the end of 2004. This Code may take account of any revisions to the Directive at European level.

Section 19(1)(c) of the Broadcasting Act, 2001 further provides that the BCI shall, upon the direction of the Minister for Communications, Marine and Natural Resources, prepare a code specifying standards to be complied with, and rules and practices to be observed, in respect of advertising, teleshopping material, sponsorship and other forms of commercial promotion employed in any broadcasting service, being advertising and other activities which relate to matters likely to be of direct or indirect interest to children. The BCI is presently drafting such a Children's Advertising Code. A Phase 1 Consultation Paper was published by the BCI in April 2003 followed by a Phase 2 Consultation Paper in October 2003. A draft of the new Children's Advertising Code has not yet been published but is expected between March – June 2004.

The Broadcasting Complaints Commission

The Broadcasting Complaints Commission is an independent statutory body whose function is to consider and adjudicate upon complaints about material broadcast (both programmes and advertisements) in relation to:-

- (a) impartiality in news and current affairs,
- (b) taste and decency,
- (c) law and order,
- (d) privacy of an individual,
- (e) slander,
- (f) published material in relation to RTE and ministerial prohibitions,

- (g) breach of advertising codes drawn up under section 19 of the Broadcasting Act, 2001 and section 4 of the Broadcasting Act, 1990 (i.e. at present, the BCI Codes).

Any television viewer may refer a complaint to the Broadcasting Complaints Commission if they are dissatisfied about the broadcasting content of an Irish broadcasting service under any of the above categories. The functions of the Broadcasting Complaints Commission are set out in section 24 of the Broadcasting Act, 2001. Where decisions of the Broadcasting Complaints Commission relate to television advertising, they will be set out in the appropriate section of this Report.

It is understood that, in the context of reform of public sector broadcasting, the Department of Communications, Marine and Natural Resources is currently drafting legislation which may merge the functions of the Broadcasting Complaints Commission and the BCI into a single content regulator to be known as the Broadcasting Authority of Ireland. Legislation in this regard may be published in July/August 2004.

- ***Self Regulation of Television Advertising in Ireland***

The advertising industry in Ireland is self-regulated by the Advertising Standards Authority of Ireland (the “ASAI”)⁹. Established in 1981, the ASAI is an independent self-regulatory body, which is financed by the advertising industry. It is stated to be “committed in the public interest to promoting the highest standards of advertising and sales promotion”

Self-regulation is achieved by means of ASAI members’ voluntary compliance with the ASAI Code of Advertising Standards (5th Edition) and Code of Sales Promotion Practice (3rd Edition) (the “ASAI Codes”). The ASAI Code of Advertising Standards (“the ASAI Code”) applies to commercial advertisements. Non-commercial advertisements, i.e. those which express the advertisers position on a political, religious, industrial relations, social or aesthetic matter or an issue of public concern, are not subject to the Code.

The general rule of the ASAI is contained in section 2.1 of the ASAI Code, viz. “all advertisements should be legal, decent, honest and truthful”. More specific general rules deal with issues of legality, taste and decency, sexism and stereotyping, vulnerable persons, honesty, truthfulness, matters of opinion, fear and distress, safety, violence and anti-social behaviour, protection of privacy, testimonials and endorsements, prices, free offers, availability of products, comparisons, guarantees, exploitation, imitation, recognisability and other requirements. In addition, there are sectoral rules dealing with health and beauty, slimming, children, alcoholic drink, financial services and products, distance selling, employment and business opportunities, occasional trading and environmental claims.

⁹ The ASAI is a founder member of the European Advertising Standards Alliance, a Brussels-based organisation comprising the self-regulatory bodies of EU Member States and a number of other European countries. The main objective of the Alliance is to promote the principle of efficient national self-regulation of advertising, mindful of differences of culture and commercial practice, and to demonstrate that self-regulation systems can operate effectively in the interests of both the industry and consumers in the context of the European Single Market. The Alliance has established a cross-border complaints procedure to ensure that a complaint from a consumer anywhere in Europe can be effectively investigated and dealt with, even if the medium involved originated in another country. A consumer in Ireland who wishes to complain about an advertisement carried in an external medium or a sales promotion originating abroad must complain directly to the ASAI who will arrange for the complaint to be processed by the self-regulatory body of the country of origin of the medium.

The ASAI Code of Sales Promotion and Practice applies to sales promotions which provide additional benefits to purchasers. This Code has general rules concerning public interest, substantiation, legality, honesty, truthfulness, protection of consumers, suitability, availability, quality, children, presentation, terms of the promotion, administration, free offers, promotions with prizes, advertisement promotions, charity-linked promotions, promotions and the trade, and data protection.

Primary responsibility for observing the ASAI Code rests with advertisers and promoters who have a duty to ensure that their claims are fair and honest and do not cause offence. Others involved in the preparation and publication of advertisements and in the design and execution of mail order operations and sales promotions also have an obligation to abide by Code provisions.

The primary objective of the ASAI Code is the regulation of commercial advertisements in the consumer interest. Section 1.3(d) of the ASAI Code provides that the Code applies, *inter alia*, to commercials broadcast on television or radio. The ASAI Code rules are indivisible and advertisers must conform, where appropriate, with all rules. Conformity with the Code is assessed in the light of an advertisement's probable effect when taken as a whole and in context. Particular attention is paid to:

- the characteristics of the likely audience,
- the media by means of which the advertisement is communicated,
- the location and context of the advertisement,
- the nature of the advertised product and the nature, content and form of any associated material made available or action recommended to consumers.

It is a condition of membership of ASAI that a member shall not publish an advertisement or undertake a promotion that does not comply with the ASAI Code. Consequently, given the detailed self-regulatory regime to be complied with by advertisers in Ireland, provisions of the ASAI Code will be set out in this Report where they mirror or augment statutory provisions or the BCI Codes. Decisions of the ASAI Complaints Committee arising from complaints made for breach of the ASAI Code will be set out in this Report where relevant.

I. Definitions (Article 1 Directive TVWF)

- Television broadcasting

Transposing Legislation

The European Communities (Television Broadcasting) Regulations 1999 transpose a number of provisions of the Directive¹⁰. Regulation 2(1) of the 1999 Regulations defines “television broadcasting” as “the initial transmission by wire over the air in unencoded or encoded form of television programmes intended for reception by the public and include the communication of programmes between the undertakings with a view to their being relayed to the public, but does not include communication services providing items of information or other messages on individual demand such as telecopying, electronic data banks and other similar services” (// art. 1a TVWF Directive). Regulation 2(1) further provides that “transmission by wire or over the air” includes transmission by satellite. This is identical to the definition in Article 1(a) of the Directive.

Other Legislation/Regulatory Codes

The Broadcasting Authority Acts 1960-2001 do not provide a specific definition of “television broadcasting”. Section 2(1) of the Broadcasting Act, 2001 (“the 2001 Act”) provides a general definition of a “broadcasting service” to mean “a service which comprises a compilation of programme material of any description and which is transmitted or relayed by means of wireless telegraphy, a cable or MMD system or a satellite device, directly or indirectly for reception by the general public, whether that material is actually received or not, but does not include such a service that is provided by the Internet”.

Further definitions in section 2(1) of the 2001 Act elaborate upon the constituents of the above definition of “broadcasting service” and provide:

“*cable system*” means a wired broadcast relay system.

“the “*Internet*” means a system commonly known by that name.

“*programme material*” means audio-visual material or, where used in the context of a sound broadcasting service, audio material and includes advertisements and material which, when transmitted, will constitute a direct offer to the public for the sale or supply to them of goods or other property (whether real or personal) or services.

“*MMD system*” means a multipoint microwave distribution system used for the transmission of broadcasting services on a point to multipoint basis.

Given the application of the 2001 Act to both sound and television broadcasting, the definition of “broadcasting service” in section 2(1) of the 2001 Act contains some linguistic difference to the definition of “television broadcasting” in Article 1(a) of the Directive. Both provisions refer to material relayed to or received by the public. The Irish legislation is more specific in listing and defining methods of communication such as wireless telegraphy, cable, MMD system of satellite. The Directive excludes “communications services providing items of information or other messages on individual demand such as telecopying, electronic data banks and other similar services”, while the 2001 Act only excludes services provided by means of the Internet. The Directive definition of ‘television broadcasting’ specifically includes “the communication of programmes between undertakings with a view to their being relayed to the public”. The definition of “broadcasting service” in Section 2(1) of the 2001 Act is silent on this point.

¹⁰ The European Communities (Television Broadcasting) Regulations 1999 repeal and replace the European Communities (Television Broadcasting) Regulations, 1991.

The Radio and Television Act, 1988 does not define “television broadcasting”. Section 2(1) of the 1988 Act defines “broadcast” as “the transmission, relaying or distribution by wireless telegraphy of communications, sounds, signs, visual images or signals, intended for direct reception by the general public with such communications, sounds, signs, visual images or signals are actually received or not”. Section 2(1) of the 1988 Act further defines a “television programme service” as “a service which comprises a compilation of audio-visual programme material of any description and is transmitted or relayed by means of wireless telegraphy directly or indirectly for reception by the general public”.

Neither the BCI codes, the RTE Sponsorship Guidelines nor the ASAI Codes contain a definition of “television broadcasting”.

- Broadcaster

Transposing Legislation

Regulation 2(1) of the European Communities (Television Broadcasting) Regulations, 1999 defines “broadcaster” as “the person under the jurisdiction of the State who has editorial responsibility for the composition of schedules of television programmes intended for reception by the public and to which the definition of “television broadcasting” relates, and who transmits them or who has them transmitted by third parties”. This is broadly analogous to Article 1(a) of the Directive save that it applies only to a “person under the jurisdiction of the State” rather than a “natural or legal person” (±// art. 1b TVWF Directive).

Other Legislation/Regulatory Codes

The Broadcasting Authority Acts, 1960-2001 provide various definitions of “broadcaster” in specific contexts. For example, section 2(1) of the 2001 Act defines “broadcaster” as “a person who supplies a compilation of programme material for the purpose of its being transmitted or relayed as a broadcasting service (whether that person transmits or relays that material as such a service or not)”.

The 2001 Act does not directly distinguish between natural and legal persons as in Article 1(b) of the Directive. However, section 11(c) of the Interpretation Act, 1937 states that the word “person”¹¹ shall, unless the contrary intention appears, be construed as importing a body corporate (whether a corporation aggregate or a corporation sole) and an unincorporated body of persons as well as an individual”. The focus in Section 2(1) the 2001 Act is on the supply of a compilation of programme material, whereas Article 1(b) of the Directive focuses on the exercise of editorial responsibility.

The Radio and Television Act, 1988 does not contain a definition of “broadcaster”. Section 2(1) of the 1988 Act however defines a “broadcast” as “the transmission, relaying or distribution by wireless telegraphy of communications, sounds, signs, visual images or signals, intended for direct reception by the general public whether such communications, sounds, signs, visual images or signals are actually received or not”.

¹¹ Section 18(c) of the Interpretation Bill, 2000 provides that the above definition of “person” shall be replaced as follows: “Person” shall be read as importing a body corporate (whether a corporation aggregate or a corporation sole) and an unincorporated body of persons, as well as an individual, and the subsequent use of any pronoun in place of a further use of “person” shall be so read”. The Interpretation Bill, 2000 has not as yet been enacted into Irish law.

Neither the BCI Codes, the RTE Sponsorship Guidelines nor the ASAI Codes contain a definition of “broadcaster”.

- Television advertising

Transposing Legislation

The European Communities (Television Broadcasting) Regulations 1999 do not contain a definition of “television advertising” (≠ art. 1c TVWF Directive).

Other Legislation/Regulatory Codes

The Broadcasting Authority Acts, 1960-2001 Act do not provide a definition of “television advertising”. Section 20(8) of the Broadcasting Authority Act, 1960 as amended, provides that “references to advertisements shall be construed as including references to advertising matter in sponsored programmes, that is to say, programmes supplied for advertising purposes by or on behalf of an advertiser”. The Radio and Television Act, 1988 similarly does not contain a definition of “television advertising”.

Section 2 of the BCI Codes transposes the definition of “television advertising” in Article 1(c) of the Directive by incorporating it in the definition of “advertisement”. Section 2.1 of the BCI Codes states that “the nature and format of advertising on broadcasting services can vary greatly and can change over time. It is desirable therefore that in defining the word “advertisement” it would be done in an organic and dynamic way to allow for future developments and should seek to embrace those forms of publicity which one seeks to bring within the code while identifying, as far as possible, those forms which one may wish to exclude from the intended understanding of the concept”. Section 2.2(i) of the BCI Codes further provides:

“In the context of these codes the word “advertisement” shall be construed as:

- (i) any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotion purposes by a public or private undertaking 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 (// art. 1c TVWF Directive).
- (ii) including references to advertising matter in sponsored programmes, i.e. programmes supplied for advertising, commercial or promotional purposes by or on behalf of an advertiser or programmes financed, in whole or in part, by advertisers for advertising, commercial or promotional purposes, subject to the exception at 2.3(vii)¹² below.”

¹² Section 2.3(vii) provides “Accreditation of a sponsor under the condition prescribed in the Codes of Standards, Practices, and Prohibitions relating to sponsorship in Broadcasting Services [Part II of BCI Codes] shall not constitute advertising”.

Part (i) of this definition replicates Article 1(c) of the Directive. However, the BCI Codes are more detailed than the Directive, giving further clarification of the definition of “advertisement”.

Section 2.3 of the BCI Codes provides for certain exclusions from the definition of advertising which are not enumerated in the Directive. Section 2.3 provides:

“2.3(i) Advertising shall **not** denote informational announcements about upcoming programmes on the services on which the announcement is made or informational announcements about upcoming programmes on related or unrelated services. In this context information shall mean the date and time of transmission of the named programme/programmes including “trailer” excerpts and a brief description of the programmes’ contents.

2.3(ii) Advertising shall **not** include appeals given air-time free of charge to any Registered Charity.

2.3(iii) Advertising shall **not** denote public service information announcements including warnings about public safety and health.

2.3(iv) Advertising shall **not** denote information announcements of forthcoming concerts, recitals or performances whether intended for broadcasting or not given by the National Symphony Orchestra, the RTE Concert Orchestra, and other RTE performing groups or of any other comparable groups which are employed by or under contract to RTE or by or under contract to a sound broadcasting contractor or television programme service contractor established under the Radio and Television Act, 1988 [to which the public are allowed entry free of charge].

2.3(v) Advertising shall **not** denote announcements of forthcoming concerts, recitals or performances organised by RTE, sound broadcasting contractors or a television programme service contractor, whether intended for broadcasting or not, to which the public are allowed entry free of charge.

2.3(vi) Advertising shall **not** denote announcements of outside broadcasting events or of non-broadcast events organised in whole or in part by the broadcaster” to which the public are allowed entry free of charge. Names of the concerns (shopping centres, commercial or retail outlets, supermarkets, etc.) providing facilities for outside broadcasts may be credited at the beginning and/or end of the programme and at prudent intervals during the programme on an informational basis. Promotional references to the concerns during the programme shall be considered advertising. In the case of non-broadcast events jointly sponsored by the broadcaster and one or more commercial concerns, informational accreditation of the joint sponsor(s) may be given in broadcast announcements without it constituting advertising.

2.3(vii) Accreditation of a sponsor under the conditions prescribed under the Codes of Standards, Practices, and Prohibitions relating to Sponsorship in Broadcasting Services [Part II of the BCI Codes] shall not constitute advertising.”

Section 1.2 of the ASAI Code defines an “advertisement” as “a paid-for commercial communication addressed to the public or a section of it, the purpose being to influence the

behaviour of those to whom it is addressed. It is characteristic of an advertisement that an advertiser pays or rewards a third party for communicating a message”.

- Surreptitious advertising

Transposing Legislation

The European Communities (Television Broadcasting) Regulations 1999 do not contain a definition of “surreptitious advertising” (≠ art. 1&d TVWF Directive).

Other Legislation/Regulatory Codes

The Broadcasting Authority Acts, 1960-2001 Act do not provide a definition of “surreptitious advertising”.

Section 8.2 of the BCI Codes transposes the definition of “surreptitious advertising” in Article 1(d) of the Directive and defines it as “the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the broadcaster to serve advertising purposes and might mislead the public as to its nature...Such representation is considered to be intentional in particular if it is done in return for payment or for similar consideration”. This is identical to the definition in Article 1(d) of the Directive.

The Radio and Television Act, 1988 does not contain a definition of “surreptitious advertising”. Neither the RTE Sponsorship Guidelines nor the ASAI Codes contain a definition of “surreptitious advertising”.

- Sponsorship

Transposing Legislation

The European Communities (Television Broadcasting) Regulations 1999 do not contain a definition of “sponsorship”.

Other Legislation/Regulatory Codes

The Broadcasting Acts, 1960-2001 Act do not provide a definition of sponsorship.

Part II of the BCI Codes, entitled Codes of Standards, Practice and Prohibitions relating to Sponsorship in Broadcasting Services, transposes the definition of sponsorship in Article 1(e) of the Directive. Section 20.1 provides that “sponsorship shall be construed for the time being as any contribution made directly or indirectly by a public or private undertaking not engaged in television and/or radio broadcasting activities or in the production of audio-visual works, to the financing of television or radio programmes with a view to promoting its name, its trade mark, its image, its activities or its product” (// art. 1e TVWF Directive). This is a *largely similar* definition to that in Article 1(e) of the Directive with some minor linguistic difference. The BCI Codes refer to any contribution made “directly or indirectly” by an undertaking, whereas the Directive simply refers to “any contribution made”. Additionally, section 22 of the BCI Codes provides further detail of what will constitute “sponsorship” within the meaning of the BCI Codes as follows:

“Sponsorship occurs where any or all of the following are present:-

- (i) cash injection
- (ii) investment in kind and supply of goods, services or knowledge.”

“*Cash injection*” is defined in section 22.1 of the BCI Codes as “the provision of direct funding by a sponsor”.

“*Investment in kind*” is defined in section 22.2 of the BCI Codes as “the acceptance of facilities or services from a sponsor”.

The RTE Sponsorship Guidelines define sponsorship as “a relationship entered into with a broadcaster and any organisation with the objective of promoting products, goods, interests or services for a consideration”. The RTE Sponsorship Guidelines further state that “distinction is needed between what sponsorship is and what advertising is. Advertising is a message from a commercial or other body contained in a recognisable and separate entity, a commercial break. Sponsorship credits stand apart from commercial breaks and the minutage allowed for them”.

Neither the Radio and Television Act, 1988 nor the ASAI Codes contain a definition of “sponsorship”.

- Teleshopping

Transposing Legislation

Regulation 2(1) of the European Communities (Television Broadcasting) Regulations, 1999 defines “teleshopping” as “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”. This is identical to Article 1(f) of the Directive.

Other Legislation/Regulatory Codes

Section 19(18) of the 2001 Act provides (with reference to section 19) ““teleshopping material” means material which, when transmitted, will constitute a direct offer to the public for the sale or supply to them of goods or other property (whether real or personal) or services”. This is similar to the definition in Article 1(f) of the Directive. The Irish definition refers to “goods or other property”, whereas the Directive is more expansive in referring to “goods or services including immovable property, rights and obligations”. The Directive refers to supply “in return for payment” whereas the BCI Codes definition is silent on that point. However, it is arguably implicit in use of the word “sale” in the BCI Codes that the definition imports a remuneration element.

Section 18.4 the BCI Codes also provides a definition of “teleshopping material”. This states that “teleshopping material is a form of commercial promotion in broadcasting services which when transmitted constitutes direct offers to the public of goods and other property (whether real or personal) or services”. This is broadly analogous to the definition in section 19(18) of the 2001 Act discussed above.

- Other Legal Definitions

Self Promotional Advertisements

“Self promotional advertisements” are not defined in the transposing European Communities (Television Broadcasting) Regulations, 1999 or the 2001 Act. Section 2.4.1 of the BCI Codes provides “self promotional advertisement on television by a broadcaster, including the promotion of a broadcaster’s ancillary commercial activities and ventures and cross media promotion of a broadcaster’s other or related broadcasting or non-broadcasting activities where such activities or ventures involve the supply of goods or services in return for payment or other remuneration, shall be subject to these Codes.”

Neither the Radio and Television Act, 1988, the RTE Sponsorship Guidelines nor the ASAI Codes contain a definition of “self promotional advertisements”.

Split Screen Advertising, Subliminal Advertising, Virtual Advertising, Interactive Advertising

The terms “split screen advertising”, “virtual advertising” and “interactive advertising” are not defined in the Broadcasting Authority Acts, 1960-2001 Act, the Radio and Television Act 1988, the BCI Codes, the RTE Sponsorship Guidelines or the ASAI Codes.

Section 10 of the BCI Codes refers to “subliminal advertising” as including “any technical device which, by using images of very brief duration or by any other means, exploits the possibility of conveying a message to, or otherwise influencing the minds of, members of an audience without their being aware or fully aware, of what has been done.”

As will be discussed in Part IX (Minors) below, the BCI are currently formulating a new Children’s Advertising Code. In a Phase 1 Consultation Paper published in April 2003, the Commission proposed the following working definitions for the purposes of the new Children’s Advertising Code:

“*Split Screen Advertising*” is a technique, which allows the simultaneous presentation of editorial content and commercial information on the same screen, divided in two or more parts.

“*Subliminal Advertising*” is advertising that includes any technical device which, by using images of very brief duration or by any other means, exploits the possibility of conveying a message to, or otherwise influencing the minds of members of an audience without their being fully aware of what has been done.

“*Virtual Advertising*” is a technique which allows broadcasters to advertise messages or mentions of sponsorship by electronically inserting these into the programme.

“*Interactive Advertising*” enables the viewer to provide information directly to the broadcaster/advertiser by means of a return path or to evolve in an interactive environment (i.e. by actively choosing the content – information or advertising – to whom s/he wishes to be exposed, and this only for as long as s/he wants).

- **Conclusion**

The definition of “television broadcasting” in Regulation 2(1) of the European Communities (Television Broadcasting) Regulations 1999 is similar to that in the Directive. The definition of “broadcasting services” in Section 2(1) of the Broadcasting Act, 2001 lists and defines the

various methods of communication of programmes. The 2001 Act appears to apply to a wider range of communication methods and so is more restrictive than the Directive.

In relation to the definition of “broadcaster”, Regulation 2(1) of the European Communities (Television Broadcasting) Regulations 1999 is more or less the same as Article 1(a) of the Directive. The definition in the Broadcasting Act, 2001 is somewhat different from the Directive in that the 2001 Act focuses on the supply of programme material while Article 1(b) of the Directive focuses on the exercise of editorial responsibility. The Directive appears to contain a more restrictive definition.

The European Communities (Television Broadcasting) Regulations 1999 do not contain a definition of “television advertising”. This is different to the Directive. The BCI Codes are more detailed than the Directive giving further clarification of the definition of “advertisement”. The BCI Codes also provides for exclusions from the definition of advertising which are not enumerated by the Directive. The Directive appears to be more restrictive.

The European Communities (Television Broadcasting) Regulations 1999 do not contain a definition of “surreptitious advertising”. This is different to the directive. The BCI Codes definition is identical to the definition in Article 1(d) of the Directive.

There is no definition of “sponsorship” in the European Communities (Television Broadcasting) Regulations 1999. This is different from the Directive. Part II of the BCI Codes provides a definition of sponsorship that is similar to the definition in Article 1(e) of the Directive.

Regulation 2(1) of the European Communities (Television Broadcasting) Regulations 1999 contains a definition of “teleshopping” that is identical to Article 1(4) of the Directive. The definition provided by Section 19(18) of the Broadcasting Act, 2001 is more or less then same as that in the Directive.

II. Advertising recognition and advertising/programme separation (Article 10)

a. Regulations

- Examination of the rules relating to advertising and teleshopping spots recognition (acoustic and/or optical means)

Article 10.1 of the Directive is mirrored by section 8 of the BCI Codes which deals with “Identification of Advertisements”. Section 8.1 of the BCI Codes states that “Advertisements [and teleshopping material]¹³ shall be clearly distinguishable as such and recognisably separate from the other items of the programme service by optical and/or acoustic means.” This replicates Article 10.1 of the Directive.

Section 2.55 of the ASAI Code provides “An advertisement should be designed and presented in such a way that it is immediately apparent that it is an advertisement”.

- Examination of the rules related to the separation between the commercial content and the programme

Section 7 of the BCI Codes deals with “Programme Separation” and provides “Advertisers shall not exercise any editorial influence over the content of programmes. No advertisement may include anything that states, suggests or implies, or could reasonably be taken to suggest or imply, that any part of any programme broadcast by a service has been supplied or suggested by an advertiser.” This complies with the requirement in Article 10.1 of the Directive that advertising be kept separate from other parts of the programme service.

Section 2.56 of the ASAI Code provides that “An advertisement feature, announcement or promotion published in exchange for a payment or other reciprocal arrangement where the content is controlled by the advertiser should comply with the Code. It should also be clearly identified and distinguished from editorial matter”.

- Examination of the rules related to isolated advertising and teleshopping spots (allowed/prohibited; specific conditions etc.)

Article 10.2 of the Directive is provided for in section 8.1 of the BCI Codes which provides: “In principle, [advertisements and teleshopping material] shall be transmitted in blocks and isolated advertising blocks shall remain the exception.” This replicates Article 10.2 of the Directive, with minor additional wording in the Irish provision elaborating that advertising and teleshopping material should be transmitted in blocks.

¹³ As applied by section 18.5 of the BCI Codes.

- Prohibition of use of “subliminal techniques”

Article 10.3 of the Directive is provided for in section 10 of the BCI Codes which, under the heading “Subliminal Advertising” provides that “No television advertisement [or teleshopping material] may include any technical device which, by using images of very brief duration or by any other means, exploits the possibility of conveying a message to, or otherwise influencing the minds of members of an audience without their being aware or fully aware, of what has been done”. This implement the Directive’s prohibition on subliminal advertising while also specifying what constitutes subliminal techniques. This is more detailed than the Directive as the Directive does not specify what is meant by subliminal techniques.

- Prohibition of surreptitious advertising and teleshopping

Article 10.4 of the Directive is provided for in section 8.2 of the BCI Codes. This provides that surreptitious advertising and teleshopping (as defined in Part I above) is prohibited.

b. Conclusion

- Emphasis placed upon the existence of other rules more or less restrictive than the Directive

Article 10 of the Directive is substantially replicated in Section 8 of the BCI Codes and Section 2.55 and 2.56 of the ASAI Code. As noted above, section 10 of the BCI Codes provide further detail on what constitutes subliminal techniques.

- Identification of specific rules not included in the Directive

The BCI Codes provide two additional rules on the identification of advertising, which are not contained in the Directive. Section 8.3 of the BCI Codes states that “Advertisements shall not feature, visually or orally, persons regularly presenting news and current affairs programmes, and the expression “News Flash” must not be used as an introduction to an advertisement, even if preceded by an advertiser’s name”.

Section 8.4 of the BCI Codes provides that “Situations and performances reminiscent of broadcast programmes must not be used in such a way as to blur the distinction between programmes and advertisement. References to programmes are unacceptable in advertisements”.

A clarification in section 8 of the BCI Codes provides: “NOTE: These rules do not prohibit the inclusion of an advertisement by reason only of the fact that it is related in subject matter to an adjacent programme e.g. advertisements for farm products and fertilizers in intervals around a farming programme”. This clarification is not contained in the Directive.

III. Rules related to insertion of advertising and teleshopping spots between and within the programmes (Article 11)

a. Regulations

- Examination of the rules related to the insertion of advertising and teleshopping spots between the programmes

Article 11.1 of the Directive is replicated in section 9 of the BCI Codes. Entitled “Insertion of Advertisements”, section 9.1 provides that “Advertisements [and teleshopping material] shall be inserted between programmes.”

- Examination of the rules related to the insertion of advertising and teleshopping spots within the programmes (allowed or prohibited; specific rules regarding the types of programme)

Section 9.1 of the BCI Codes provides: “Provided the conditions contained in paragraphs 9.2 to 9.5 are fulfilled, advertisements [and teleshopping material] may also be inserted during programmes in such a way that the integrity and value of the programme taking into account natural breaks in and the duration and nature of the programme and the rights of the rights holders are not prejudiced”. This is identical to Article 11.1 of the Directive.

Article 11.2 of the Directive is replicated in section 9.2 of the BCI Codes which provides that “In programmes consisting of autonomous parts, or in sports programmes and similarly structured events and performances comprising intervals, advertisements and teleshopping material shall only be inserted between the parts or in the intervals”. This is identical to Article 11.2 of the Directive.

Article 11.3 of the Directive is replicated in section 9.3 of the BCI Codes which provides “The transmission of audio-visual works such as feature films and films made for television (excluding series, serials, light entertainment programmes and documentaries), provided their scheduled duration is more than forty-five minutes, may be interrupted once for each complete period of forty five minutes. A further interruption is allowed if their scheduled duration is at least twenty minutes longer than two or more complete periods of forty five minutes”. With some minor linguistic differences, this is substantially identical to Article 11.3 of the Directive.

Article 11.4 of the Directive is replicated in section 9.4 of the BCI Codes which provides “Where programmes, other than those covered by paragraph 9.2 are interrupted by advertisements [or teleshopping material], a period of at least twenty minutes should elapse between each successive advertising break within the programme”. This is identical to Article 11.4 of the Directive.

- Possible prohibitions of insertion of advertising and teleshopping spots within certain types of programme

Article 11.5 of the Directive is replicated in section 9.5 of the BCI Codes which provides “Advertisements [and teleshopping material] shall not be inserted in any broadcast of a religious service. News and current affairs programmes, documentaries, religious programmes, and children’s programmes, when their scheduled duration is less than thirty minutes shall not be interrupted by advertisements [or teleshopping material]. If their scheduled duration is for thirty minutes or longer, the provisions of the previous paragraphs shall apply”. This is identical to Article 11.5 of the Directive.

b. Conclusion

- Emphasis placed upon the existence of other rules more or less restrictive than the Directive

The provisions of Irish law exactly replicate Article 11 of the Directive and there are no more detailed rules regulating this matter.

- Identification of rules not included in the Directive

Non applicable.

IV. Quantitative Restrictions (Article 18)

a. Regulations

- Examination of the legal maximum percentage of daily transmission time devoted to teleshopping and advertising spots and for other forms of advertising (20% in the Directive)

Public Broadcasters

Section 31(1) of the Broadcasting Act 2001, provides: “In the case of a broadcasting service provided by [RTE] (not being a broadcasting service which consists of programme material supplied by it pursuant to a contract entered into under this Act), the total daily times for broadcasting advertisements and teleshopping material fixed by [RTE] and the maximum period so fixed to be given to advertisements and teleshopping material in any hour shall be subject to the approval of the Minister”.

Section 49 of the Broadcasting Act, 2001 applies to TG4 and provides that “In the case of a broadcasting service provided by Teilifís na Gaeilge (not being a broadcasting service which consists of programme material supplied by it pursuant to a contract entered into under this Act), the total daily times for broadcasting advertisements and teleshopping material fixed by Teilifís na Gaeilge and the maximum period so fixed to be given to advertisements and teleshopping material in any hour shall be subject to the approval of the Minister”.

There are no explicit statutory provisions which set out the maximum percentage of daily transmission time devoted to advertising and teleshopping spots in respect of public broadcasters.

Independent broadcasters

The Radio and Television Act, 1988 does not refer to teleshopping material and therefore the legislation does not provide a composite maximum percentage of daily transmission times devoted to advertising and teleshopping material.

- Examination of the maximum daily transmission time devoted to advertising messages (15% in the Directive)

Public Broadcasters

There are no explicit statutory provisions which set out the maximum permitted daily transmission time devoted to advertising messages.

Independent Broadcasters

Section 10(4) of the Radio and Television Act, 1988 provides that the total daily times for broadcasting advertisements by an independent broadcaster shall not exceed a maximum of 15% of the total daily broadcasting time. This replicates Article 18.1 of the Directive.

- Examination of the maximum daily transmission time devoted to advertising and teleshopping spots within a given clock hour (20% in the Directive)

Public Broadcasters

As discussed above, there are no explicit statutory provisions which set out the maximum daily transmission time devoted to advertisements and teleshopping. However, by agreement with the Minister for Communications, Marine and Natural Resources, RTE and TG4 may currently show six minutes of advertising or teleshopping material per hour. This comprises 10% of an hour. However, RTE and TG4 may broadcast up to seven and a half minutes of advertising or teleshopping material per hour in peak times provided that the total daily advertising quota is not exceeded. This comprises 12.5% of an hour. RTE has self-imposed a stricter time period in respect of children's programming and broadcasts an average of five minutes advertising during children's television. This comprises 8.33% of an hour.

Consequently, by means of the current agreement between the Minister for Communications, Marine and Natural Resources and RTE and TG4, Irish law is stricter than Article 18.2 of the Directive in permitting a lesser period of time to be devoted to advertisements and teleshopping material by public broadcasters within a given clock hour.

Independent Broadcasters

Section 10(4) of the Radio and Television Act, 1988 provides that the maximum time to be given to advertisements in any hour shall not exceed ten minutes. This comprises 16.66% of an hour. Consequently, Irish law is stricter than the Directive in permitting a lesser period of time to be devoted to advertisements by independent broadcasters within a given clock hour.

- Examination of other possible quantitative restrictions

Section 12 of the BCI Codes provides "Forms of advertisements such as direct offers to the public for the sale, purchase or rental of products or for the provision of services shall not exceed one hour per day on any broadcasting service". This provision is not contained in the Directive.

- Examination of the factors to be taken into account or not for the calculation of advertising time

Non applicable.

Expected New Code: Minuteage Rules

Section 19(3) of the Broadcasting Act, 2001 provides that the BCI shall “in accordance with subsection (5)¹⁴, makes rules with respect to (a) the total daily times that shall be allowed for the transmission of advertisements and teleshopping material on a broadcasting service or sound broadcasting service, being a service which consists of a compilation of programme material supplied pursuant to a contract entered into under this Act [i.e. in respect of public broadcasters] or the Act of 1988 [i.e. independent broadcasters], and (b) the maximum period that shall be allowed in any given hour for the transmission of advertisements and teleshopping material on such a broadcasting service or sound broadcasting service, and the Commission may make different such rules with respect to different classes of broadcasting service or sound broadcasting service”.

Section 19(4) of the 2001 Act provides that the above rules shall provide for the matters required to be provided for by Chapters IV and V of the Directive. No such code has as yet been published by the BCI. It is understood that such a code may be published towards the end of 2004.

b. Conclusion

- Emphasis placed upon the existence of rules more or less restrictive than the Directive

As discussed, under current Irish law, both public and independent broadcasters are subject to stricter regulation of advertising and teleshopping time than that in the Directive.

- Identification of specific rules not included in the Directive, in particular rules aimed at the reduction of advertising volume (for instance the imposition of a special tax on advertising)

In Ireland, there is no special tax regime for advertising and accordingly, there are no specific tax provisions that operate to discourage either the generation of advertising income or the incurring of advertising expenditure. In general terms, where a company within the charge to Irish corporation tax generates advertising income, it will be liable to tax at a rate of 12.5% in respect of that income (net of allowable expenses) provided it arises as part of its trading activity. If the income does not arise as part of a trading activity carried on by the relevant company, it will be liable to tax at a rate of 25%. Where an individual or partnership generates advertising income, a charge to income tax arises at the individual's or individual partner's marginal rate of tax (currently either 20% or 42% depending on income level).

An entity carrying on a trading activity will generally be allowed a deduction in respect of expenses incurred on advertising provided the relevant expenses are incurred “wholly and exclusively” for the purpose of the entity's trade and are of a revenue nature. A supply of advertising services generally attracts a charge to Value Added Tax at a rate of 21%.

¹⁴ Section 19(5) of the 2001 Act provides “Before preparing a Code or making rules under this section, the Commission shall make available for inspection by any person who makes a request of it in that behalf a draft of the Code it proposes so to prepare or the rule it proposes so to make and shall have regard to any submissions made to it, within such period as it specifies for the purpose, by that person in relation to the draft before it prepares the Code and makes the rule concerned.

V. Quantitative restrictions related to teleshopping programmes (Article 18 a)

a. Regulations

- Examination of the minimum duration of windows devoted to teleshopping programmes (15 minutes in the Directive)

There are no equivalent statutory or regulatory provisions in Irish law analogous to Article 18a.1 of the Directive.

- Examination of the maximum number of windows (8 in the Directive)

There are no equivalent statutory or regulatory provisions in Irish law analogous to Article 18a.2 of the Directive.

- Examination of the maximum daily duration (3 hours in the Directive)

Irish law does not refer to “teleshopping windows”. As noted in Part IV, section 12 of the BCI Codes provides “Forms of advertisements such as direct offers to the public for sale, purchase or rental of products or for the provision of services shall not exceed one hour per day on any broadcasting service.” Section 18.5 of the BCI Codes provides that certain sections of the BCI Codes apply both to advertising and teleshopping material. Section 12 of the BCI Codes is not included in this list. Therefore it may be that this section is specific only to a certain category of promotional advertisement and not teleshopping. However, it is arguable, given that the wording used in this section is analogous to the definition of “teleshopping material” both in the BCI Codes and in Article 1(f) of the Directive that section 12 applies to teleshopping material. If it does, Irish law may be stricter than Article 18a.2 of the Directive in providing that the total time dedicated to teleshopping in a day by public and independent broadcasters shall be a maximum of one hour.

b. Conclusion

- Emphasis placed upon the existence of other rules more or less restrictive than the Directive

There is no directly analogous provision in Irish law to Article 18.a. However, insofar as the duration of teleshopping material may be regulated by section 12 of the BCI Codes, the Irish provisions may be more restrictive than the Directive.

- Identification of specific rules not included in the Directive, for instance rules aimed at the reduction of teleshopping programmes

In Ireland, there is no special tax regime for advertising and accordingly, there are no specific tax provisions that operate to discourage either the generation of advertising income or the incurring of advertising expenditure. In general terms, where a company within the charge to Irish corporation tax generates advertising income, it will be liable to tax at a rate of 12.5% in respect of that income (net of allowable expenses) provided it arises as part of its trading activity. If the income does not arise as part of a trading activity carried on by the relevant company, it will be liable to tax at a rate of 25%. Where an individual or partnership generates advertising income, a charge to income tax arises at the individual's or individual partner's marginal rate of tax (currently either 20% or 42% depending on income level).

An entity carrying on a trading activity will generally be allowed a deduction in respect of expenses incurred on advertising provided the relevant expenses are incurred "wholly and exclusively" for the purpose of the entity's trade and are of a revenue nature. A supply of advertising services generally attracts a charge to Value Added Tax at a rate of 21%.

VI. Sponsoring (Article 17)

a. Regulations

- Examination of the rules related to the editorial independence of the broadcaster

Part II of the BCI Codes, entitled “Codes of Standards, Practice and Prohibitions Relating to Sponsorship in Broadcasting Services”, sets out rules for public and independent broadcasters relating to sponsorship. RTE is also regulated by its own RTE Sponsorship Guidelines.

Section 21.1(i) of the BCI Codes replicates Article 17(1)(a) of the Directive and provides: “the content and scheduling of sponsored programmes may in no circumstances be influenced by the sponsor in such a way as to affect the responsibility and editorial independence of the broadcaster in respect of programmes” (/ art. 17.1a TVWF Directive).

The RTE Sponsorship Guidelines provide analogous provisions to Article 17.1 albeit in more general terms. The Guidelines state: “...a sponsor should have no editorial input or involvement in programming or scheduling, nor should they appear to have any. This is the core principle of this Code. With this overriding principle in place both sponsor and broadcaster can exploit the full opportunities of a worthwhile relationship...”

- Sponsor identification

Section 21.1(ii) of the BCI Codes replicates Article 17(1)(b) of the Directive and provides: “[Sponsored programmes] must be clearly identified as such by the name and/or logo of the sponsor...”(// art. 17.1 b TVWF Directive).

The RTE Sponsorship Guidelines provide “The presence of sponsorship must be clearly indicated to the programme audience.”

- Examination of the rules related to the insertion of the sponsor’s name or logo within the programme (beginning/end, break bumper, during all programme)

Section 21.1(ii) of the BCI Codes provides: “[Sponsored programmes] must be clearly identified as such by the name and/or logo of the sponsor at the beginning and/or end of the programmes. (In view of this identification requirement, logos would be acceptable as “bumper” credits around advertising breaks during the programme)” (±// art. 17.1 b. TVWF Directive).

This latter provision regarding bumper credit is not contained in the Directive. Depending on how one construes the language of Article 17.1(b) of the Directive i.e. “at the beginning and/or the end of the programme”, section 21.1(ii) of the BCI Codes may be construed as broader in permitting the display of sponsorship logos at the beginning or end of advertising during the course of a programme as opposed to the beginning or end of the programme.

The RTE Sponsorship Guidelines provide:

“...it is...essential that any association be clearly indicated at both the beginning and end of a programme. No sponsor’s message can appear within a TV programme. Where commercial breaks appear within the programme the sponsor may be credited both going into and coming out of the break...Sponsored programmes (as opposed to coverage of sponsored events) cannot include the name of the sponsor in the title of the programme.

The nature of the sponsorship must be made clear in the credits, thus;

- (i) A sponsor funding part or whole of a programme should say one of the following two lines, “Sponsored by.....” or ‘In association with
- (ii) If a sponsor provides / makes the programme this too must be made clear, e.g. “Produced by.....”
- (iii) No credit can in anyway allow the broadcaster to abdicate its full responsibilities, e.g. “Brought to you by.....”

Both the BCI Codes and RTE Sponsorship Guidelines replicate the provisions of Article 17.1 of the Directive. However, they go further to provide more detailed rules relating to permitted sponsorship.

- Identification of the programmes that cannot be sponsored

Tobacco (Article 17.2)

Article 17.2 of the Directive is provided for in sections 20.2(i) and 21.2 of the BCI Codes. Section 20.2(i) provides:

“[A sponsor] must not be involved in the manufacture, supply or provision of a product or service which is listed as unacceptable in the Code of Standards, Practice and Prohibitions in Advertising and other forms of commercial promotion in broadcasting services [Part I of BCI Codes]”.

Section 21.2 states:

“Programmes may not be sponsored by natural or legal persons whose principal activity is the manufacture or sale of products, or the provision of services, the advertising of which is prohibited by the Code of Standards, Practice and Prohibitions in Advertising and other forms of Commercial Promotion in Broadcasting [Part I of the BCI Codes].

The subsidiary of a manufacturer or brand-seller of products, the advertising of which is prohibited, who uses a name or a trademark that differs completely from the manufacturers and whose activity is different from the production, distribution or provision of services in relation to such products may sponsor programmes.”

Both sections 20.2(i) and 21.2 refer to Part I of the BCI Codes which, in section 13, provides “All forms of advertising for cigarettes, cigars and other tobacco products shall be prohibited”. As such, sponsorship by undertakings whose principal activity is the

manufacture or sale of cigars, cigarettes and other tobacco products is not permitted. The BCI Codes goes further than Article 17.2 of the Directive in providing that subsidiaries of companies whose advertising is proscribed, may engage in the sponsorship of programmes where they are involved in an unrelated activity and use a name or trade mark different from their parent company. The Directive is silent on this point.

The RTE Sponsorship Guidelines, in a section entitled “Unsuitable Sponsors” contains an analogous provision to Article 17.2 of the Directive, which provides “Persons or companies generally known for their manufacture or supply of tobacco products cannot be sponsors”.

Medicines (Article 17.3)

Article 17.3 of the Directive deals with television sponsorship by undertakings involved in the manufacture or sale of medicinal products and medical treatment. This is not directly covered by Part II of the BCI Codes. However, such a provision may be implied by reason of section 20.2(ii) of the BCI Codes which provides: “[A sponsor] must not be associated with a programme which addresses an audience to which its commercials are not permitted to appeal (e.g. alcoholic drink sponsorship of youth programmes is not permitted) or during which it would not be permitted to advertise”. Section 18.3 of the BCI Codes provides that “Advertising for medicinal products and medicinal treatments which are available only on prescription is prohibited.” Section 18.7 of the BCI Codes provides “Teleshopping material for medicinal products, which are subject to a marketing authorisation within the meaning of Council Directive 65/65/EEC as amended by Directive 93/39/EEC shall be prohibited.” Appendix 3 to the BCI Codes also prohibits advertising for medicines and medical treatment which are only available on prescription. Therefore by implication from section 20.2(ii) of the BCI Codes, sponsorship by undertakings involved in the manufacture or sale of medicinal products and medicinal treatment in Ireland may not promote medicines and medical treatments which are only available on prescription.

The RTE Sponsorship Guidelines in the section entitled “Unsuitable Sponsors” provides “While pharmaceutical companies may be sponsors, no mention or association with any of their products, only available on prescription, is acceptable.” This broadly replicates Article 17.3 of the Directive.

News and Current Affairs (Article 17.4)

Article 17.4 of the Directive is provided for in section 23.1 of the BCI Codes which provides:

“Sponsorship of news, current affairs and religious programmes is prohibited. For the purposes of this section, magazine and information style programmes are not considered to be news/current affairs programmes.”

Section 23.2 of the BCI Codes further provides: “Reports and interviews for news and current affairs programmes must not be set in such a way as to give undue commercial prominence to any company”. This provision is not contained in the Directive.

The RTE Sponsorship Guidelines provide that news programmes, current affairs programmes, religious programmes, station announcements and children programmes are not suitable for sponsorship.

Article 17.4 is replicated in Irish law by the BCI Codes and RTE Sponsorship Guidelines. However, Irish law goes further to prohibit sponsorship of religious and children's programmes in addition to news and current affairs programmes. Section 23.1 of the BCI Codes provides greater detail as to what will constitute a news or current affairs programme and further provides that news and current affairs programmes may not contain reports and interviews which give undue commercial prominence to any company.

- Examination of the rules related to the content of the message (moving images, mention of the product, slogan etc.)

Section 21.1(iii) replicates Article 17(1)(c) of the Directive with some linguistic difference and provides: “[Sponsored programmes] must not encourage the purchase or rental of the products or services of the sponsor or a third party, in particular by making special promotional references to those products or services other than in advertisements in commercial breaks”. Article 17.1(c) does not make reference to advertisements in commercial breaks. It is arguable that such a provision is self-explanatory.

The RTE Sponsorship Guidelines provide:

“[Sponsor] [c]redits at the beginning and end of a programme may be both visual and verbal...Current advertising straplines or those used in the past three years may not be used in sponsorship credits. Nor can credits be subsequently used for advertising material while the sponsorship relationship is still in place. Credits may however be programme related and may also include product use. While credits and advertising messages must be different, credits must still comply with all relevant Advertising Codes of Practice in force at the time.”

In relation to “product use” in credits, while Section 26 of the BCI Codes prohibits product placement, BCI state that a product may be included verbally and visually if the product is the sponsor of the programme. If the brand is the sponsor, then no reference may be made to a product as this would amount to product placement. There are no specific rules on product use in the BCI Codes or the RTE Sponsorship Guidelines.

The RTE Sponsorship Guidelines also provide:

“Credits must not be confused with station announcements or news items thus the use of Continuity Presenters or Newsreaders is not acceptable either for visual purposes or as voiceovers.”

These provisions are not contained in the Directive.

- Examination of the maximum duration of the mention and/or maximum daily/per hour volume

The BCI Codes do not set out the maximum duration of any mention of a sponsor. However, the RTE Sponsorship Guidelines provide:

“Credits at the beginning and end of a programme may be both visual and verbal but must not exceed 10 seconds in length. Where two or more sponsors are involved this may be extended to 15 seconds. In and out of commercial breaks on television, credits may also be visual and verbal but must not exceed 7 seconds in length....”

These provisions are not contained in the Directive.

- Examination of other rules eventually limiting the volume of sponsorship (ceiling for sponsorship profits, special tax etc.)

There are no Irish tax laws which limit the amount of income that may be generated by means of sponsorship deals. However, the entity in receipt of sponsorship income will be subject liable to tax in respect of the income. Refer to Part IV. b above for details of applicable tax rates.

The question of whether a sponsorship payment will be tax deductible for the donor falls to be determined in accordance with general tax principles regarding the deductibility of expenses. Accordingly, for the payment to be deductible it must be incurred wholly and exclusively for the purposes of a trade and must be revenue in nature. To satisfy the “wholly and exclusively” test, the payment must have a genuine commercial objective for the business of the donor. Advertising is generally regarded as being a genuine commercial objective.

- Examination of other relevant rules related to product placement, price mentioning during TV shows, sponsorship linked to schedule/points indication during sports broadcasts etc)

Section 21.3 of the BCI Codes provides “Sponsorship involvement in any programme must not constitute advertisement as defined in the Codes of Standards, Practice and Prohibition in Advertising and other forms of Commercial Promotions in Broadcasting Services [Part I of the BCI Codes]”. The BCI Codes therefore requires that the sponsor’s involvement must be one of sponsorship, as defined, rather than for the purpose of promoting a good or service.

Section 26 of the BCI Codes prohibits “product placements” and provides:

“It is not always possible in the interests of authenticity to avoid references to the names of commercial products or services or their incidental portrayal in radio and television programmes, but the practice known as “product placement” is strictly forbidden.”

In relation to sponsorship of sports programmes, section 23.4 of the BCI Codes states that “Sponsors must be clearly identified as such by the name and/or logo of the sponsor at the beginning and/or end of programmes. Product placement by the sponsor is forbidden as is the display of advertising material “in studio””. This is analogous to the general provision in Article 17.1(b) of the Directive, however the BCI Codes is more restrictive than the Directive in prohibiting “in studio” advertisement or product placement.

Sponsorship – The Preparation of Codes

Section 19(1)(b) and (c) of the Broadcasting Act, 2001 states that the BCI shall, upon being directed by the Minister to do so and in accordance with the provisions of that section prepare:

- a code specifying standards to be complied with, and rules and practices to be observed, in respect of advertising, teleshopping material, *sponsorship* and other

forms of commercial promotion employed in any broadcasting service or sound broadcasting service (section 19(1)(b));

- a code specifying standards to be complied with, and rules and practices to be observed, in respect of advertising, teleshopping material, *sponsorship* and other forms of commercial promotion employed in any broadcasting service or sound broadcasting service, being advertising and other activities as aforesaid which relate to matters likely to be of direct and indirect interest to children. (s19(1)(c)).

No such codes or rules have as yet been drawn up by the BCI. It is understood that the BCI will draft a General Advertising Code towards the end of 2004, which may contain provisions relating to sponsorship. A Children's Advertising Code is currently being drafted by the BCI under section 19(1)(c) which may contain provisions relating to sponsorship of children's programmes. It is understood that a draft of the Children's Advertising Code may be published between March-June 2004.

b. Conclusion

- Emphasis placed upon the existence of other rules more or less restrictive than the Directive

As discussed, Irish law contains more detailed provisions on sponsorship than contained in the Directive.

- Identification of specific rules not included in the Directive, in particular rules aimed at the reduction of teleshopping broadcasts (special tax on advertising, ceiling for maximum annual advertising profits etc.)

This section will briefly set out those rules contained in the BCI Codes and the RTE Sponsorship Guidelines which, in addition to the above highlighted provisions, are not contained in the Directive.

Section 19 of the BCI Codes sets out a general statement on the function and place of sponsorship as follows:

“Editorial integrity is an essential basis for a broadcaster's output. Equally, the sponsorship of certain programmes is an attractive commercial proposition for many organisations, particularly corporate advertisers. It should be seen as a legitimate part of a broadcaster's revenue and a means of enhancing existing programmes or of making programmes which otherwise could not be included in the schedules.

Broadcasters should ensure that the programming responsibilities imposed by Sections 18(1), 18(2), 18(1B), and Section 17 of the Broadcasting Authority Act, 1960 (inserted by Section 13 of the Broadcasting Authority (Amendment) Act, 1976) in the case of R.T.E., and Sections 9 and 18 of the Radio and Television Act, 1988, in the case of the Independent Broadcasting Contractors operating under the auspices of the Independent Radio and Television Commission, must not be prejudiced by sponsorship”.

Section 20.2 of the BCI Codes deals with the responsibilities of broadcasters. Section 20.2 states that:

“It is the responsibility of broadcasters to ensure that editorial integrity is not influenced by the presence of sponsorship. A sponsor:-

- (i) must not be involved in the manufacture, supply or provision of a product or service which is listed as unacceptable in the Codes of Standards, Practice and Prohibitions in Advertising and other forms of Commercial promotion in Broadcasting Services [Part I of the BCI Codes],
- (ii) must not be associated with a programme which addresses an audience to which its commercials are not permitted to appeal (e.g. alcoholic drink sponsorship of youth programmes is not permitted) or during which it would not be permitted to advertise,
- (iii) should not have an involvement in the editorial content of the programme or appear to do so.

Note: This is not intended to inhibit normal communication between a sponsor and a broadcaster”.

Section 22.3 of the BCI Codes sets out rules concerning the provision of prizes in television programmes. It states “Substantial prizes offered should be paid for at best competitive prizes by the broadcaster and should be appropriate to the programme and in good taste. In any reference to the prize, the use of advertising copy is strictly prohibited as this constitutes surreptitious advertising and contravenes the requirement on programme separation contained in the Codes of Standards, Practice and Prohibitions in Advertising in Broadcasting Services [Part I of BCI Codes]. Broadcasters must ensure that public or private undertakings and natural or legal persons whose principal activity is the manufacture or sale of products or provision of services, the advertising of which is prohibited, are not using the mechanism of supplying prizes to circumvent this prohibition.”

A similar provision is contained in the RTE Sponsorship Guidelines which provides “Sponsors may provide prizes to programmes and broadcasters may mention the prize together with a brief factual statement. No prizes should be offered which appear in an editorial context anywhere else in the programme. Prizes offered by way of audience competitions must not include questions relating to the product. Questions connected to sports and music events, music, film, video, theatre and book reviews are exempt from this provision. In general, prizes should be seen as adding value to the programme content.” The Directive is silent on the provision of prizes as a constituent of sponsorship.

In relation to sponsorship of special events, section 23.3 of the BCI Codes states that:

“Special events coverage may involve the broadcaster in agreeing logistical and facilities support from commercial or Public Service bodies. In such circumstances credits and on-air acknowledgements of contributors may be permitted provided:

- (i) acknowledgements take the form of a statement of information and are not based on copy supplied to the programme makers.

- (ii) credits are consistent with the programme style”.

The RTE Sponsorship Guidelines contain similar provisions which provide:

“Coverage of events which may have a sponsor involvement are common place. It is acceptable to have a sponsor of the coverage separate to the event sponsor, but the event sponsor may also be the broadcast sponsor. Undue coverage of a visual or verbal nature should not be given to advertising signage or branding messages at such events. No coverage should be provided at events, which does not have a bona fide “non-broadcast” status. The following can be used as guidelines.

- (a) The event must be recognised as official by a sporting or cultural body.
- (b) Broadcast coverage of the sponsorship must not be the principle purpose of the event.
- (c) The event must be open to the public, whether it is broadcast or not.
- (d) The broadcaster must decide in the interest of audiences, and not purely commercial gain.

In general visual and aural references to the event sponsor should be sufficient to fulfil any contractual obligation’s, or required by good broadcast coverage.”

The Directive is silent on the rules for sponsorship of coverage of special events.

Section 23.5 of the BCI Codes states that “Broadcasters must ensure that coverage of sporting events, in terms of the actual decision to cover and method of coverage is not in any way influenced by the presence of a sponsor or sponsorship”. This is broadly analogous to the general provision in Article 17.1(a) of the Directive in the specific context of coverage of sporting events.

Section 25.1 of the BCI Codes provides that “Presenters and other “on-air” personnel must not make gratuitous reference to commercial products or services”. The Directive is silent on this point.

Section 25.2 of the BCI Codes provides that “Under no circumstances shall presenters and other “on-air” personnel advertise or promote during the course of a programme any products or events with which they are associated”. The Directive is silent on this point.

Section 25.3 of the BCI Codes states that “Product endorsement by programme presenters during the course of a programme is prohibited irrespective of source or purchase arrangement”. The Directive is silent on this point.

Section 26 of the BCI Codes states that “It is not always possible in the interests of authenticity to avoid references to the names of commercial products or services or their incidental portrayal in radio and television programmes, but the practice known as “product placement” is strictly forbidden”. A similar provision is contained in the RTE Sponsorship Guidelines which provides: “Product placement is the inclusion of, or reference to a product or service within a programme for which consideration is received by the broadcaster. This is not allowed as it implies editorial involvement”. The Directive is silent on this point.

The RTE Sponsorship Guidelines in its section entitled “Unsuitable Sponsors” provides: “A product or service not acceptable under prevailing advertising codes may not be a sponsor. A

product or service not acceptable for advertising in specific time bands or programme type cannot sponsor programmes in those time bands or of that type”. Section 15(b) of the BCI Codes recognises a voluntary code whereby spirit based alcoholic drinks are not advertised on television and assumes that this situation will continue. As such, a company producing spirit based alcoholic drinks may not sponsor a television programme in Ireland. This rule is not contained in Article 17 of the Directive¹⁵.

The RTE Sponsorship Guidelines also contain additional provisions concerning “Advertising Relating to Sponsorship” and “Promotions/Trailers”. The former provides “Advertising aimed at increasing the awareness of the sponsorship relationship can only use phrases, which would be acceptable as staplines. Advertising promoting the sponsorship association will not be aired in or around the sponsored programme.” The latter provides “The objective of station promotion or trailers for upcoming programmes is to alert audiences and provide general information about the broadcasters’ programme. The sponsor’s presence should therefore be secondary. Only one display of the sponsor’s logo may appear during the programme production.” The Directive is silent on these points.

In Ireland, there is no special tax regime for advertising and accordingly, there are no specific tax provisions that operate to discourage either the generation of advertising income or the incurring of advertising expenditure. In general terms, where a company within the charge to Irish corporation tax generates advertising income, it will be liable to tax at a rate of 12.5% in respect of that income (net of allowable expenses) provided it arises as part of its trading activity. If the income does not arise as part of a trading activity carried on by the relevant company, it will be liable to tax at a rate of 25%. Where an individual or partnership generates advertising income, a charge to income tax arises at the individual’s or individual partner’s marginal rate of tax (currently either 20% or 42% depending on income level).

An entity carrying on a trading activity will generally be allowed a deduction in respect of expenses incurred on advertising provided the relevant expenses are incurred “wholly and exclusively” for the purpose of the entity’s trade and are of a revenue nature. A supply of advertising services generally attracts a charge to Value Added Tax at a rate of 21%.

¹⁵ Television advertising and teleshopping for alcoholic beverages will be discussed in Part IX.

VII. New Advertising Techniques

The new advertising techniques mentioned are not used at present on Irish broadcasting channels.

a. Split screens

There are no specific rules or guidelines on split screen techniques under Irish law. This technique is not used at present on Irish broadcasting channels. There are no decisions or guidelines of public media authorities on this issue. See below for impending regulation.

b. Interactive advertising

There are no specific rules or guidelines on interactive advertising under Irish law. This technique is not used at present on Irish broadcasting channels. There are no decisions or guidelines of public media authorities on this issue. See below for impending regulation.

c. Virtual advertising

There are no specific rules or guidelines on virtual advertising under Irish law. This technique is not used at present on Irish broadcasting channels. There are no decisions or guidelines of public media authorities on this issue. See below for impending regulation.

d. Other new advertising techniques

To date, no other new advertising techniques are used in Irish broadcasting channels. As such, there are no specific rules or guidelines addressing new techniques.

Impending Regulation of New Advertising Techniques

As discussed in Part IX (Minors) below, the BCI is presently drafting a Children's Advertising Code. For the purposes of developing this Code, the Commission proposed working definitions of split screen advertising, interactive advertising, virtual advertising and subliminal advertising in their Phase 1 Consultation Paper published in April 2003. These working definitions are set out in Part I above. In its Phase 2 Consultation Paper published in October 2003, the BCI stated that rules governing these new advertising techniques will be developed within a general advertising code to be published in late 2004. The BCI concluded that as children's advertising is a subset of all advertising, these rules, once drafted, will be applied to children's advertising.

VIII. General rules related to advertising and teleshopping content (Article 12)

a. Regulations

- Indication of the rules related to the content of commercial messages (human dignity, discrimination, religious or political beliefs, health and safety, environment, and eventually other rules)

The principles set out in Article 12 of the Directive are provided for in Irish law in the BCI Codes and the ASAI Code.

Section 4.1 of the BCI Codes provides “The general principle which governs all broadcast advertising [and teleshopping material] is that it should be legal, honest, decent and truthful. Broadcasting, and particularly television broadcasting, because of its constant presence in the home, raises problems which do not necessarily occur in other media and it is therefore essential to maintain a consistently high quality in broadcast advertising [and teleshopping material]”. Section 4.2 of the BCI Codes states that “These codes are intended to be applied in the spirit as well as in the letter”.

These principles are also mirrored in the ASAI Code. Section 2.1 of the ASAI Code provides “All advertisements should be legal, decent, honest and truthful”. Section 2.2 of the ASAI Code provides “All advertisements should be prepared with a sense of responsibility to consumers and to society”. Section 2.3 of the ASAI Code provides “All advertisements should respect the principles of fair competition generally accepted in business”. Section 2.4 of the ASAI Code provides “The Code is applied in the spirit as well as in the letter”.

The general standards regulating the content of television advertising are contained in section 5 of the BCI Codes. Section 5.1 states:

“advertising [and teleshopping material] shall not:

- (i) prejudice respect for human dignity,
- (ii) include any discrimination on grounds of race, sex or nationality,
- (iii) be offensive to religious or political beliefs; or
- (iv) encourage behaviour prejudicial to the protection of the environment”(// art. 12 TVWF Directive).

Section 5 of the BCI Codes replicates Articles 12(a), (b), (c) and (e) of the Directive. Section 11 of the BCI Codes relates to Health and Safety and provides “Advertisements should not encourage behaviour prejudicial to health or safety. Advertisements should not without justifiable reason depict or describe situations which show dangerous practices or a disregard for safety. Special care should be taken in advertisements directed towards or depicting children.”. This reflects Article 12(d) of the Directive however section 11 of the BCI Codes contains greater detail on the extent of the prohibition.

The ASAI Code contains similar general provisions on the content of advertising to those contained in Article 12(a)-(e) of the Directive. Section 2.13 of the ASAI Code provides “An advertisement should contain nothing that is likely to cause grave or widespread offence”. There is no directly analogous provision in the Directive however it is in line with the tenor of Article 12(c). Section 2.14 provides “Advertisements should respect the dignity of all persons and should avoid causing offence on grounds of gender, marital status, family status, sexual orientation, religion, age, disability, race of membership of the traveller community”.

Section 2.15 of the ASAI Code provides “Advertisement should reflect the principle of the equality of men and women. They should avoid sex stereotyping and any exploitation or demeaning of men and women. Where appropriate, advertisements should use generic terms that include both the masculine and feminine gender; for example, the term “business executive” covers both men and women.” Section 2.16 states:

“To avoid causing offence, advertisements should be responsive to the diversity in Irish society and advertisements which portray or refer to people within the groups mentioned in 2.14 should:

- (a) respect the principle of equality in any depiction of these groups;
- (b) fully respect their dignity and not subject them to ridicule or offensive humour;
- (c) avoid stereotyping and negative or hurtful images;
- (d) not exploit them for unrelated commercial purposes;
- (e) not ridicule or exploit religious beliefs, symbols, rites or practices.”

Section 2.14, 2.15 and 2.16 broadly reflect Article 12(b) of the Directive however they go further to detail the rules in respect of equality amongst the following categories viz. gender, marital status, family status, sexual orientation, religion, age, disability, race of membership of the traveller community. Article 12(b) of the Directive refers only to the grounds of race, sex or nationality. Consequently, Article 2.14-2.16 of the ASAI Code is broader than the Directive.

Sections 2.26, 2.27 and 2.28 of the ASAI Code are broadly analogous to Article 12(d) and provide:

“2.26 An advertisement should not cause fear or distress without good reason such as the encouragement of prudent behaviour or the discouragement of dangerous or ill-advised actions. In such cases the fear aroused should not be disproportionate to the risk.

2.27 An advertisement should not encourage dangerous behaviour or show unsafe practices except in the context of promoting safety. Particular care should be taken with advertisements directed at or depicting children.

2.28 An advertisement should contain nothing that condones or is likely to provoke violence or anti social behaviour.”

Section 11 of the ASAI Code sets out rules governing advertising and environmental claims and provides:

“Environmental Claims

11.1 Environmental claims should not be used without qualification unless advertisers can provide convincing evidence that their product will cause no environmental damage.

11.2 Qualified claims and comparisons may be acceptable if advertisers can demonstrate that their product provides an improvement in environmental terms either against their competitor's or their own previous products.

11.3 The basis of any claim should be explained clearly and should be qualified where necessary. Unqualified claims may mislead if they omit significant information.

11.4 Where there is a significant division of scientific opinion or where evidence is inconclusive this should be reflected in any statements made in the advertisement. Advertisers should not suggest that their claims command universal acceptance if this is not the case.

11.5 If a product has never had a demonstrably adverse effect on the environment, advertisements should not imply that the formulation has been changed to make it safe. It is legitimate, however, to make claims about a product whose composition has been changed or has always been designed in a way that omits chemicals known to cause damage to the environment.

11.6 The use of extravagant language should be avoided, as should bogus and confusing pseudo-scientific terms. If it is necessary to use a scientific expression, its meaning should be clear.

11.7 Symbols may imply environmental claims in themselves. They should be simple and used in such a way that they do not convey false impressions about the characteristics of goods or services.”

Section 11 complies with the spirit of Article 12(e) of the Directive, however it goes further to detail specific rules relating to advertising and environmental claims. Such rules are not contained in the Directive.

b. Conclusion

- Emphasis placed upon the existence of other rules more or less restrictive than the Directive

Section 11 of the BCI Codes and sections 2.26 to 2.28 of the ASAI Code relating to Health and Safety are more detailed than the Directive. Additionally, sections 2.14-2.16 of the ASAI Code in respect of discrimination and equality of treatment and section 11 of the ASAI Code in respect of environmental claims are more detailed than the Directive.

- Identification of specific rules not included in the Directive

Article 12 of the Directive is provided for in Sections 4 and 5 of the BCI Codes and parts of sections 2 and 11 of the ASAI Code. The BCI Codes and ASAI Code however provide further detail regulating the content of advertising.

Section 6.1 of the BCI Codes provides that “Advertising shall not be misleading or shall not prejudice the interest of consumers”. Section 6.2 of the BCI Codes states “No advertisement shall contain any element of spoken or visual presentation which is calculated to mislead either directly or by implication, with regard to the merits of the product or service advertised or its suitability for the purpose recommended.” Section 2.21 of the ASAI Code provides “The design and presentation of advertisements should allow them to be easily and clearly understood. Where footnotes are used that they should be of sufficient size and prominence and easily legible; where appropriate they should be linked to the relevant part of the main copy”. Section 2.22 of the ASAI Code provides “An advertisement should not mislead by inaccuracy, ambiguity, exaggeration, omission or otherwise”. Section 2.23 of the ASAI Code further provides “Obvious untruths or deliberate hyperbole that are unlikely to mislead, incidental minor inaccuracies and unorthodox spellings are not necessarily in conflict with the Code provides they do not affect the accuracy or perception of the advertisement in any material way”. While such provisions are not contained in the Directive, section 6.1 of the BCI Codes and sections 2.21, 2.22 and 2.23 of the ASAI Code comply with EU legislation on misleading advertising.

Section 16 of the BCI Codes provides “Individual living persons should not normally be portrayed or referred to in advertisements without their permission. However, reference to living persons may normally be made in advertisements for books, films, radio or television programmes, newspapers, magazines etc, which feature the persons referred to in the advertisement provided it is not offensive or defamatory”. Sections 2.29 - 2.32 of the ASAI Code similarly provide:

“2.29 Subject to the exceptions referred to in 2.30 below, advertisers should have written permission in advance from anyone portrayed or referred to in an advertisement. Permission is also required before anyone’s house or other possessions can be featured in a manner which identifies the owner to the public.

2.30 Exceptions include the use of crowd scenes or property depicting in general outdoor locations or where the purpose of the advertisement is to promote a product such as a book or film of which the person concerned is a subject.

2.31 Advertisement should not exploit the public reputation of persons in a manner which is humiliating or offensive. Advertisements should not claim or imply an endorsement where none exists. Advertisers are reminded that persons who do not wish to be associated with the advertised product may take legal action against them.

2.32 References to deceased persons should be handled with particular care to avoid causing offence or distress.”

These rules are not contained in the Directive but may come under the general heading of respect for human dignity in Article 12(a) of the Directive.

Section 2.17 of the ASAI Code provides that “Advertisers should take account of public sensitivities in the publication of advertisements and avoid the exploitation of sexuality and use of coarseness and undesirable innuendo. They should not use offensive provocative copy or images mainly to attract attention.”¹⁶ The Directive is silent on this point.

Section 2.20 of the ASAI Code provides “Advertisers should not exploit the credulity, inexperience or lack of knowledge of consumers”. The Directive is silent on this point.

Section 2.24 of the ASAI Code provides “Claims such as “Up to” and “From” should not exaggerate the value of or the range of benefits likely to be achieved in practice by consumers”. The Directive is silent on this point.

Regulation of Advertising Content – Expected Codes

Section 19(1)(b) of the Broadcasting Act 2001 empowers the Minister for Communications, the Marine and Natural Resources to direct the BCI to prepare codes specifying standards to be complied with and rules and practices to be observed in respect of advertising, teleshopping material, sponsorship and other forms of commercial promotion employed in any broadcasting service. To date no such codes have been published. It is understood that a General Advertising Code may be published by the BCI in late 2004.

ASAI Complaints Decisions

- Sections 2.13 and 2.17 of the ASAI Code

ASAI Complaints Bulletin 03/2 (29 April 2003), Case Report Ref: AC/0302/0154 (Batch No: 143)

A complaint was made to the ASAI in relation to a television commercial for velvet toilet tissue which showed a series of naked bottoms which were described with words such as “cuddly” or “firm”. The strap line used was “love your bum”. A series of complaints were received from complainants who considered the commercial offensive and distasteful. Other complainants considered that the commercial had been shown in the early evening when the children were watching television.

The Complaints Committee investigated the complaints under Sections 2.13 and 2.17 of the ASAI Code. The Complaints Committee rejected the complaint and concluded that the use of nudity was not done in a provocative, offensive or sexually suggestive manner and considered that it had a relevance to the product being advertised. As such the committee concluded that the commercial was not in breach of the code.

- Section 2.27 of the ASAI Code

ASAI Complaints Bulletin 03/1 (24 February 2003), Case Report Ref: AC/0301/0022 (Batch No: 142)

A complaint was made to the ASAI concerning a television commercial for Bulmers which featured an old man being presented with chainsaw by three younger men. The old man is

¹⁶ Section 2.18 of the ASAI Code provides “The fact that a product is offensive to some people is not in itself sufficient basis for objecting to an advertisement for the product. Advertisers should nevertheless avoid causing offence in such advertisements.”

later shown cutting a branch from a tree using a hand saw. His stance is uncomfortable and he uses the chainsaw as an improvised shooting stick by sticking the top of the blade into the ground and using the handle as a seat while he continues to saw the branch using the hand saw. The complainant argued that the manner in which one of the younger men was seeing carrying the saw holding the blade with his hand was dangerous and contrary to all guidelines on how to hold a chainsaw. The complainant argued that the use of chainsaw with the blade sticking into the ground by the old man resting, was highly dangerous and irresponsible.

The Complaints Committee investigated the complaint under section 2.27 of the ASAI Code. The Complaints Committee rejected the complaint and found that the chainsaw depicted in the advertisement could not be started accidentally. They concluded that the manner in which the chainsaw had been handled by the younger men and the old man was unlikely to encourage dangerous behaviour.

ASAI Complainants Bulletin 03/2 (29 April 2003), Case Report Ref: AC/0301/0129 (Batch No: 143)

A complaint was made to the ASAI concerning a television commercial for Heineken which featured a young man dipping his arm into a vat of ice searching for a bottle. The man's arm appeared red and was shivering. The man eventually retrieved a bottle of Heineken and stood with other men who also had red arms and were shivering. The complainant argued that the commercial could lead to people imitating the said action which might lead to frostbite and even gangrene.

The Complaints Committee investigated the complaint under section 2.27 of the ASAI Code. The Complaints Committee rejected the complaint and concluded that the commercial was unlikely to encourage dangerous behaviour.

ASAI Complaints Bulletin 03/2(29 April 2003), Case Report Ref: AC/0303/0348 (Batch No: 143)

A complaint was made to the ASAI concerning a television commercial for Meteor mobile phones which featured people using mobile phones in various locations including an operating theatre. The complainant argued that the use of mobile phones in an operating theatre was considered to be unsafe and felt that it was irresponsible to show such use in an operating theatre in the advertisement.

The Complaints Committee investigated the complaint under section 2.27 of the ASAI Code. The Complaints Committee rejected the complaint and concluded that conformity with the Code is to be assessed in light of an advertisement's possible effect when taken as a whole and in context. Particular attention was to be paid to the characteristics of the likely audience, the media by means of the advertisement is communicated, the location and context of the advertisement and nature of the advertised product, content and form of associated material made available or action recommended to consumers. The Complaints Committee noted the humorous nature of the commercial and concluded that the commercial, when taken as a whole and in context, did not contravene the ASAI Code.

ASAI Complaints Bulletin 03/4 (2 September 2003), Case Report Ref: AC/0307/0734 (Batch No: 145)

A complaint was made to the ASAI concerning a television commercial for HB Ice Cream which featured a scene in which 3 young men jump from a bridge into a river. The complainant argued that attempts might be made by young persons to imitate the scene which could lead to injury or death.

The Complaints Committee investigated the complaint under section 2.27 of the ASAI Code. The Complaints Committee rejected the complaint and found that the commercial, when viewed as a whole and in context, was unlikely to encourage dangerous behaviour and was not in contravention of the ASAI Code.

ASAI Complaints Bulletin 03/5 (22 October 2003), Case Report Ref: AC/0308/0874 (Batch No: 146)

A complaint was made to the ASAI concerning an advertisement for McDonalds which depicted a businessman in a suit with a briefcase suspended by his jacket collar from the back of a pick-up truck. The complainants found the advertisement distressing as it reminded them of instances where people they knew had committed suicide by hanging.

The Complaints Committee investigated the complaint under sections 2.26 and 2.27 of the ASAI Code. The Complaints Committee rejected the complaint and concluded that the humorous and clearly exaggerated manner in which the action was depicted was unlikely to cause widespread offence or distress and was unlikely to be imitated.

ASAI Complaints Bulletin 03/6 (16 December 2003), Case Report Ref: AC/0310/1048 (Batch No: 147)

A complaint was made to the ASAI concerning a television commercial promoting Eircom broadband services. The advertisement included a scene showing two young men playing a computer game involving high speed driving and crashes. The complainant argued that the commercial promoted speed driving and glorified high speed car crashes at a time when there was general concern with the need for road safety. The Complaints Committee investigated the complaint under section 2.27 of the ASAI Code. The Complaints Committee rejected the complaint and concluded that the commercial was unlikely to encourage dangerous driving in that the use of a computer game was to demonstrate the advantages of the Eircom broadband service.

- Various sections of the ASAI Code

ASAI Complaints Bulletin 03/1 (24 February 2003), Case Report Ref: AC/0301/0055 (Batch No: 142)

A number of complaints were made to the ASAI concerning an advertising campaign for “Family First” by the Educational Building Society on television, radio and newspapers. The campaign advertised a financial product to enable parents of first-time house buyers to leverage the equity in their family homes to provide the first-time buyer with a contribution to the deposit required to purchase a new home. The advertisement featured a son asking his father for €20,000 for a deposit on a house followed by a reference to the product being advertised and offering no legal fees and no repayments on the deposit for 3 years. It stated that terms and conditions applied.

The grounds on which the advertising campaign was objected to included that it was

offensive to parents, that it put pressure on parents and played on people's insecurities, that it was irresponsible to encourage parents to erode their own future financial stability, that it added to the rising costs spiral of new homes and that it was wrong to regularise or normalise the concept that a parent should mortgage their homes in this manner. One complainant felt that the absence of a mention of interest payments in some of the advertisements was also misleading.

The Complaints Committee investigated the complaints under sections 2.2, 2.13 and 2.18 of the ASAI Code.

The Complaints Committee rejected the complaints and did not consider that the advertising was misleading on the grounds complained of. The complaint regarding interest payments was considered to be met by the inclusion of a warning in the advertisement that terms and conditions applied. The Complaints Committee was conscious that the issue of rising house prices and the difficulties being experienced by people in the housing market, in particular young first-time buyers, was the subject of considerable concern throughout the country. It was also conscious of the fact that a number of financial institutions are advertising products whereby home owners can borrow money on the foot of the equity which they have in their own properties. It was apparent from a number of the complaints that the complainants found the product in this case to be objectionable and even offensive and they were concerned about the fact that parents might be led to prejudicing their own financial security if they availed of the product. However, the ASAI Code stipulates that the fact that the product is offensive to some people is not in itself sufficient basis for objecting to an advertisement for the product.

In relation to the manner in which the product was advertised, many complainants put emphasis on what they felt was an element of moral blackmail being put on parents to make them feel guilty and in some cases argued that it could put strain on families, both of a financial and an emotional nature. The Complaints Committee considered, however, that by and large these aspects of the complaints appeared to be based more on the nature of the product than on the actual presentations in the advertisements, which the Complaints Committee did not consider to be offensive or overbearing in themselves. The Complaints Committee recognised that the level of social responsibility attaching to the product was not a matter that arose under the ASAI Code. The Complaints Committee concluded that the advertising featured a conversation between adults, and thus did not come under the rules of the Code that advertisements should not include any appeal to children to persuade their parents to buy advertised products for them.

ASAI Complaints Bulletin 03/1 (24 February 2003), Case Report Ref: AC/0211/985 (Batch No: 142)

A number of complaints were made to the ASAI concerning a television commercial for Pot Noodle. The opening scene shows a couple eating sandwiches after which the man makes a telephone call and goes searching for Pot Noodles in a "red light" district. He approaches a number of women and in each case is slapped on the face when he asks for Pot Noodle. Finally, he enters a shop and is told by the female assistant to meet her around the back of the shop. One complainant argued that the females in the street and shop were dressed in an overtly sexual fashion and appeared to be linked to the sex industry. The complainant considered the overt references to sex offensive and the whole advertisement in poor taste. Women were relegated to the status of sexual objects and the way the advertisement

portrayed women did not support any sort of equal status as all the women portrayed were involved in the sex industry. Other complainants considered the commercial to be very violent. Another complainant found the commercial to be totally discriminating against women as it portrayed the 'wife' as being a dowdy insignificant person and the 'single' women as prostitutes.

The Complaints Committee investigated the complaints under sections 2.13 and 2.17 of the ASAI Code. The Complaints Committee rejected the complaint and acknowledged that while the advertisement had offended the complainants, it did not consider the advertisement likely to give rise to grave or widespread offence particularly as its showings were confined to broadcasting after 9pm.

ASAI Complaints Bulletin 03/2 (29 April 2003), Case Report Ref: AC/0303/0233 (Batch No. 143)

A number of complaints were made to the ASAI concerning a television commercial for Wrigley's Xcite. The commercial shows a dishevelled young man asleep on a couch who subsequently sits up and a dog is pushed out of his mouth in a vomiting motion. The commercial uses the slogan "Get rid of your dog breath". The complainants argued that the commercial was repulsive, grossly offensive, sickening and revolting.

The Complaints Committee investigated the complaints under section 2.13 and 2.17 of the ASAI Code.

The Complaints Committee upheld the complaints and considered, notwithstanding the response of advertisers that research had shown that the advertisement was extremely well received and enjoyed by the majority of people who watched it, that the commercial contravened sections 2.13 and 2.17 of the ASAI Code.

ASAI Complaints Bulletin 03/2 (29 April 2003), Case Report Ref: AC/0301/0059 (Batch No: 143)

A complaint was made to the ASAI concerning an advertisement for a Nicotine replacement patch. The advertisement for a Nicorette patch described it as the only patch designed just for waking hours and made the claim "you are twice as likely to succeed with Nicorette day time only patch". The complainant, a medical doctor, argued that he had not seen any data that suggested that one type of patch was superior to another and argued that the advertisement suggested that this product was superior to its competitors. The complainant said that some heavy smokers actually benefit from waking up with some nicotine in their system to beat morning cravings.

The Complaints Committee investigated the complaint under Section 2.22, 2.48 and 3.1 of the code.

The Complaints Committee upheld the complaint and considered that the principle issue arising under the ASAI Code was whether or not the advertisement claimed that their product was better than other similar products and if so, had the claim been substantiated. The Complaints Committee considered that if the advertiser's contention based on research that all commercial available forms of nicotine replacement have similar success rates had been made known in the advertisement, then the statement "you are twice as likely to succeed with Nicorette daytime only patch" would clearly relate to the benefit of nicotine replacement

therapy and would not be complying any comparison with other products similar to the one advertised. However, as consumers would not be aware of the right of merits of one patch against another, the advertisement could be interpreted by consumers as being a twofold claim to favourably differentiate the products from others firstly by stating its uniqueness as a daytime patch and secondly by claiming it to be twice as successful. In these circumstances, the complaint was upheld by the Complaints Committee and it recommended that in future advertising the basis of the claims should be expressed more clearly.

ASAI Complaints Bulletin 03/3 (30 June 2003), Case Report Ref: AC/0304/0456 (Batch No: 144)

A number of complaints were made to the ASAI concerning television advertisements by the Irish Concrete Federation. The advertisements showed, in animated form, a fictional family who were unhappy with their house which was portrayed as being, in various advertisements, noisy, cold and not durable. The voiceover in each advertisement indicated that the fictional family regretted that they had not checked that their house was a soundproofed, insulated, durable concrete built house before they purchased it. The series of advertisements claimed that concrete homes are better built homes.

A number of complainants argued that the advertisements were comparing concrete built homes with timber frame houses in an unfair manner and that this could affect the resale value of the latter; that the advertisements suggested that concrete built houses are better insulated than alternatives which was misleading because, it was argued, other materials are better insulators and timber frame houses are easier to heat; that the faults portrayed in the advertisements could as easily occur in a concrete built house. One complainant argued that the advertisements claimed that concrete was environmentally sound and that this was misleading.

The Complaints Committee investigated the complaints under section 2.22 and 2.50 of the ASAI Code.

The Complaints Committee upheld the complaint and noted that while the advertisements did not make any specific reference to any particular type of building material used in houses other than concrete, in the circumstances where there were essentially just two types of homes built in Ireland (i.e concrete built and timber frame houses), the sketches could only be understood as referring to timber frame houses. The Complaints Committee concluded that the illustrations, even though in cartoon form, were exaggerated and unfairly attacked and attempted to discredit other forms of house construction and were in breach of the Code. The Complaints Committee opined that there were other ways that advertisers could have illustrated their belief in their own products and expressed their concern at the complaints raised that the advertising could adversely affect the value of homes that were not concrete built.

ASAI Complaints Bulletin 03/5 (22 October 2003), Case Report Ref: AC/0308/0902 (Batch No: 146)

A complaint was made to the ASAI concerning a television commercial for RoC Skincare's Protient Immediate Lift. The script of the commercial used the wording "Before the face lift, have you tried everything? RoC introduces Protient Immediate Lift. From just 7 days your face could be 20% firmer. Surgery can wait. For results you can see. New Protient Immediate Lift. We keep our promises". The complainant argued that the words "Surgery can wait"

trivialised cosmetic surgery, which trivialisation was dangerous, as there are risks with all surgery. The complainant also argued that the commercial fuelled the insecurities of women by reinforcing the belief that a woman is not allowed to age and only young women or apparently young women are acceptable.

The Complaints Committee investigated the complaint under sections 2.9, 2.22 and 2.27 of the ASAI Code.

The Complaints Committee rejected the complaint in light of the response of the advertisers who stated that the message of the commercial was that using Protient Immediate Lift can improve the appearance of the skin so effectively that a woman might not consider cosmetic surgery necessary. The Complaints Committee concluded that the commercial did not normalise or trivialise cosmetic surgery and also found that the commercial was unlikely to mislead members of the public.

IX. Specific Products and Targets

- Tobacco Products (Articles 13 and 17)

a. Regulations

Existing Irish Statutory Provisions

Article 13

The regulation of tobacco advertising is governed in Ireland by statute. Section 2(1) of the Tobacco Products (Control of Advertising, Sponsorship and Sales Promotion) Act, 1978 empowered the Minister for Health and Children to make regulations for the control and regulation of advertising, sponsorship and any other activities which are intended or likely to promote the sales of tobacco products. Section 1 of the 1978 Act provides that:

““advertisement”, in relation to a tobacco product, includes every form of recommendation of the product to the public, including, in particular:

- (a) the statement of the name of the product or of any brand, trade description or designation by reference to which the product is sold, where such a statement may reasonably be regarded as a recommendation of the product to the public; and
- (b) the statement of any properties of the product on a label, container, wrapper or package used for the product or in a leaflet, circular, pamphlet or brochure issued to the public or given to a purchaser of the product,

and cognate words shall be construed accordingly”.

The Minister for Health and Children enacted the Tobacco Products (Control of Advertising, Sponsorship and Sales Promotion) Regulations, 1991 as amended¹⁷ under section 2 of the 1978 Act. Part III of 1991 Regulations as amended sets out rules relating to advertising and sponsorship. Regulation 8.2 of the 1991 Regulations as amended provides that subject to the provisions of Articles 10, 11, 12, 13, 14, and 15 tobacco products may be advertised only in certain newspapers, internally in premises which are points of retail sale of tobacco products, and in certain areas such as duty free zones at airports and ferry ports. As such under present Irish law, the advertising of tobacco products on television is not permitted in compliance with Article 13 of the Directive.

Article 17

¹⁷ The Tobacco Products (Control of Advertising, Sponsorship and Sales Promotion) Regulations, 1991 were amended by the Tobacco Products (Control of Advertising, Sponsorship and Sales Promotion)(Amendment) Regulations, 1994, the Tobacco Products (Control of Advertising, Sponsorship and Sales Promotion)(Amendment) Regulations, 1996, the Tobacco Products (Control of Advertising, Sponsorship and Sales Promotion)(Amendment) Regulations 2000 and the Tobacco Products (Control of Advertising, Sponsorship and Sales Promotion)(Amendment)(No.2) Regulations, 2000.

Regulation 20 of the 1991 Regulations as amended provides that “A person engaged in the manufacture, importation, distribution or sale of tobacco products shall not incur expenditure in the sponsorship of events or activities in which participants are mainly under eighteen years of age or where members of the audience are likely to be predominantly under that age.” Regulation 21 as amended provides:

“(1) A person engaged in the manufacture, importation, marketing, advertising, distribution or sale of tobacco products shall not incur expenditure on sponsorship unless such expenditure has been approved by the Minister and shall not exceed an amount as determined, from time to time, by the Minister.

(2) A person engaged in the manufacture, importation, marketing, advertising, distribution, or sale of tobacco products who has not, in the twelve months prior to the date of coming into operation of this sub-Article, engaged in sponsorship in the State, shall not commence any sponsorship in the State without the prior approval of the Minister who may, at the same time, determine the expenditure which such person may expend on such sponsorship during a specified period.

(3) A person engaged in the manufacture, importation, marketing, advertising, distribution or sale of tobacco products shall not commence sponsorship of any event or activity in the State which was not sponsored in the State in the twelve months prior to the 1st day of May, 1986, without the prior approval of the Minister who may, at the same time, determine the expenditure which such person may expend on such sponsorship during a specified period.

(4) Expenditure for the purposes of this Article means the amount of money allocated to sponsorship annually without regard to any receipts accruing as a result of such sponsorship.

(5) A decision by the Minister in pursuance of the provisions of sub-Articles (1), (2) or (3) of this Article shall be communicated in writing to the person concerned.”

Regulation 22 of the 1991 Regulations provides that sponsored events may be advertised only in certain newspapers, magazines and in certain locations. Consequently, sponsored events may not be advertised on television.

While the above provisions do not specifically address the sponsorship of television programmes, any sponsorship undertaken by entities engaged in the manufacture, importation, distribution or sale of tobacco products must be first approved by the Minister for Health and Children. Specific regulation of sponsorship of television programmes by entities engaged in the manufacture or sale of tobacco products is set out in the BCI Codes (discussed below).

Proposed Irish Tobacco Legislation

The Public Health (Tobacco) Act, 2002 was enacted to regulate the sale, marketing and smoking of tobacco products in Ireland and to replace the Tobacco Products (Control of Advertising, Sponsorship and Sales Promotion) Act, 1978 and the Tobacco (Health Promotion and Protection) Act, 1988. Sections 33 to 36 of the 2002 Act regulate advertising and sponsorship of tobacco products. In brief, section 33(1) provides that subject to

provisions on advertising in foreign publications and advertising directed to persons involved in the business of selling or distributing tobacco products, “a person who advertises, or causes the advertisement of, a tobacco product shall be guilty of an offence”. Section 36 of the 2002 Act provides that it shall be an offence for a person to give financial or other assistance to or for the benefit of a person, an event or activity, in consideration of “(a) use, display or advertising by the person, or at an event or activity concerned (b) association with the person, event or activity, or (c) promotion of a tobacco product, the name of a tobacco manufacturer or importer, the name of a brand of tobacco product or a trademark, emblem or marketing image or logo used in the marketing of a tobacco product”. Section 36(2) provides that it shall also be an offence for a person to receive such financial assistance.

The Minister for Health is required by virtue of section 1(2) of the 2002 Act to enact legislation (known as a commencement order) to bring the above provisions of the 2002 Act into force. Such a commencement order in respect of the above provisions has not been made, therefore the existing regime is that contained in the Tobacco Products (Control of Advertising, Sponsorship and Sales Promotion) Act, 1978 and regulations made thereunder (as set out above).

However, due to a failure to notify a number of provisions of the 2002 Act to the European Commission under Directive 98/34/EC of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, it was feared that a number of the provisions of the 2002 Act would be unenforceable. Consequently, the Public Health (Tobacco)(Amendment) Act, 2004 (“the 2004 Amendment Act”) replaces the definition of advertisement in section 2(1) of the 2002 Act with the following:

“‘advertising’ has the same meaning as it has in the Directive of 2003¹⁸, and cognate words shall be construed accordingly”

The 2004 Amendment Act replaces sections 33 of the 2002 Act with the following:

“Subject to section 35, a person who advertises, or causes the advertisement of, a tobacco product, in contravention of the Directive of 2003 shall be guilty of an offence.”

Section 33(4) provides that, for the purposes of section 33:

“ ‘advertisement’ includes, in relation to a tobacco product, every form of recommendation of the product to the public and, in particular-

- (a) (i) a statement of the name of a manufacturer or importer of a tobacco product, or the name of any brand of tobacco product, or
- (ii) a statement of any trade description or designation, or a display or other publication of a trademark, emblem, marketing image or logo, by reference to which the product is marketed or sold,

¹⁸ “Directive of 2003” is defined as “Directive No. 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, the text of which is set out in the Schedule to the Public Health (Tobacco) (Amendment) Act 2003;”.

in circumstances where such statement, display or publication may reasonably be regarded as a recommendation of the product to the public, and

- (b) a statement of the properties of the product on a label, container, wrapper or package used for the product or in a leaflet, circular, pamphlet or brochure issued to the public or given to a purchaser of the product,

and cognate words shall be construed accordingly.”

2003 “36. (1) A person who engages in sponsorship in contravention of the Directive of

of an offence.

- (2) It shall be an offence for a person to give financial or other assistance, or cause financial or other assistance to be given, to or for the benefit of a person, or for or in relation to an event or activity, in consideration of the

- (a) use, display or advertising by the person, or at the event or activity concerned,

- (b) association with the person, event or activity, or

- (c) promotion,

of a tobacco product, the name of a tobacco manufacturer or importer, the name of a brand of tobacco product or a trademark, emblem, marketing image or logo used in the marketing of a tobacco product.

- (3) It shall be an offence for a person to receive financial or other assistance to which subsection (2) applies.

- (4) In this section ‘sponsorship’ has the same meaning as it has in the Directive of 2003”.

The above provisions of the 2004 Amendment Act have not yet been brought into force by the Minister for Health and Children. Consequently, the current Irish law is that set out in the Tobacco Products (Control of Advertising, Sponsorship and Sales Promotion) Regulations 1991 and the BCI Codes. The 2004 Amendment Act, when brought into effect, will proscribe tobacco advertising and sponsorship in all forms and not solely on the television medium.

Regulatory Codes

Article 13 of the Directive is provided for in section 13 of the BCI Codes which states “All forms of advertising [and teleshopping material] for cigarettes, cigars and other tobacco products shall be prohibited. NB An advertiser who markets more than one product may not use advertising copy devoted to an acceptable product for purposes of publishing the brand

name or other identification of an unacceptable product”. Section 13 of the BCI Codes goes further than the Directive in prohibiting an advertiser from marketing an acceptable product for the purposes of publishing the brand name of an unacceptable product. This may arguably make the BCI Codes more stringent, although it may not add anything to the ban on “*all forms of television advertising*” (emphasis added) in Article 13 of the Directive.

As discussed in Part VI above, section 21.2 of the BCI Codes provides that programmes may not be sponsored by natural or legal persons whose principal activity is the manufacture or sale of products, or the provision of services, the advertising of which is prohibited by Part I of the BCI Codes. Consequently, television programmes may not be sponsored by undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products in accordance with Article 17 of the Directive.

The RTE Sponsorship Guidelines in a section entitled “Unsuitable Sponsors” provides that “persons or companies generally known for their manufacture or supply of tobacco products cannot be sponsors”.

b. Conclusion

By reason of the existing statutory regime, BCI Codes and RTE Sponsorship Guidelines, advertising of tobacco and related products and sponsorship by undertaking involved in the manufacture and sale of cigarettes and other tobacco products is prohibited on television in Ireland. This implements the prohibition in Articles 13 and 17 of the Directive.

- Medicines (Article 14)

a. Regulations

Existing Irish Statutory Provisions

The advertising of medical products is governed in Ireland by statute under the Medicinal Preparations (Advertising) Regulations, 1993-1996. “Advertising” is defined in Regulation 2(1) of the Medicinal Preparations (Advertising) Regulations, 1993 (as amended) as including:

- “(i) every form of advertising, whether in a publication, or by the display of any notice, or by means of any letter (whether circular or addressed to a particular person), press release or other document, or by words inscribed on any article, or by the exhibition of a photograph or cinematograph, or by way of sound recording, sound broadcasting or television or in any other way,
- (ii) any form of door to door information, canvassing activity or inducement designed to promote the prescription, supply, sale or consumption of medical products¹⁹ and including in particular:
 - (a) the advertising of medical products to the general public;

¹⁹ Regulation 2 of the Medicinal Products (Amendment) Regulations, 1999 provides that the term “medicinal product” shall replace reference to the term “medicinal preparation” in various Regulations, including the Medicinal Preparations (Advertising) Regulations 1993-1996.

- (b) the advertising of medical products to persons qualified to prescribe or supply them;
- (c) visits by medical sales representatives to persons qualified to prescribe medical products;
- (d) the supply of samples of medical products;
- (e) the provision of inducements to prescribe or supply medical products by the gift, offer or promise of any benefit or bonus, whether in money or in kind;
- (f) the sponsorship of promotional meetings attended by persons qualified to prescribe or supply medical products;
- (g) the sponsorship of scientific congresses attended by persons qualified to prescribe or supply medical products and in particular payment of their travelling and accommodation expenses in connection therewith, and cognate words shall be construed accordingly”.

It is arguable that while the 1993 Regulations as amended do not refer to teleshopping, the breadth of the definition in Regulation 2(1)(i) in referring to “every form of advertising ... or in any other way” includes teleshopping.

Regulation 4 of the 1993 Regulations as amended, provides that a person shall not advertise a medicinal product in respect of which a product authorisation has not been granted. Where such an authorisation exists, any advertising which is undertaken must comply with the particulars listed in the summary of product characteristics (which is contained in the product authorisation) and must encourage the rational use of the medicinal product by presenting it objectively and without exaggerating its properties and shall not be misleading. Regulation 5 of the 1993 Regulations as amended provides that a person shall not advertise any medicinal product which may not be sold except in accordance with a prescription or which is a controlled drug under the Misuse of Drugs Act 1977 (as amended).

Regulation 6 of the 1993 Regulations provides that a person shall not publish or take any part in the publication of an advertisement referring to any medicinal product in a manner which might lead to the use of such preparation in the diagnosis, prevention or treatment in human beings of an ailment, infirmity, injury or defect set out in Schedule 1 of the Regulations (as amended).

Regulations 5 and 6 do not apply to advertisements which are published in such a manner and insofar as was reasonably necessary to bring it to the notice of certain persons including: health professionals, nurses, trainee health professionals and nurses and members of the Government. In such a manner, the regulations differentiate between advertising to health professionals (which is permitted provided certain requirements are met) and to the general public (which is prohibited in respect of prescription medicines and in respect of non-prescription medicines, only where certain requirements are met).

Regulation 8 provides that a person who advertises a (non-prescription) medicinal product to the general public shall ensure that such advertising conforms with the following requirements (set out in Schedule 2 of the 1991 Regulations as amended):

“1. *Format of the advertisement*

The advertisement must be set out in such a way that it is clear that the message conveyed is an advertisement.

2. *The advertisement shall contain:*

- a. A clear identification by name that the product being advertised is a medical product, as well as by the common name if the preparation contains only one active ingredient;
- b. The information necessary for the correct use of the medical product;
- c. A warning to read carefully the instructions on the package leaflet or on the outer packaging, as the case may be;

3. *The advertisement shall not contain any material which:*

- a. gives the impression that a medical consultation or surgical operation is unnecessary, in particular by offering a diagnosis or by suggesting treatment by mail;
- b. suggests that the effects of taking the medicine are guaranteed, are unaccompanied by side effects or are better than or equivalent to those of another treatment or medical product;
- c. suggests that the health of the subject can be enhanced by taking the medicine;
- d. suggests that the health of the subject could be affected by not taking the medicine, this prohibition shall not apply to vaccination campaigns;
- e. is directed exclusively or principally at children;
- f. refers to a recommendation by scientists, health professionals or persons who are neither of the foregoing but who, because of their celebrity, could encourage the consumption of medical products;
- g. suggests that the medical product is a foodstuff, cosmetic or other consumer product;
- h. suggests that the safety or efficacy of the medical product is due to the fact that it is natural;
- i. could, by a description or detailed representation of a case history, lead to erroneous self diagnosis;
- j. refers, in improper, alarming or misleading terms, to claims of recovery;
- k. uses, in improper, alarming or misleading terms pictorial representations of changes in the human body caused by disease or injury, or of the action of a medical preparation on the human body or parts thereof;
- l. mentions that the medical product has been granted a marketing authorisation.”

Regulation 16 provides that the Minister for Health and Children may approve of any code of practice or any part of any code of practice for the purpose of providing practical guidance with respect to the requirements or prohibitions of any of the provisions of these Regulations. Currently, the Minister has given his approval to section 3 of the ASAI Code dealing with Health and Beauty. Section 3 provides:

“Health and Beauty

3.1 Claims about health and beauty products and treatments should be backed by substantiation including the results of practical trials on human subjects of sufficient rigor, design and execution as to warrant general acceptance of the results.

3.2 No reference should be made to tests, trials or endorsements by any college, hospital, clinic, laboratory or similar establishment unless there exists a bona fide establishment corresponding to the description used and it is under the effective supervision of a registered medical practitioner or other appropriate professional. Reference to such establishment should be made only with the permission of the appropriate authorities.

3.3 An advertisement should not offer any product or treatment for serious or prolonged ailments or for conditions requiring the attention of a registered medical or other qualified practitioner.

3.4 An advertisement for a health or beauty product or treatment:

- (a) should not contain any offer to diagnose, advise, prescribe or treat by correspondence;
- (b) should not encourage indiscriminate, unnecessary or excessive use of the product or treatment;
- (c) should not suggest that the product or treatment is safe or effective merely because it is “natural” nor should it refer to the omission of any ingredient in a way that suggests that the ingredient is unsafe or harmful;
- (d) should not employ words, phrases or illustrations that claim or imply the cure of any ailment, disability, illness or disease, as distinct from the alleviation or relief of symptoms;
- (e) should not contain any claim to provide rejuvenation, that is to prevent, retard or reverse the changes brought about by or associated with increasing age;
- (f) should not cause unwarranted anxiety or suggest that any product or treatment is necessary for the maintenance of health;
- (g) should not suggest that a product or treatment will achieve success in every case or that the outcome can be other than dependent on the particular circumstances of the individual person;
- (h) should not use unfamiliar scientific terms for common conditions.

3.5 Advertisers offering individual treatments, particularly those that are physically invasive, may be asked to provide prior to publication full details of the treatments together with information about those who would supervise and administer them. Consumers should be encouraged to take independent medical advice before committing themselves to significant treatments.

3.6 Advertisements for any products offering to deter the habit of smoking should make it clear that they offer only assistance, are not cures and that any success will necessarily be dependent on the willpower of the user.

3.7 An advertisement for a medicinal product should not contain an offer to refund money to dissatisfied customers.

3.8 Claims about the effect that a cosmetic has on or in the skin should distinguish between the composition of the product and any effects caused by the mode of application, such as massage.

Vitamins, Minerals and Food Supplements

3.9 An advertisement should not suggest or imply that a well balanced diet needs to be augmented by vitamins or minerals on a regular basis. Advertisers may offer supplements as a safeguard and may refer to the vitamin and mineral content of a particular product but should not suggest that there is a widespread vitamin and mineral deficiency. Advertisements should not imply that supplements will guard against dietary deficiency, elevate mood or enhance performance and supplements should not be promoted as a substitute for a healthy diet. Advertisements should not claim that a food supplement is capable of preventing, treating or curing disease.

3.10 An advertisement may promote vitamin and mineral supplementation to certain categories of people e.g. those who eat nutritionally inadequate meals, the elderly, children and adolescents, convalescents, athletes in training, those who pursue physically very active occupations or recreations, women of child-bearing age and dieters.

3.11 Although there may be some depletion of vitamin stores during illness, an advertisement should not suggest that the replacement of such vitamins will influence the speed or extent of recovery. The prescribing of vitamins and minerals in such cases is a matter for a doctor and self-medication should not be encouraged.

Hair and Scalp

3.12 An advertisement should not claim that a particular product or treatment can prevent baldness or slow it down, arrest or reverse hair loss, stimulate or improve hair growth, nourish hair roots, strengthen the hair or improve its health (as distinct from its appearance) unless the claim can be substantiated in accordance with the requirements of paragraph 3.1 above.

3.13 Hair transplantation and re-positioning should both be regarded as physically invasive treatments - see paragraph 3.5 above.

Alternative and Complementary Medicine

3.14 Advertisements for alternative and complementary products and services including those for natural, herbal and traditional remedies are subject to the requirements of the Code.

Other Requirements

3.15 The advertising of medical preparations and cosmetic products is governed by a number of other codes and Statutory Regulations, some of which are quoted in the Appendix.”

Regulatory Codes

Section 18.3 of the BCI Codes provides that “Advertising for medicinal products and medical treatments which are available only on prescription is prohibited.” Appendix 3 to the BCI Codes also prohibits advertising for medicines and medical treatment which are only available on prescription. Section 21.2 of the BCI Codes provides that “Programmes may not be sponsored by natural or legal persons whose principal activity is the manufacture or sale of products, or the provision of services, the advertising of which is prohibited by the Codes of Standards, Practice and Prohibitions in Advertising and other forms of Commercial Promotion in Broadcasting [Part I of the BCI Codes]”. Thus advertising of medicinal products and medical treatment which are only available on prescription is prohibited in Ireland. Similarly, it is arguable by implication from section 21.2 of the BCI Codes that undertakings whose principal activity is the manufacture and sale of prescription medicines may not sponsor programmes in Ireland.

In addition to the above section 3 of the ASAI Code as approved by the Minister for Health and Children, section 4 of the ASAI Code sets out a number of rules relating to advertising and slimming/weight loss as follows:

“Slimming

4.1 A programme in which the intake of energy is lower than its output is the main self-treatment for achieving weight loss. Any claims made for the effectiveness of a slimming plan, method or product should be backed by rigorous practical trials on human subjects. Testimonials do not constitute substantiation and the opinions expressed in them should be supported where necessary by independent evidence.

4.2 Claims that long-term slimming, weight loss or inch loss can be achieved either generally or from specific areas of the body by any means other than dieting (e.g. by expelling water, speeding up the metabolism, using mechanical devices, wearing garments or applying substances to the skin) should not be made unless they can be substantiated. Slimming claims in respect of an unproven weight loss method cannot be justified merely by offering a diet or exercise scheme with it.

4.3 Advertisers should be able to show that their diet plans are nutritionally well balanced. These will be assessed in relation to the subjects who would be using them. Vitamins and minerals do not contribute to weight loss, but can be offered to slimmers as a safeguard against any shortfall when dieting.

4.4 An advertisement should not suggest that persons of normal weight need to slim. “Crash diets” should not be advertised because of the danger that such diets can pose to the health of dieters not under medical supervision. An advertisement should not

offer treatment for conditions that require medical treatment, such as obesity and anorexia.

4.5 Advertisements for diet aids such as low-calorie foods, food substitutes, appetite depressants and meal replacements should make it clear that they can be effective only as part of a calorie controlled diet. Prominence should be given to the role of the diet, and advertisements should not give the impression that particular methods cannot fail or that dieters can eat as much as they like and still lose weight.

4.6 Advertisers should not make general claims that specific amounts of weight can be lost within a stated period. Claims that individuals have lost specific amounts of weight should be compatible with good medical and nutritional practice, should give details of the time period and should not be based on unrepresentative experiences.

4.7 Both physical and passive exercise operate slowly to improve muscle tone and this can have an effect on body shape. An improvement in posture may also benefit the figure. Advertisers should be able to substantiate any claims that such methods used alone or in conjunction with a diet plan can lead to weight or inch loss. Advertisements for intensive exercise programmes should encourage users to check with a doctor before starting.”

The medical, dental, opticians and pharmaceutical professions are also governed by self-regulatory codes. For example, the Medical Council Guide to Ethical Conduct sets out the areas in which advertising by doctors is permissible. The Irish Pharmaceutical Healthcare Association (IPHA) has two codes which have been approved by the Minister for Health and Children which set out detailed guidance to assist pharmaceutical companies to comply with their legal advertising requirements. The Code of Marketing Practice provides guidance on the advertising and promotion of prescription and non-prescription medicines to doctors and pharmacists while the Code of Advertising Standards covers advertisements for non-prescription medicines aimed at the general public. Dentists must comply with the Dental Council’s Guidelines on Public Relations and Communications. Opticians must comply with the Optician’s Board Rules relating to Advertising.

b. Conclusion

Irish law, while incorporating the key prohibition in Article 14 of the Directive provides more detailed regulation of advertising of medicinal products in respect of prescription and non-prescription medicines. The ASAI Code also regulates the advertising of health, beauty and slimming products which rules are not contained in the Directive.

ASAI Complaints Decisions

ASAI Complaints Bulletin 03/4 (2 September 2003), Case Report Ref: AC/0306/0665 (Batch No: 145)

A complaint was made to the ASAI concerning a television commercial for Kellogg’s Kick-Start. The voiceover included the wording “Tests at a leading university have shown that people who ate a bowl of Kellogg’s cereal such as Special K or Crunchy Nut for breakfast,

then again for lunch or dinner for two weeks were able to lose up to 6lbs.” And “Try our Kick-Start and see if you can lose up to 6lbs in 2 weeks”. A footnote on the screen used the wording “Can help slimming or weight control only as part of a calorie controlled diet. Third meal must be well balanced.” The complainant considered the commercial to be in breach of Section 4.6 of the ASAI Code which states that advertisers should not make general claims that specific amounts of weight can be lost within a stated period, as the commercial included a specific claim that “you can lose up to 6lbs in just two weeks”.

The Complaints Committee investigated the complaint under section 4.6 of the ASAI Code.

The Complaints Committee rejected the complaint and were satisfied that the wording used “Try our Kick-Start and see if you can loose up to 6lbs in 2 weeks” was not a claim that a specific amount of weight can be lost but an invitation or a challenge to attempt to do so and as such was not in contravention of the ASAI Code.

- Alcoholic Beverages (Article 15)

- a. **Regulations**

Article 15 of the Directive is provided for in section 15 of the BCI Codes. Section 15 provides:

“The advertising of alcoholic drink may be accepted by broadcasters provided it complies fully with the following criteria:-

(a) Alcoholic drink advertising [and teleshopping material] must not encourage young people or other non-drinkers to begin drinking - it must be cast towards brand selling and identification only”.

This provision is specific to the Irish code however it reflects the spirit of Articles 15(a) and (b) of the Directive. While the Directive refers to “minors”, section 15 of the BCI Codes refers to “young people or other non-drinkers”.

Section 15(b) of the BCI Codes states “This code recognises a voluntary code whereby spirit based alcoholic drinks (i.e. whiskey, gin, vodka, brandy, etc.) are not advertised on radio or television. The code is framed on the assumption that this situation will continue”. This provision is specific to the Irish code and is more restrictive than the Directive.

Section 15(c) of the BCI Codes states “This code will apply to all other alcoholic drinks, i.e., beers, wines, sherries, fortified wines, vermouths, liqueurs, etc”. This provision is specific to the Irish code in the sense of enumerating the alcoholic drinks envisaged by the Codes.

Section 15(d) of the BCI Codes states “Where soft drinks are promoted as mixers this code will apply in full. When promoted as refreshments in their own right soft drinks are not subject to this code, but due care should be exercised if bar or similar locations are used”. This provision is specific to the Irish code and is more restrictive than the Directive in extending application of the BCI Codes to soft drinks where promoted as an accompaniment to alcoholic beverages.

Section 15(e) of the BCI Codes states “Broadcasters will ensure that alcoholic drink advertisements [and teleshopping material] are not transmitted in or around programmes primarily intended for young viewers or listeners; advertisers are required to take account of the age profile of the viewers and listeners so that advertisements are communicated, so far as it is possible, to adults”. This provision is specific to the Irish code in requiring broadcasters not to schedule advertisements during a period of programming for young viewers. It complies with the spirit of Article 15(a) of the Directive.

Section 15(f) of the BCI Codes states “Advertising [and teleshopping material] shall not encourage immoderate consumption of alcohol or present abstinence or moderation in a negative light”. This replicates Article 15(e) of the Directive.

Section 15(g) of the BCI Codes states “Advertisements [and teleshopping material] shall not claim that alcohol has therapeutic qualities or that it is a stimulant, a sedative, tranquilliser or a means of resolving personal conflicts”. This replicates Article 15(d) of the Directive, apart from the additional use of the word “tranquilliser” in the BCI Codes.

Section 15(h) of the BCI Codes states “Advertising [and teleshopping material] shall not place emphasis on high alcoholic content as being a positive quality of the beverages”. This replicates Article 15(e) of the Directive.

Section 15(i) of the BCI Codes states “Advertisements [and teleshopping material] for alcoholic drink may not be aimed specifically at minors or, in particular, depict minors consuming these beverages”. This replicates Article 15(a) of the Directive. When coupled with section 15(a) and section 15(e) of the BCI Codes above, the Irish position is more detailed than Article 15(a) of the Directive.

Section 15(j) of the BCI Codes states “The advertising of alcoholic drinks should not create the impression that consumption of such beverages contributes towards sexual attraction and success, or social success.” This is very similar to article 15(c) of the Directive however the Irish provision refers to “sexual attraction and success or social success” and in this respect is broader than the Directive.

Section 15 (k) of the BCI Codes states “Advertisements [and teleshopping material] shall not link the consumption of alcohol to enhanced physical performance or to driving”. This replicates Article 15(b) of the Directive.

Section 6 of the ASAI Code regulates the advertisement of alcoholic drinks. Section 6.1 provides “Advertisements for alcoholic drinks (i.e. those that exceed 1.2% alcohol by volume) should be socially responsible and should not exploit the young or the immature. They should neither encourage excessive drinking nor present abstinence or moderation in a negative way. Under broadcasting regulatory requirements, advertising of spirit based alcoholic drinks (i.e. whiskey, gin, vodka, brandy etc.) is not permitted on radio or television broadcasting services”. Section 6.2 of the ASAI Code provides:

“An advertisement may refer to the social dimension or refreshing attributes of a drink but

- (a) should not imply that it can improve physical performance,

- (b) should not imply that drinking can contribute to social or business success or distinction or that those who do not drink are less likely to be acceptable or successful than those who do,
- (c) should not suggest that any drink can contribute towards sexual success or make the drinker more attractive to the opposite sex by word or allusion,
- (d) should not portray drinking as a challenge nor should it be suggested that those who drink are brave or daring,
- (e) should not link in any way the consumption of alcohol to aggressive or antisocial behaviour.”

Section 6.3 of the ASAI Code provides “Advertisements should not suggest that a product can mask the effects of alcohol in tests on drivers; advertisements for breath testing devices should include a prominent warning on the dangers of drinking and driving”.

Section 6.4 of the ASAI Code regulates advertising and young people. It provides:

“Advertisements should not be directed at minors (those under 18 years of age) or in any way encourage them to start drinking. Accordingly:

- (a) anyone depicted in an alcohol advertisement should be over twenty-five and should appear to be over twenty-five;
- (b) treatments that are likely to appeal to minors should not be used. Advertisements should not feature characters (real or fictitious), motifs, colours or styles that are likely to appeal particularly to minors in a way that would encourage them to drink.
- (c) alcohol advertising should not be placed in media primarily intended for minors. Advertisers should take account of the age profiles so that advertisements are communicated, so far as it is possible, to adults.”

Section 6.5 of the ASAI Code entitled “Health & Safety” provides:

“In interests of health & safety:

- (a) Advertisements should not encourage immoderate drinking or regular solitary drinking and abstinence or moderation should not be presented in a negative light. Buying of large rounds should not be depicted or implied.
- (b) Advertisements should not claim that alcohol has therapeutic qualities or that it is a stimulant, a sedative or a means of resolving personal conflict.
- (c) Advertisers should ensure that low alcohol drinks (i.e. those that contain 1.2% alcohol by volume or less) are not promoted in a way that encourages inappropriate consumption.

- (d) Advertisements should not depict any association with activities or locations where drinking alcohol would be unsafe or unwise. In particular, advertisements should not associate the consumption of alcohol with operating machinery, driving, any activity relating to water or heights, or any other occupation that requires concentration in order to be done safely.
- (e) Factual information can be given about the alcoholic strength of a particular drink but it should not be the principal theme of any advertisement. Drinks should not be promoted as being more or less intoxicating or presented as preferable because of their higher or lower alcohol content.”

The RTE Sponsorship Guidelines in its section entitled “Unsuitable Sponsors” provides: “A product or service not acceptable under prevailing advertising codes may not be a sponsor. A product or service not acceptable for advertising in specific time bands or programme type cannot sponsor programmes in those time bands or of that type”. Thus for example, a company producing spirit based alcoholic may not sponsor a programme. This is stricter than the Directive provisions, both in Articles 15 and 17.

The advertising of alcoholic drinks is also self regulated by members of the drinks industry in Ireland under the remit of the umbrella MEAS organisation. In addition to existing legislation and codes, members of MEAS are required to comply with the voluntary Code of Practice Regarding the Naming, Packaging and Merchandising of Alcoholic Beverages. Additionally, a new body known as Central Copy Clearance Ireland (“CCCI”) was established in 2003 by the ASAI, the Drinks Industry Group (now replaced by MEAS), the Association of Advertisers in Ireland and the Institute of Advertising Practitioners in Ireland. CCCI provides an independent pre-publication vetting service for all alcohol-related advertising judged against the ASAI Codes. Under this system, no alcohol-related product advertisement may be published in any media in the Republic of Ireland until it has obtained clearance from CCCI. The system will also apply to advertising booked from abroad for Republic of Ireland media. The Irish media has agreed to comply with these arrangements.

Proposed Legislation: Regulation of Alcohol Advertising

The Department of Health and Children is currently drafting legislation which will enable the Minister for Health and Children to introduce regulations to control alcohol advertising, sponsorship and marketing practices/sales promotion. It is understood that the legislation will be put before the Dail in Autumn 2004.

b. Conclusion

The current Irish law is stricter than that required by the Directive. Although all parts of Article 15 of the Directive are reproduced exactly in section 15 of the BCI Codes, the Irish provision is more detailed and in some respects provides stricter regulation.

ASAI Complaints Decisions

ASAI Complaints Bulletin 03/1(24 February 2003), Case Report Ref: AC/0212/1121 (Batch No: 142)

A complaint was made to the ASAI concerning a television commercial for Bacardi Breezer which featured a woman driving a car who subsequently stops in the belief that she has hit a cat. The cat jumps on the bonnet, smiles at the woman and they both drive off together. The complainant objected to the advertisement on two grounds: (1) that it breached the ASAI Code's requirement that advertisements for alcoholic drink should not associate the consumption of alcohol with driving nor should it be advertised in an inappropriate location (in this case a road) and (2) the advertisement featured fictitious characters that are likely to appeal to minors. The complainant argued that the main character in the advertisement, a grinning cat, clearly appeals to minors being a family pet. It also wears the Bacardi bottle top on its collar which serves as an incentive for children to want to drink the product in order to get the bottle to put around their cats. The complainant objected to the implication that if one drinks Bacardi Breezer one can have a life that's fun and charming and defy death just like the cat.

The Complaints Committee investigated both complaints under section 6 of the ASAI Code.

The Complaints Committee rejected complaint number (1) in respect of association of alcoholic drink with driving. The Complaints Committee concluded that while a street scene showing driving did appear in the advertisement and to that extent must be associated with the total message of the commercial, nevertheless, the advertisement in this case did not show any particular association between drinking and the activity taking place. The Complaints Committee did however express concern at a car apparently being driven at high speed on a public road. In relation to complaint number (2), the Complaints Committee did not consider that the advertisement was in breach of the ASAI Code provisions relating to alcoholic advertisements and the particular appeal to minors in a way that would encourage them to drink. However, the Complaints Committee felt that the character of the cat with the prominent display of the Bacardi logo had become identified with Bacardi over a series of similar advertisements, which were eluded to in the commercial. The story of the cat's successful escapades appear to imply that Bacardi is to be associated with, and to that extent could contribute to, social or even sexual success. In the light of this, the Complaints Committee upheld the complaint that the advertisement implied that the alcoholic drink can contribute to a life that's fun and charming in breach of the ASAI Code.

ASAI Complaints Bulletin 03/1 (24 February 2003), Case Report Ref: AC/0211/982 (Batch No: 142)

A complaint was made to the ASAI concerning a television and cinema advertisement based on a player about to take a "free" in a hurling match. The advertisement showed the foul leading to the free kick, the various apprehensions of the player's mind and the likely outcome if he succeeded. The latter was illustrated by a congratulatory scene in a pub, where the player is kissed and presented with a pint of Guinness. The commercial concluded with the word "Believe". The complainant argued that the advertisement equated sporting success with the consumption of alcohol and that the advertisement used the glamour associated with a young person's game to promote the consumption of alcohol among young people.

The ASAI investigated the complaint under section 6 of the ASAI Code.

The Complaints Committee upheld the complaint and concluded, in relation to the first grounds of the complaint (that the advertisement equated sporting success with the consumption of alcohol), the strong association between the product and the sporting action in the story line whereby the product could be seen either as an incentive to or award for

sporting success gave rise to an implication that drinking can contribute to success in breach of the ASAI Code. In relation to the complaint regarding the association between the product and the glamour associated with what was described as a “young person’s game” the commercial was primarily related to and arose from the sponsorship by Guinness Ireland of hurling, a national game played and enjoyed by adults and young people. The Complaints Committee considered that the advertisement would be likely to appeal particularly to minors especially those associated with the sport and was not in conformity with the spirit of the ASAI Code.

ASAI Complaints Bulletin 03/3 (30 June 2003), Case Report Ref: AC/0305/0614 (Batch No: 144)

A complaint was made to the ASAI concerning a television commercial for Miller Beer “One Life, One Beer – Beer Tap”. The advertisement featured a maker of customised cars and motorbikes in his workshop talking about his work fashioning a beer tap and demonstrating it to his friends in the bar. The complainant felt that the advertisement associated cars with drinking beer and also that the advertisement was demeaning to women and had offensive sexual overtones in the concluding scene where the men are shown drinking and looking at women walking across the top of the bar.

The Complaints Committee investigated the complaint under section 6.1, 6.2 and 6.3 of the ASAI Code.

The Complaints Committee rejected the complaint and were satisfied that the advertisement did not depict any association, either implied or explicit, with driving. In relation to the final scene in the commercial, the Committee expressed their concerns about the portrayal of any scene in an advertisement for alcoholic drink showing people engaging in an over-exuberant or sexually suggestive manner. Nevertheless they accepted that, in this particular case when considered in the context of the commercial as a whole, it primarily illustrated an aspect of the social dimension of the drink and did not imply that it could contribute to social or sexual success.

- Minors (Article 16)

- a. **Regulations**

Regulation 8 of the European Communities (Television Broadcasting) Regulations, 1999 provides:

“(1) Subject to paragraph (2) of this Regulation, a broadcaster shall not broadcast programmes that might seriously impair the physical, mental or moral development of minors, in particular those that involve pornography or gratuitous violence.

(2) Programmes (not being those that involve pornography or gratuitous violence) which might impair the physical mental or moral development of minors may only be shown –

- (a) where the broadcaster ensures, by selecting the time of the broadcast or by any technical means, that minors would not normally be expected to hear or see such broadcasts, and

- (b) if broadcast in unencoded form, where the broadcaster ensures that such programmes are preceded by an acoustic warning or are identified by the presence of a visual symbol throughout their duration.”

Section 14 of the BCI Codes deals with “Advertising and Children’s Programmes”. Section 14.1 of the BCI Codes states that “Advertisers must exercise the utmost care and discrimination with regard to the content and presentation of advertisements transmitted during breaks within or near or adjacent to programmes designed for children”. Section 14 of the BCI Codes implements Article 16 of the Directive. The opening paragraphs of Article 16 and section 14.1 of the BCI Codes are framed in different language. Section 14 of the BCI Codes appears to be limited to advertisements transmitted “during breaks within or near or adjacent to programmes designed for children”. There is no such temporal limit in the Directive. Consequently, under the existing BCI Codes, advertisers need only have regard to the content of advertisements transmitted during children’s programming while the Directive appears to impose a wider obligation of general diligence in advertising.

Section 14.2 of the BCI Codes states that “Advertisements [and teleshopping material] shall not exhort children to buy a product or service by exploiting their inexperience or credulity”. This replicates Article 16(a) of the Directive.

Section 14.3 of the BCI Codes states that “Advertising [and teleshopping material] shall not exploit the special trust minors place in parents, teachers or other persons”. This replicates Article 16(c) of the Directive.

Section 14.4 of the BCI Codes states that “Advertisements [and teleshopping material] shall not directly encourage minors to persuade their parents or others to purchase or make enquiries about the goods or services being advertised”. This replicates Article 16(b) of the Directive save that section 14.4 of the BCI Codes refers also to persuasion to make “enquiries”.

Section 14.5 of the BCI Codes states that “Advertisements [and teleshopping material] shall not unreasonably show children in dangerous situations”. Section 14.5 should be read in conjunction with section 11 of the BCI Codes relating to Health and Safety which provides “Special care should be taken in advertisements directed towards or depicting children”. This replicates Article 16(d) of the Directive.

Section 18.6 of the BCI Codes states that “Teleshopping material shall not exhort minors to contract for the sale or rental of goods or services”. This replicates Article 16.2 of the Directive.

Section 15(e) of the BCI Codes provides that “Broadcasters will ensure that alcoholic drink advertisements are not transmitted in or around programmes primarily intended for young viewers or listeners; advertisers are required to take account of the age profile of the viewers and listeners so that advertisements are communicated, so far as it is possible, to adults”. Section 15(i) of the BCI Codes states that “Advertisements for alcoholic drink may not be aimed specifically at minors or, in particular, depict minors consuming these beverages”. This latter provision is identical to article 15(a) of the Directive.

Section 5 of the ASAI Code regulates Advertising and Children.

Section 5 states:

“Advertising and Children

Advertisements addressed to children should comply with the rules in this Section in addition to all other rules in the Code. There are rules relating to children and safety in Section 2, paragraph 2.27, to children and vitamins in Section 3, paragraph 3.10, to young people and advertising for alcoholic drinks in Section 6, paragraph 6.4, to children and Distance Selling in Section 8, paragraph 8.10, and rules relating to children and sales promotions in the Code of Sales Promotion Practice at paragraphs 12.27 and 12.28 and 12.59(h).

5.1 Children lack adults’ knowledge, experience and maturity of judgement. Advertisements addressed directly or indirectly to children and advertisements likely to be seen or heard by them should have regard to the special characteristics of children and the ways in which they perceive and react to advertisements.

5.2 An advertisement should contain nothing that is likely to result in physical, mental or moral harm to children or that is likely to frighten or disturb them. For example,

- a. Children should not be portrayed in a manner that offends against accepted standards of good taste and decency.
- b. They should not be encouraged to enter into unsafe situations or strange places or talk to strangers, e.g. for the purpose of making collections or accumulating labels, wrappers or coupons.
- c. They should not be shown in morally or physically dangerous situations or behaving dangerously in the home or outside except to promote safety. Children should not be shown unattended in street scenes unless they are old enough to take responsibility for their own safety.
- d. They should not be encouraged to engage in, or be portrayed engaging in anti-social behaviour; where they appear as pedestrians or cyclists they should be seen to observe the Rules of the Road. Special attention should be paid where relevant, to the wearing of car seat-belts and safety helmets.
- e. They should not be shown using or in close proximity to dangerous substances or equipment without direct adult supervision. Examples include matches, petrol, gas, medicines, certain household substances as well as certain electrical appliances and machinery, including agricultural equipment.
- f. An open fire in a domestic scene should always have a fireguard clearly visible when a child is included in the scene.

5.3 An advertisement should not exploit the loyalty, credulity, vulnerability or lack of experience of children. For example,

- a. They should not be made to feel inferior or unpopular for not buying an advertised product.
- b. They should not be made to feel that they are lacking in courage, duty or loyalty if they do not buy or do not encourage others to buy a particular product.
- c. Advertisements should not undermine the authority, responsibility or judgement of parents or guardians. Advertisements should not include any appeal to children to persuade their parents or other adults to buy advertised products for them.
- d. A product that is part of a series should be clearly indicated as such and should include the method of acquiring the series.

5.4 An advertisement addressed to children:

- a. should not feature products that are unsuitable for children;
- b. should make it easy for them to judge the actual size, characteristics and performance of any product advertised;
- c. should not exaggerate what is attainable by an ordinary child using the product;
- d. should not encourage an unhealthy lifestyle or unhealthy eating or drinking habits; advertisements representing mealtime should clearly and adequately depict the role of the product within the framework of a balanced diet; snack foods should be clearly represented as such, and not as substitutes for meals;
- e. should not ask them to disclose personal information about themselves or their families without having first obtained permission from their parents or guardians;
- f. should not minimise the price of products by the use of such words as “only” or “just”.

Section 5 of the ASAI Code, while implementing the spirit of Article 16 of the Directive, contains more detailed rules which are not contained in the Directive.

Proposed New Children’s Advertising Code

Section 19(1)(c) of the Broadcasting Act, 2001 provides:

“The Commission shall, when being directed by the Minister to do so and in accordance with the provisions of this section, prepare..... a code specifying standards to be complied with, and rules and practices to be observed, in respect of advertising, teleshopping material, sponsorship and other forms of commercial promotion employed in any broadcasting service or sound broadcasting service, being advertised

and other activities as aforesaid which relate to matters likely to be of direct or indirect interest to children”.

Section 19(2) of the 2001 Act provides:

“A direction of the Minister under subsection (1) shall specify that the Commission shall give priority to the preparation of the code under paragraph (c) of that subsection before the preparation of the other codes under that subsection and the Commission shall give such priority in the preparation of the first-mentioned code accordingly”.

Sections 19(5) and 19(6) of the 2001 Act require that the Commission make available for inspection a draft of the code or the rules its proposes to make.

In April 2003, the BCI published a Phase One Consultation Paper on the proposal to draft a new Children’s Advertising Code. This document, amongst other issues, considered how a definition of “children’s’ advertising” might be phrased. For example, the definition might refer to the times at which the advertisements were broadcast, or the content of the advertising, for example using children as subjects/actors within the advert or using language, visuals or characters that might be attractive to children.

A Phase Two Consultation Paper was published by the BCI in October 2003. This sets out some of the key findings of the phase one consultation process and made further suggestions towards developing a draft code. Having considered the submissions received in response to the consultation document, the Commission proposed the following definition of “children’s advertising” for the purposes of developing the Children’s Advertising Code:

“That which promotes products, services or activities that are deemed to be of particular interest to children or is broadcast during and between children’s programmes”.

The Commission set out a number of headings under which submissions were invited as follows:

- (a) social values;
- (b) inexperience and credulity;
- (c) avoiding undue pressure;
- (d) special protection;
- (e) safety/avoidance of harm;
- (f) parental responsibility;
- (g) promotion of programme characters, advertiser generated characters and personal endorsements;
- (h) product prohibitions;
- (i) factual presentation;
- (j) price and purchase terms/comparison claims;
- (k) identification, separation, insertion/scheduling of advertising;
- (l) use of split screen, virtual and interactive advertising;
- (m) assessment;
- (n) code administration.

Phase Two of the consultation process terminated in February 2004. During Phase Three, the BCI will prepare and circulate a draft of the new Children's Advertising Code. It is expected that a draft of the code will be published between March and June 2004.

Further proposed legislation: Suspended

A private member's Bill entitled the Broadcasting (Amendment) Bill, 2003 was introduced in December 2003. The Bill proposed amendment to section 19 of the Broadcasting Act, 2001 by the insertion of a subsection (2(A)) in Section 19. The proposed Section 19(2A) stated:

“A direction of the Minister under subsection (1) may also specify that the Commission shall introduce measures which allow for the restriction of the advertising of certain classes of products and the restriction of advertising to children under certain age categories including, inter alia, measures to:

- (a) prohibit the promotion as part of children's television broadcast schedules of the sale and/or consumption of foodstuffs or beverages with high concentration of –
 - (i) sugar,
 - (ii) salt,
 - (iii) fat,
- (b) restrict the promotion as part of children's television broadcast schedules of the sale and promotion of children's toys,
- (c) restrict the inclusion of advertising during programming where the viewing age profile is designated as being below certain age limits”.

It was proposed that section 19 would also be amended by the insertion a requirement that the BCI would make rules relating to “Support for the acquisition of media literacy as a tool to combat the effect of advertising on children, aiming to give young people analytical tools to understand how the media influences their thoughts and actions”.

However, the Bill was defeated at Second Stage in Dail Eireann due to the impending release of the new Children's Advertising Code by the BCI (discussed above).

b. Conclusion

Article 16 of the Directive is replicated in Irish law. Irish law, particularly the ASAI Code, however goes further than the Directive to provide more detailed rules than the Directive.

Broadcasting Complaints Commission Decision

On 25 July 2003 a complaint was lodged by Mr Terence Brannigan (Reference number 79/03) to the Broadcasting Complaints Commission. The complaint related to an advertisement for HB Ice Cream showing a young girl running home from school screaming

and pretending to her mother that she had a sore throat. Her mother inspects her throat and offers her ice cream to soothe it as her brother looks on with envy. A second advert in the series shows a little boy deliberately breaking a toy and making it look as if his brother was responsible. As the mother portrayed in the advert thinks that the older brother broke the toy, she gives an ice cream to the younger boy and again the older brother looks on with envy. The complainant argued that the tenor of such advertisements was to reward such antics on behalf of young children and taught them to be deceitful in order to get what they want. He argued that such advertising was immoral and may lead to children developing such deceitful ways in their adult life.

The Broadcasting Complaints Commission rejected the complaint and found that the advertisements did not attempt to exploit children or the relationship between the parents and their children. They found that both advertisements were based on humour and portrayed inoffensive fun.

ASAI Complaints Decisions

ASAI Complaint Bulletin 03/6 (16 December 2003), Case Report Ref: AC/0310/1079 (Batch No: 147)

A complaint was made to the ASAI concerning a television commercial for the National Lottery. The Commercial showed a young girl checking the lotto numbers as they were being called out on the television. When the family's winning numbers are announced the young girl calls to her father. A number of scenes showing the family enjoying various holiday experiences are then shown. The complainant argued that the lottery ticket is a gambling product and as such a child has no place in such an advertisement for gambling. The complainant argued that, while the child checks the numbers, it is clear that there was an attempt on the part of the Lotto to tap into the immense force that is pester power; the child is portrayed as a direct consumer of the gambling product. The complainant argued that it was inappropriate to include a child in marketing products that are legally only available for purchase by person over eighteen years of age.

The Complaints Committee investigated the complaint under sections 2.2, 5.1 and 5.3 of the ASAI Code.

The Complaints Committee rejected the complaint and found that the advertisement was aimed at an adult audience and not at children, particularly as Lotto tickets can be purchased only by person over 18 years of age. In these circumstances, the Complaints Committee did not consider that the advertisement exploited children. Insofar as the advertisement was likely to be seen or heard by children, the Complaints Committee did not find that the advertisement showed children in a morally or physically dangerous situation and it did not include an appeal to them to persuade their parents to buy Lotto tickets.

ASAI Complainants Bulletin 03/6 (16 December 2003), Case Report Ref: AC/0311/1099 (Batch No. 147)

A complaint was made to the ASAI concerning a television and radio advertising campaign promoting the Sunny D drink featuring a cartoon child character call "Max Wilde" shown in abnormal situations. For example, Max Wilde was featured as requesting only spinach in a school canteen or snacking on spinach from a bag on the school bus. The complainant argued that such a campaign might be seen to suggest that any child who expressed

preference for a health food option such as spinach or rhubarb is abnormal because, in the words of the catch phrase of the advertisement “No child is like Max Wilde”. The complainant’s concern was amplified following the release of results of a research study compiled by Dublin City University on behalf of the ERHA. The study suggested that the levels of childhood obesity were increasingly alarming in Ireland. The complainant felt that advertising campaigns which promote a product of questionable nutritional value by undermining foods of proven nutritional value should not be allowed to continue in breach of the ASAI Code.

The Complaints Committee investigated the complaint in light section 5 of ASAI Code.

The Complaints Committee rejected the complaint. In light of the advertiser’s explanation that Sunny D was being promoted as an alternative to fizzy drinks as part of wider campaign to encourage healthy eating and provide mothers with healthy eating tips, the Complaints Committee concluded that the advertisement were unlikely to encourage an unhealthy lifestyle or unhealthy eating or drinking habits.

ASAI Complaints Bulletin 03/1 (24 February 2003), Case Report Ref: AC/0211/1028 (Batch No: 142)

A complaint was made to the ASAI concerning a television commercial for “Skittles”. The advertisement, featuring the catch line “Taste the rainbow”, showed various fantastic events caused by the vibrant taste of Skittles, such as electrical disturbances, rainbows bursting from manhole covers and the sky raining sweets. The complainant argued that the advertisement was undesirable and unnecessary and very wrong at a time when society was cursed with the ever increasing problem of drug addiction, ecstasy taking and dangerous and/or illegal pill popping for kicks. The complainant argued inter alia that the advertisement exploited the vulnerability of children and exaggerated the effects attainable by an ordinary child using the product.

The Complaints Committee investigated the complaint under sections 2.22, 2.5 and 5.1 of the ASAI Code.

The Complaint Committee rejected the complaint and concluded that the advertisement was unlikely to encourage drug taking by young persons.

Other products/services

- ***Appendix 2 of the BCI Codes***

Appendix 2 of the BCI Codes provides that advertisements for products and services coming within the recognised character of the following shall be prohibited:

1. Moneylenders;
2. Fortune-tellers and the like;
3. Organisations/companies/persons seeking to advertise for the purpose of giving betting tips;

4. Betting – advertising encouraging people to bet is not acceptable. Firms who wish to advertise their services for those who want to bet is acceptable;
5. Products for treatments for bust development or – except as permitted by the regulations incorporated in Appendix 3 – slimming, weight reduction or limitations, or figure control;
6. Clinics for the treatment of hair and scalp;
7. Smoking cures;
8. Products for treatment of alcoholism;
9. Contact or corneal lenses;
10. Breath testing devices and products which purport to mask the effects of alcohol;
11. Unacceptable products or services listed in Appendix 3 of the BCI Codes.

Note: Appendix 6 of the BCI Codes and the Appendix to the ASAI Codes sets out the Irish statutory provisions which regulate advertising in various sectors and on various media. The list of advertising provisions set out below is an indicative list only and does not refer to every statutory provision under Irish law which regulates advertising.

- ***Abortion***

Section 10 of the Health (Family) Planning Act 1979 as amended states:

“Nothing in this Act shall be construed as authorising:

- (a) the procuring of abortion;
- (b) the doing of any other thing the doing of which is prohibited by section 58 or 59 of the Offences Against the Person Act, 1861 (which sections prohibit the administering of drugs or the use of instruments to procure abortion or the supplying of drugs or instruments to procure abortion); or
- (c) the sale, importation into the State, manufacture, advertising or display of abortifacients”

As such, by virtue of section 10 of the Health (Family Planning) Act, 1979 advertising of abortifacients is prohibited on any medium in Ireland.

In relation to advertising abortion as a medical service, the Regulation of Information (Services Outside the State For Termination of Pregnancies) Act, 1995 applies. This Act prescribes the conditions subject to which certain information relating to services lawfully available outside the state for the termination of pregnancy may be given to individual women or the general public. In this context, the Act amends the Indecent Advertisements Act, 1889, and the Censorship of Publications Acts, 1929 to 1967.

Section 4 of the Regulation of Information (Services Outside the State For Termination of Pregnancies) Act, 1995 provides:

“It shall not be lawful:

- (a) to display a notice (including an advertisement) containing Act information²⁰ in or at a place to which the public have access whether upon payment or free of charge; or
- (b) to distribute without solicitation by the recipients a book, newspaper, journal, magazine, leaflet or pamphlet, or any other document, or a film or a recording (whether of sound or images or both), containing Act information”.

Appendix 3(18) of the BCI Codes provides that “No advertisements of products, medicines or treatments for disorders or irregularities peculiar to women should contain the following or similar expression which may imply that the product, medicine or treatment advised can be effective in inducing miscarriage: “Female pills”, “not to be used in cases of pregnancy”.”

- *Airfares*

The Consumer Information (Advertisements for Airfares) Order, 2000 (S.I. 468 of 2000) regulates the information necessary in an advertisement for airfares. This Order was made by the Minister of State at the Department of Enterprise Trade and Employment under section 11 of the Consumer Information Act, 1978²¹. “Advertisement” is defined in Regulation 3 as including, unless expressly provided otherwise “every form of advertising”. Regulation 4(1) of the 2000 Order provides:

“(1) In every advertisement for an airfare

- (a) the total price payable for the airfare by the purchaser shall be clearly stated as one single amount and in the currency in which it is payable,
- (b) where applicable, and separately, the monetary amount of any charge to be imposed in respect of the method of payment of the airfare shall be clearly stated.

(2) Without prejudice to the requirements of paragraph (1) of this Article, a statement of the individual amounts which constitute the total price payable for the airfare may be included in such an advertisement and where such a statement is included it shall specify every such amount together with the item in respect of which it is payable.”

Regulation 5 provides:

“Without prejudice to Article 4 of this Order, where an advertisement for an airfare contains a statement about the method of booking or the method of payment for the

²⁰ Section 2 of the Regulation of Information (Services Outside the State for Termination of Pregnancies) Act, 1995 provides that the Act applies to information that: “(a) is likely to be required by a woman for the purpose of availing herself of services provided outside the State for the termination of pregnancies, and (b) relates to such services or to persons who provide them, and information to which this Act applies is referred to in this Act as “Act information”.”

²¹Section 11(1) of the Consumer Information Act, 1978 empowers the Minister for Enterprise Trade and Employment to make an Order imposing requirements as to the inclusion of specific information in advertisements where it appears to him to be necessary or expedient in the interests of persons to whom goods, services, accommodation or facilities, of any description are to be supplied or provided, that advertisements of the goods, services, accommodation or facilities should contain or refer to any specific information.

airfare and there are restrictions with respect to the use of either such method applicable, the existence of those restrictions shall be clearly stated in the advertisement.”

Regulation 6(1)(b) provides that where there are any restrictions in relation to the availability of an airfare, the existence of such a restriction must be clearly stated in the advertisement.

- ***Certain Batteries***

Regulation 9 of the Waste Management (Hazardous Waste) Regulations 1998 as amended by the Waste Management (Hazardous Waste)(Amendment) Regulations 2000 provides that a person shall not advertise batteries containing more than 0.0005% of mercury by weight, including such batteries incorporated into an appliance. A person is similarly prohibited from advertising any appliance which contains or is designed to contain a specified battery unless the battery can be easily removed, when spent, by the user of the appliance. Such specified batteries include, for example, batteries which contain more than 25mg of mercury per cell or in the case of alkaline manganese batteries, more than 0.025% of mercury by weight.

- ***Cars***

Regulation 9(2) of the European Communities (Consumer Information on Fuel Economy and CO2 Emissions of New Passenger Cars) Regulations 2001²² provides “where a television advertisement...refers to an engine related performance criterion of a specific model, the television...advertisement...shall include the official fuel consumption, at least on the combined test cycle, and the official specific CO2 emissions, of the model or models, referred to in the advertisement and, where several variants or versions are grouped under one model, the values given for fuel consumption and for CO2 emissions of that model shall be based on the variant or version offered for sale or lease in the State with the highest official fuel consumption and the highest official CO2 emission within that group.”

- ***Consumer Credit***

The Consumer Credit Act 1995²³ regulates the advertising of consumer credit, hire-purchase, hiring and money lending in Ireland. In section 2(1) “advertisement” is defined as including “every form of advertising, whether in a publication, by television or radio, by display of notices, signs, labels, showcards or goods, by distribution of samples, circulars, catalogues, price lists or other material, by exhibition of pictures, models or films, or in any other way, and references to the publishing of advertisements shall be construed accordingly”. Part II of the Act deals with the advertising of credit, hire purchase or consumer hire agreements. Section 21 requires that an advertisement offering to provide credit shall, if mentioning a rate of interest or making any claim in relation to the cost of credit, contain a clear and prominent statement of the annual percentage rate of interest using a representative example if no other means is practicable charged (provided it is indicated that this is only a representative example), and no other rate of interest shall be included in the advertisement. Section 22 provides rules for advertising financial accommodation related to goods or services. Section 23 deals with advertising of consumer-hire agreements and section 24 deals with comparative

²² The Regulations implement Council Directive 1999/94/EC relating to the availability of consumer information on fuel economy and CO2 emissions in respect of the marketing of new passenger cars.

²³ This Act gives effect to Council Directive No. 87/102/EEC of 22 December 1986 as amended by Council Directive No. 98/88/EC of 22 February 1990.

advertising for financial accommodation. Section 25 deals with advertising of credit without charge and section 26 deals with advertising of financial accommodation to comply with the Act. Section 27 imposes an obligation on a provider of financial accommodation to ensure advertisements comply with the Act and section 28 empowers the Minister for Enterprise Trade and Employment to make further regulations relating to advertising of financial accommodation. Section 135 of the Act regulates the advertising of house loans.

- ***Contraceptives***

The Health (Family) Planning Acts 1979-1993 regulate the advertising and display of contraceptives²⁴ and contraceptive sheaths²⁵ in Ireland. Section 7(1) of the Health (Family) Planning Act 1979 as amended states “A person shall not take any part in, or procure, the publication of an advertisement or notice in relation to contraception or contraceptives, or display, or procure the display of, contraceptives, except to such extent as may be allowed by, and in accordance with, regulations for the purposes of this section”. A person who contravenes regulations made under section 7(1) is guilty of an offence. The Minister for Health and Children made regulations under section 7(1) of the 1979 Act in 1980 and 1992. The current regulations are the Health (Family Planning) Regulations 1992 (S.I. No. 312/1992).

Regulation 6 of the Health (Family Planning) Regulations 1992 provides:

- “6. (1) A person may take part in or procure publication of an advertisement or notice in relation to contraceptives, other than contraceptive sheaths, or may display or procure the display of contraceptives where-
- (a) such publication or display relates to family planning services, or
 - (b) such publication or display is such only as is reasonably necessary for the informing of
 - (i) a person providing family planning services in accordance with the Acts,
 - (ii) a registered medical practitioner,
 - (iii) a registered pharmaceutical chemist or registered dispensing chemist and druggist,
 - (iv) a person who is in training with a view to becoming a member of any of the classes of person specified in sub-paragraph (i) to (iii) of this paragraph, or
 - (c) such publication or display is arranged by or on behalf of the Minister.

²⁴ “Contraceptive” is defined in section 1 of the Health (Family Planning) Act 1979 as amended as “any appliance or instrument, excluding contraceptive sheaths (within the meaning of the Health (Family Planning)(Amendment) Act, 1993), prepared or intended to prevent pregnancy resulting from sexual intercourse between human beings.”

²⁵ “Contraceptive sheath” is defined in section 1 of the Health (Family Planning)(Amendment) Act, 1993 as including “a contraceptive sheath designed and intended for use by a male person and a contraceptive sheath designed and intended for use by a female person.”

- (2) (a) Subject to sub-article (3), a person may take part in or procure the publication of an advertisement or notice in relation to contraceptive sheaths, if-
 - (i) the publication of the advertisement or notice is conducted only through a printed publication, and
 - (ii) the publication of the advertisement or notice is such only as is reasonably necessary to inform persons about the benefits of the product, and
 - (iii) the publication does not appear in a publication apparently directed primarily to persons under 17 years of age.
- (b) Sub-Article (a) of this Article does not apply to advertisements or notices in relation to contraceptive sheaths the publication or display of which is arranged by or on behalf of the Minister.
- (3) A person may advertise or display contraceptive sheaths, if the advertisement or display is associated with the sale, or supply otherwise by way of sale, of contraceptive sheaths.”

The wording of Regulation 6(1) demonstrates that the advertising of contraceptives may only take place for certain specified purposes i.e. relating to family planning services and only so far as is reasonably necessary for the purposes of informing certain persons in the medical or pharmaceutical field. It may be argued that it would not be “reasonably necessary” to advertise contraceptives to medical or pharmaceutical personnel on television due to the availability of printed circulars and journals etc in these fields. As such, a television advertisement might only be possible under the Regulations in respect of family planning services. It is clear from Regulation 6(2)(a) that contraceptive sheaths may not be advertised on television in Ireland.

- ***Cosmetics***

The European Communities (Cosmetic Products) Regulations, 1997 to 2000 regulate the advertising of cosmetic products in Ireland. Regulation 9 of the European Communities (Cosmetic Products) Regulations 1997 as amended provides that “A person shall not place a cosmetic product on the market if the text, names, trade marks, pictures, and figurative and other signs employed in the labelling, presentation for sale and advertising of the product suggest a characteristic which the product in question does not possess”. Regulation 10 of the 1997 Regulations as amended provided that “Any reference to testing on animals which is included with or appears on the container or packaging of a cosmetic product or which appears in any advertising or promotional material relating to a cosmetic product must state clearly whether or not such tests have been carried out and, if they have, whether they relate to the cosmetic product itself, to any of its ingredients or to both”.

- ***Financial Services***

The Irish Financial Services Regulatory Authority (“IFSRA”)²⁶ as regulator of Ireland’s financial services sector, regulates advertising by credit institutions and other regulated financial institutions in respect of compliance with statutory advertising provisions and regulatory codes. To date, the Central Bank of Ireland (as it was then known) has published the following Codes of Conduct in respect of advertising:

- (a) Advertising Requirements applicable to Credit Institutions (November 2001);
- and
- (b) Advertising Requirements contained in the Handbook for Investment and Stockbroking Firms (November 2000).

In March 2004, IFSRA launched a public consultation process with a view to developing a set of unified codes of conduct applicable to all financial services firms operating in Ireland. Advertising by credit institutions and specifically, disclosure requirements in such advertising will be examined as part of this consultation process.

In addition to the above Codes, Appendix 5 to the BCI Codes sets out rules governing the advertising of financial services. Section 5 provides:

“1. Investment and Savings

In view of the importance of giving full information in connection with any offer to the public of debentures, bonds and shares and in view of the difficulty of ensuring that such information is given in the limited time of the normal broadcast advertisement, invitations to invest are limited to the following:-

- (a) invitations to invest in Irish Government stocks, prize bonds and savings certificates, stocks of public and corporation stocks within the state.
- (b) invitations to place money on deposit or share account with registered building societies.
- (c) invitations to place money on deposit with the Post Office or any Trustee Savings Bank.
- (d) invitations to place money on deposit with the associated banks and other financial institutions holding trustee status or specially approved by the Central Bank of Ireland.
- (e) unit trusts authorised as such by the Minister for Industry and Commerce.

2. Prospectus

Advertisements announcing the publication in established national or provincial newspapers and journals or prospectuses offering shares or debentures to the public

²⁶ With effect from 1 May 2003, following the commencement of the provisions of the Central Bank and Financial Services Authority of Ireland Act 2003 (the “2003 Act”), the Central Bank of Ireland, as regulator of credit institutions and investment business firms, was re-named the Central Bank and Financial Services Authority of Ireland (the “Bank”) and the Bank’s supervisory and regulatory functions were transferred to the Irish Financial Services Regulatory Authority (“IFSRA”) as a constituent part of the Bank.

may be accepted provided that these are strictly limited to giving the name of the company whose shares or debentures are being offered, the amount of the offer and the names and dates of publication of the newspapers and journals in which a prospectus may be found. No person may be shown on the screen during the course of the advertisements. No advertisement will be allowed which contains any review of or advice on investments. The service of recognised stock exchanges may be advertised.

3. Insurance

Life and endowment facilities, annuities, retirement and sickness assurance etc., and all general insurance may normally be advertised only by companies licensed to transact such business in Ireland.

4. Hire Purchase

Advertisements relating to the sales of goods on hire purchase or credit sale must comply with the provisions of the Hire-Purchase (Amendment) Act, 1960, and with any Orders made under that Act.

5. Lending and Credit

The advertisement of mortgage or lending facilities and credit services is acceptable from:-

- (a) government and local government agencies;
- (b) banks and companies holding certificates under the Central Bank Act, 1971;
- (c) registered building societies;
- (d) insurance companies;
- (e) registered friendly societies;
- (f) credit card organisations;
- (g) companies offering goods and services on hire purchase or credit terms. (See paragraph (e) of Appendix 1).
- (h) companies which have obtained Orders of Exemption from the Moneylenders Acts, 1900 and 1933.

PART B - ADVERTISING CONTENT

Within the generality of the Codes, the following rules set out the minimum requirement to be observed in all advertisements offering services and facilities of a financial nature:-

1. advertisements must comply with all relevant legal requirements.
2. no advertisement is acceptable which directly or indirectly invites the remittance of money direct to the advertiser or any other person without further formality.

3. advertisements must present the financial offer or service in terms which do not mislead, whether by exaggeration, omission or in any other way. In particular:-

(a) Tax Benefits

References to income tax and other tax benefits must be properly qualified to show what they mean in practice and to make it clear, where appropriate, that the full advantage may only be received by those paying income tax at a particular rate.

b) Interest on Savings and Investment

Reference to interest payable on savings and investments must be stated clearly and be factually correct at the time of the transmission of the advertisement. Calculations of interest must not be based on unstated factors (e.g. minimum sum deposited, minimum deposit period, or minimum period of notice for withdrawal) which might affect the sum received by the individuals or be capable of misunderstanding in any other way. It should be clear whether the interest is gross or net of tax. Interest rates related to variables must be so described.

(c) Interest on Loans or Mortgages

There may be no reference to specific rates or sums charged against borrowers unless the quoted rate or sum is fixed and applies universally to all borrowers; or is accompanied by a clear statement of the factors which might affect the position of individual borrowers; or is the highest currently charged; or is clearly and justifiably presented as an example only.

(d) Rates of Growth or Return on Unit Trusts

No advertisement referring directly or indirectly to benefits to be derived from a purchase of units may state or imply that they are other than a medium to long-term investment. There may be no projection of specific rates of growth or returns and no implication that past performance will inevitably be repeated. All references to past achievements or future possibilities must be qualified by a clear and unambiguous reference to the fact that the price of units and the income from them may go down as well as up.

(e) Insurance Premiums and Cover

Reference to rates and conditions in connection with the insurance must not be inaccurate or misleading and in specifying rates of premium or cover, there must be no misleading omission of conditions. In life insurance advertising, references to specific sums assured or guaranteed bonuses must be accompanied by all relevant qualifying conditions, e.g. age and sex of the assured at the outset of the policy, period of policy and amount and number of premiums payable. In references to "with profit" policies and bonuses, there must be no implication that past performance will inevitably be repeated. In advertisements for life assurance linked with unit trust investment, any reference to a specific maturity value, unless guaranteed, must be qualified by reference to the variables which might affect the quoted figure.

4. Actors may not purport to be chairmen, directors, officers or other employees of an advertiser. No one may appear to give independent professional advice on any investment offer. Celebrated entertainers, writers or sportsmen may not present, endorse or recommend any investment offer.

NB Full and detailed information will be required in connection with any financial offer or service to be advertised.”

Section 7 of the ASAI Code deals with the advertising of financial services and products and provides:

“7. Financial Services and Products

7.1 Advertisements for financial services and products should be prepared with care and with the conscious aim of ensuring that members of the public fully grasp the nature of any commitment into which they may enter as a result of responding to an advertisement. Advertisers should not take advantage of people's inexperience or gullibility.

7.2 Advertisements which invite a response by mail should contain the full address of the advertiser separate from any response coupon.

7.3 Advertisements should indicate the nature of the contract being offered and provide information on any limitations on eligibility, any charges, expenses or penalties attached and the terms on which withdrawal may be arranged. Alternatively, where an advertisement is short or is general in its content, free explanatory material giving full details of the offer should be made available before a binding contract is entered into.

7.4 When an advertisement contains any forecast or projection, it should make clear the basis on which the forecast or projection is made explaining, for example:

- whether reinvestment of income is assumed
- whether account has been taken of any applicable taxes
- whether any penalties or deductions will arise on premature realisation or otherwise.

7.5 Advertisements should make it clear that the value of investments is variable and, unless guaranteed, can go down as well as up. If the value of the investment is guaranteed details should be included in the advertisement.

7.6 Advertisements should specify that past performance or experience does not necessarily give a guide for the future. Any examples used should not be unrepresentative.

Statutory and Other Regulatory Requirements

7.7 Advertisements for financial products and services, including investment opportunities, deposits and credit facilities, are subject to a number of statutory and Central Bank requirements, some of which are quoted in the Appendix.

- ***Foodstuffs***

The European Communities (Labelling, Presentation and Advertising of Foodstuffs) Regulations 2002-2003 regulate the advertising of foodstuffs in Ireland. Regulation 4(1) of the European Communities (Labelling, Presentation and Advertising of Foodstuffs) Regulations 2002 provides that “A person shall not sell, present or advertise foodstuffs, or provide free samples of foodstuffs, unless they comply with the Directives²⁷ and these Regulations.” Regulation 2(1) of the 2002 Regulations defines “advertise” as including “every form of advertising, whether in a publication, by video, sound broadcasting, television, electronic communication or radio, by display of notices, signs, labels, showcards or goods, by distribution of samples, circulars, catalogues, price lists or other material, by exhibition of pictures, photographs, models or films, or in any other way”.

The European Communities (Foodstuffs Intended for Particular Nutritional Uses) Regulations 2002 as amended by the European Communities (Foodstuffs Intended for Particular Nutritional Uses)(Amendment) Regulations 2002 set out rules concerning foodstuffs intended for particular nutritional uses²⁸. These regulations revoke the Health (Foods for Particular Nutritional Uses) Regulations, 1991. Regulation 8(2) of the 2002 Regulations provide that Directive 2000/13/EC (as amended) relating to the labelling, presentation and advertising of foodstuffs shall apply to foodstuffs of particular nutritional uses subject to further additional requirements. Regulation 10(1) provides that the labelling, presentation and advertising of foodstuffs for particular nutritional uses must not attribute properties for the prevention, treatment or cure of human disease to such products or imply such properties. Regulation 10(2) provides that Regulation 10(1) shall not prevent the dissemination of any useful information or recommendations exclusively intended for persons having qualifications in medicine, nutrition or pharmacy. Regulation 11 prohibits, in respect of the labelling, presentation and advertising of foodstuffs for normal consumption, the use of adjectives “dietetic” or “dietary” whether alone or in conjunction with other words to designate these foodstuffs.

- ***Gaming and Lotteries***

The advertising of certain games and lotteries and betting on certain events in Ireland is governed by the Betting Act, 1931 and the Gaming and Lotteries Acts, 1956-1979 as amended. Section 32 of the Betting Act, 1931 prohibits the publication of any advertisement advocating or inviting or otherwise relating to betting on football games at places outside a registered premises (such as a bookmakers). Section 22 of the Gaming and Lotteries Act 1956 as amended prohibits the advertisement of certain unlicensed lotteries in certain newspapers and cinemas or by radio. Section 22 of the 1956 Act does not explicitly refer to

²⁷ Regulation 2(1) of the European Communities (Labelling, Presentation and Advertising of Foodstuffs) Regulations 2002 as amended define “Directives” as Directive No. 2000/13/EC of the European Parliament and of the Council of 20 March 2000 as amended by Commission Directive 2001/101/EC of 26 November 2001 and by Commission Directive 2002/67/EC of 18 July 2002, Commission Directive No. 87/250/EEC of 15 April 1987, Commission Directive No. 94/54/EC of 18 November 1994 (as amended by Council Directive No. 96/21/EC of 29 March 1996) and Commission Directive No. 1999/10/EC of 8 March 1999.

²⁸ Regulation 3(1) of the European Communities (Foodstuffs Intended for Particular Nutritional Uses) Regulations, 2002 defines “Foodstuffs for particular nutritional uses” as those foodstuffs which: “(a) are clearly distinguishable from foodstuffs for normal consumption, owing to their special composition or manufacturing processes, and (b) are suitable for their claimed nutritional purposes and which are marketed in such a way as to indicate such suitability.”.

advertising on television. Appendix 2 of the BCI Codes set out above should be consulted in this regard. The Gaming and Lotteries Acts 1956-1979 do not apply to the National Lottery.

- ***Infant Formula***

Regulations 8 to 10 of the European Communities (Infant Formula and Follow-On Formulae) Regulations, 1998-2000 regulate the advertising of infant formula in Ireland. “Advertisement” is defined in Regulation 3(1) as “any pronouncement in the course of a trade, business or profession for the purpose of promoting the supply of goods and services”.

Regulation 10(2) provides that the advertising of infant formula shall be restricted to publications specialising in baby care and scientific publications. Consequently, the advertisement of infant formula on television in Ireland is not permissible.

- ***Religion and Politics***

Public Broadcasters

Section 20(4) of the Broadcasting Authority Act 1960, as amended, states that RTE shall not accept any advertisement or teleshopping material which is directed towards any religious or political end or has any relation to any industrial dispute. Section 65 of the Broadcasting Act, 2001 provides:

“Nothing in section 20(4) of the Act of 1960 [i.e relating to public broadcasters] or section 10(3) of the Act of 1988 [i.e. relating to independent broadcasters] (including either of those sections as applied by this Act) shall be construed as preventing the broadcasting of a notice of the fact—

(a) that a particular religious newspaper, magazine or periodical is available for sale or supply, or

(b) that any event or ceremony associated with any particular religion will take place,

if the contents of the notice do not address the issue of the merits or otherwise of adhering to any religious faith or belief or of becoming a member of any religion or religious organisation.”

Section 18(1) of the Broadcasting Act, 1960 as amended provides:

“Subject to subsection (1A) of this section, it shall be the duty of [RTE] to ensure that-

(c) all news broadcast by it is reported and presented in an objective and impartial manner and without any expression of [RTE’s] own views.,

(d) the broadcast treatment of current affairs, including matters which are either of public controversy or the subject of current public debate, is fair to all interests concerned and that broadcast matter is presented in an objective and impartial manner and without any expression of [RTE’s] own views,

(e) any matter, whether written, aural or visual, and which relates to current affairs, including matters which are either of public controversy or the subject

of current public debate, which pursuant to section of this Act [function of RTE] is published, distributed or sold by [RTE] is presented by it in an objective and impartial manner.”

Section 18(2) of the Broadcasting Act 1960 provides that section 18(1) shall not prevent RTE from accepting party political broadcasts.

Independent Broadcasters

Section 10(3) of the Radio and Television Act 1988 provides that “No advertisement shall be broadcast which is directed towards any religious or political end or which has any relation to an industrial dispute”. Section 9 of the Radio and Television Act 1988 deals with the duty of independent broadcasting contractors in relation to programmes. Sections 9(1)(a) and (b) of the 1988 Act provide:

“Every sound broadcasting contractor shall ensure that-

- (a) all news broadcast by him is reported and presented in an objective and impartial manner and without any expression of his own views;
- (b) the broadcast treatment of current affairs, including matters which are either of public controversy or the subject of current public debate, is fair to all interests covered and that the broadcast matter is presented in an objective and impartial manner and without any expression of his own views: Provided that should it prove impracticable in relation to a single broadcast to apply this paragraph, two or more related broadcasts may be considered as a whole, if the broadcasts are transmitted within a reasonable period of each other.”

Section 9(2) of the 1988 Act states “Nothing in subsection (1) (a) or (1) (b) shall prevent a broadcasting contractor from transmitting political party broadcasts: provided that a broadcasting contractor shall not, in the allocation of time for such broadcasts, give an unfair preference to any political party”.

Public and Independent Broadcasters

Section 17 of the BCI Codes entitled “Politics, Religion and Industrial Relations” states “In this regard, the provision of section 20(4) of the Broadcasting Authority Acts 1960-1993 [now 1960-2001], in the case of broadcasting services operated by the R.T.E Authority, and section 10(3) of the Radio and Television Act, 1988, in the case of services established under that Act [i.e. independent broadcasters], and any amendments thereof; shall apply”.

In March 2003 the Minister for Communications, Marine and Natural Resources launched a public consultation process to assess public opinion on the existing ban on religious advertising contained in section 20(4) of the Broadcasting Authority Act, 1960 as elaborated in section 65 of the Broadcasting Act 2001. A report on the public consultation process issued by Minister for Communications, Marine and Natural Resources in September 2003 noted that the vast majority of submissions received by the Minister were strongly in favour of lifting the ban on religious advertising. Having reviewed the submissions received, the Secretary General to the Department of Communications, Marine and Natural Resources

reported to the Minister in September 2003 and suggested that the ban on religious advertising remain. It is understood that the Minister has accepted this recommendation and that the ban on religious advertising on television in Ireland has been retained.

- ***Solicitors***

The advertising by solicitors is regulated in Ireland by the Law Society of Ireland under the Solicitors (Advertising) Regulations 2002. The 2002 Regulations set out advertising which is permissible and the information to be contained in such advertisements. Regulation 6(i) of the 2002 Regulations provides that advertisements by solicitors may be published on television (provided the information requirements are complied with).

- ***General Regulation of Advertising and Teleshopping in Consumer Legislation***

There exists in Ireland a number of general statutory provisions on consumer protection containing rules on advertising applicable to all media. These include the Consumer Information Act, 1978 which deals with misleading advertising by building upon the Merchandising Marks Act, 1887. The Consumer Information Act, 1978 legislates for accuracy in information given in connection with goods or services, and prohibits false and misleading trade descriptions, false and misleading statements, false and misleading prices and false and misleading advertisements.

The definition of “advertisement” in section 1 of the Consumer Information Act, 1978 states that it “includes a catalogue, a circular and a price list”. Thus advertising is not exhaustively defined as in the later legislation and codes considered in this Report, but by implication the definition would encompass technological methods of advertising by audio-visual means. Section 8(1) of the 1978 Act deals with misleading advertisements and provides that “a person shall not publish, or cause to be published, an advertisement in relation to the supply or provision in the course or for the purposes of a trade, business or profession, of goods, services or facilities if it is likely to mislead, and thereby cause loss, damage or injury to members of the public to a material degree.” Breach of this section is a criminal offence. To supervise this, section 8(3) empowers the Director of Consumer Affairs to apply to the High Court for an order prohibiting the publication or further publication of an advertisement which contravenes section 8(1).

The European Communities (Misleading Advertising) Regulations 1988²⁹ transpose Directive 84/450/EEC of 10 September 1984. Regulation 3 provides that the Director of Consumer Affairs may, upon a request being made to him or on his own initiative, request any person engaging or proposing to engage in advertising which is misleading advertising to discontinue or refrain from such advertising. Regulation 4 is analogous to section 8(3) of the Consumer Information Act, 1978 and entitles any person, including the Director of Consumer Affairs to apply to the High Court for an order prohibiting the publication or further publication of advertising the publication of which is misleading advertising.

The European Communities (Protection of Consumers in Respect of Contracts Made by Means of Distance Communications) Regulations 2001³⁰ implemented Directive 97/7/EC of 20 May 1997. The Regulations apply when a consumer and supplier are not physically in each other’s presence prior to the conclusion of the contract, with the result that the consumer

²⁹ S.I. 134 of 1988.

³⁰ S.I. 207 of 2001.

is unable to see the product or ascertain the nature of the service prior to concluding the contract. The Regulations apply to television teleshopping, according to the definition of “means of distance communication” set out in Regulation 2 and as listed in Schedule 1 to the Regulations. A distance contract is defined in Regulation 3 as “a contract between a supplier and a consumer which (a) relates to good or services, (b) is made under an organised distance sales or service-provision scheme run by the supplier and (c) is made by the supplier making exclusive use of one or more means of distance communication up to and including the moment at which the contract is made...”. Certain transactions relating to financial services, automatic vending machines or automated commercial premises, telecommunications operators (through the use of public payphones), construction and sale of immovable property and auctions are excluded from application of the Regulations. Under Regulation 4, a distance contract will only be enforceable by the supplier against the consumer if the supplier has provided certain specified information set out in Schedule 3 of the Regulations. Regulation 6 provides that there is an implied condition in a distance contract that the consumer has a “cooling off” period of seven working days in which to cancel the contract without reason and without penalty or charge, except the cost of returning the goods. Failure to comply with Regulation 6 is a criminal offence.

* * *