

**BIRD & BIRD**

**THE EVOLUTION OF NEW ADVERTISING  
TECHNIQUES**

**THE NETHERLANDS**

**THE NETHERLANDS**

**- SUMMARY -**

**This summary has been drafted by Bird & Bird Brussels  
on the basis of the national report**

# TELEVISION

## 1. Definitions

- **Advertising:** The Dutch Media Act makes a distinction between "advertising expression" and "advertising messages". The definition is broader and more general than the definition in the Directive TVWF.

Section 1jj and kk Media Act:

(jj) advertising expression: advertising messages or other expressions which clearly result in the public being encouraged to buy a specific product or to use a specific service, or in public opinion being influenced in a positive manner as regards a specific business, branch of industry or institution in a way which promotes the sale of products or the use of services;

(kk) advertising messages: messages which are unmistakably intended to encourage the public to buy a specific product or to use specific services, or to influence public opinion in a positive manner as regards a specific undertaking, branch of industry or establishment in order to promote the sale of products or the use of services;

- **Sponsoring :** The Dutch Media Act contains a somewhat different definition from the Directive TVWF:

Section 1 Media Act

In this Act and the provisions based upon it, the terms set out below shall have the following meanings:

(ll) sponsorship of a programme: the provision of financial or other contributions by a government institution or private company not normally involved in broadcasting activities or in the making of audio-visual productions, towards the production or purchase of a programme for the purpose of facilitating or enabling its broadcast;

(mm) sponsor: the public or private undertaking which sponsors a programme;

(nn) sponsor's contribution: the contribution provided by a sponsor;

- **Tele-shopping :** The definition in the Dutch Media Act is similar to the definition in the Directive.

Section 1 Media Act

In this Act and the provisions based upon it, the terms set out below shall have the following meanings:

xx. teleshop message: advertising expression in a television programme consisting of a direct offer to the public with a view to the supply of products or services for payment.

- **other relevant definitions:** The Media Act also defines "programme" and "programme service".

Section 1f Media Act

programme service: an electronic product with visual or audio content intended to be broadcast to and to be received by the general public or a part thereof, with the exception

of data services, services available only on individual demand, and other interactive services;  
programme: a clearly distinct and as such recognisable part of a programme service;

## **2. Advertising**

### **a) Rules on insertion in and between programmes**

The Media Act makes a distinction between public broadcasting and commercial broadcasting.

#### **➤ Public broadcasting**

Only a few programmes can be interrupted by advertisement from the Radio and Television Advertising Foundation. This possibility has been codified in Section 41a.1 (d) Media Act with respect to (1°) programmes containing a report or a coverage from a sporting event, a stage performance or similar events or performances; (2°) programmes including a complete report of the event or performance.

The interruption has to take place during the natural breaks or between separate parts of the event or the performance and the responsible broadcaster has not made objections to the interruption because of the integrity, the character or the coherence of the programme.

Specific rules regarding the timing of interruptions during the programmes are further laid down in Section 41 and the Media Decree. On the basis of Section 41a.2 Media Act, the Media Decree (Section 11.1 and 2) describes the following rules:

- the television programmes can only be interrupted once every 45 minutes (Section 11.1);
- the duration of the television programmes has to be longer than 90 minutes and the programmes must continue for 20 minutes or longer after the commercial break (Section 11.2a);
- the duration of the interruption must be 2 minutes or longer (Section 11.2b);
- the interruption must not affect the rights of the rightholder (Section 11.2c), for example the copyright (moral rights) on a programme.

#### **➤ Commercial broadcasting**

The rules are similar to the provisions of the Directive (art.11). In the Netherlands the determination of the programme duration is done on the basis of a net-approach (the duration of the programme is determined by its length without commercial breaks or other breaks).

## **b) Rules on the maximum amount of advertising**

### **➤ Public broadcasting**

Yearly, the Radio and Television Advertisement Foundation (STER) may use a maximum of 6,5 percent of the broadcasting time for its commercials (and the settings for the commercials) (Section 39b Media Act jo. Section 7 Media Decree).

Per period of twenty-four hours, the STER is allowed to use a maximum of 15 percent per programme service network for its commercials (Section 41a.1 (a) Media Act).

Per 60 minutes, the STER can use a maximum of 12 minutes (20 percent) for commercials (Section 41a.1 (b) Media Act). Every commercial break has to last at least 2 minutes.

### **➤ Commercial broadcasting**

The rules are identical to the Directive TVWF. Every break has to last at least 2 minutes.

## **3. Tele-shopping**

Public broadcasters are not allowed to distribute teleshopping messages. Commercial broadcasters and teleshopping channels are allowed to transmit teleshopping spots. The rules are generally the same as the rules of the Directive TVWF. Nevertheless the Media Act states that no more than 20% of the total length of an entire programme service provided by a broadcaster within a given day, shall consist of teleshopping.

## **4. Sponsoring**

### **➤ Public broadcasting**

Sponsoring of programmes is not allowed unless it concerns programmes of a cultural nature, sporting events or a report of events for charity. In these cases the sponsor has to be mentioned at the beginning and/or at the end of the programme. The message can contain: name/logo or trademark of the sponsor, it has to be static, may not fill the whole screen and cannot include an advertising message. The message can have a duration of 5 seconds maximum.

## ➤ **Commercial broadcasting**

The programmes can be sponsored and the rules are similar to the rules included in the Directive TVWF. The sponsor has to be mentioned at the beginning and/or at the end of the programme, name/logo or trademark can be mentioned but advertising messages are prohibited. There is no maximum duration.

## **5. Product Placement - Surreptitious advertising**

Dutch media law applies the principle of "undue prominence". Naming or showing products in a programme is only allowed if it fits in the context of the programme and on the condition that the presence is not accentuated.

The Dutch Media Act also contains a definition and a prohibition on surreptitious advertising which is almost identical to the one contained in the Directive TVWF, except for the fact that the condition "the advertising might mislead the public as to its nature" is not included.

## **6. New advertising techniques**

### **a) Split screen techniques :**

Are not used and there is no specific regulation in the Netherlands. The Dutch Media Authority however issued a negative advice on the use of this technique (in casu: programme content was shown during advertising). The prohibition is based on the obligation to separate advertising from programmes.

### **b) Virtual advertising**

Is not used (except for one known case) and there is no specific regulation. It is permitted to use virtual techniques on the condition all the rules on advertising are observed.

### **c) Interactive advertising (digital television)**

Is used in the Netherlands but there is no specific regulation. All the existing rules on advertising apply.

### **d) Other new techniques**

**Dotwin:** this is a button that the viewer has to attach to his screen and that has to be returned to the broadcaster to win a price. It is not regulated at this moment and the Commissariaat waits for further development.

**Combination of TV and Internet :** a commercial broadcaster wanted to transmit the (commercial) streaming video content of a website. This is not accepted on the basis of current audiovisual regulation.

## **RADIO**

The rules on TV -advertising also apply to radio.



## **INTERNET AND MOBILE PHONE**

There is no specific regulation but general rules on consumer protection, the e-commerce Directive (implementation is proceeding), self-regulatory codes ...apply. For mobile phone the Code for telephone information services applies and has to prevent abuse for advertising purposes.

**THE NETHERLANDS**

**- REPORT -**

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# TELEVISION

## **I. Advertising**

### **A. General regulation**

#### 1. General law on consumer protection applicable to all media

The TV-Directive does not contain provisions on misleading advertising. The general law regarding the protection of both competitors and consumers against misleading (and comparative) advertising in any form of media, is codified in Part 3, Section 4 of the sixth book of the Dutch Civil Code (Sections 194-196). The section includes a provision concerning the misleading character of the advertisement (Section 194), a provision concerning the burden of proof (Section 195) and a provision containing a sanction regulation (Section 196). These rules implement the Directive on misleading and comparative advertising.

Broadcasters are also bound by norms of self-regulation: the Dutch Advertising Code (hereinafter DAC). On the topic of advertising on television, the Code contains several provisions, including a definition of the concept of advertising (Section 1). Pursuant to Section 2, advertising must conform to the law, the truth and the requirements of good taste and decency. According to Section 5, the form of advertising must not undermine the confidence in advertising. Section 7 of the DAC codifies the principle that advertising shall not be misleading, but must be clear and complete.

#### Section 7 DAC

Advertising shall not be misleading, in particular about the price, contents, origin, composition, properties or effectiveness of the products concerned. Advertising shall be as clear and complete as possible in terms of such factors as its nature and form and the public at which it is aimed. The party selling the products shall also be indicated clearly.

#### 2. Specific audiovisual regulation

##### a) Definitions

Section 1c of the TV-Directive defines television advertising as follows:

‘television advertising’ means any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking 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;

The definitions in the Dutch Media Act (Mediawet) follow another pattern. They do not include the element of payment or similar consideration. There are two definitions in the Act concerning '(television) advertising' (as defined in Section 1c Directive): Section 1jj of the Media Act concerns advertising *expressions* and Section 1kk advertising *messages*.

Advertising expressions can be advertising messages or other expressions, where Section 1jj contains the more general definition. Both Sections do not specifically define television advertising, but advertising in general.

The difference between the two Sections is that with an advertising message one has the *intention* to promote the sale of products, and with an advertising expression the intention is irrelevant, only the direct or indirect *effect* (of promoting the sale of a product) counts. The definitions mention no specific conditions of application, like the fact that the advertising expression must be paid for. Therefore breaking the rules concerning surreptitious advertising could take place without evidence of the message being paid for by the advertiser.

These definitions are applicable to television and radio.

Section 3 of the Media Act defines which messages do not qualify as advertising in the sense of the Act: “The term advertising expression as defined in section 1 (jj) shall not be understood to include calls to support, or the positive influencing of opinions towards, establishments of a scientific, cultural, religious, spiritual, political or charitable nature, provided that any such calls do not relate to buying a specific product or using a specific service which is commercially available.”

Section 1jj and kk Media Act:

(jj) advertising expression: advertising messages or other expressions which clearly result in the public being encouraged to buy a specific product or to use a specific service, or in public opinion being influenced in a positive manner as regards a specific business, branch of industry or institution in a way which promotes the sale of products or the use of services;

(kk) advertising messages: messages which are unmistakably intended to encourage the public to buy a specific product or to use specific services, or to influence public opinion in a positive manner as regards a specific undertaking, branch of industry or establishment in order to promote the sale of products or the use of services;

#### b) Authorisation to distribute advertising

There is a different regime concerning the authorization to distribute advertising for public and for commercial broadcasters.

#### Public Broadcasting

The authorization to broadcast advertising message is exclusively given to the Radio and Television Advertising Foundation (Stichting Etherreclame, hereinafter STER) and to the local and regional public broadcasting organizations (Sections 26.1 and 43a Media Act).

The STER provides 'a program service for general broadcasting purposes consisting of advertising messages supplied by third parties, as well as filler items before, after and between the advertising messages' (Section 26.1 Media Act).

In the public broadcasting system, the STER only transmits advertising messages and the public broadcasters only programs. The money the STER generates is, *inter alia*, used to finance the public broadcasters. STER is associated with the Dutch Advertising Code.

Local and regional public broadcasters are allowed to transmit advertising messages (Sections 52.1 jo. 43a Media Act). If they want to do so they must meet two conditions: 1) they have to be covered by the Dutch Advertising Code (DAC), directly or through an interest group (Section 43b.2 Media Act), and 2) they have to draw up a program service statute in which the journalistic rights and obligations of their employees are regulated (Section 43c.4 Media Act), especially concerning the independence of commercial interests of third parties.

#### Section 26 Media Act

1. The Radio and Television Advertising Foundation shall provide a program service for general broadcasting purposes consisting of advertising messages supplied by third parties, as well as filler items before, after and between the advertising messages.

#### Section 43a Media Act

Local and regional broadcasting establishments which have been allocated broadcasting time shall be permitted to provide programs consisting of advertising messages supplied by third parties as well as filler items before, after and between these advertising messages.

#### Section 52.1 Media Act

1. The programs of establishments which have obtained broadcasting time shall not include any advertising messages unless this is expressly permitted by this Act.

#### Section 43b.2 Media Act

2. Local and regional broadcasting establishments which provide programs as referred to in Section 43a, shall be required to ensure that, either through direct membership or through an interest group, they are covered by the Dutch Advertising Code (*Nederlandse Reclame Code*) or some other comparable scheme established by the Advertising Code Foundation (*Stichting Reclame Code*) and, in that context, are subject to the supervision of the Advertising Code Foundation. They shall be required to prove that this is the case by submitting a written statement from the Advertising Code Foundation to the Media Authority.

#### Section 43c.4 Media Act

4. Section 64, paragraph 1 under (d) shall apply equally to local and regional broadcasting establishments which provide programs as referred to in Section 43a, and to their staff.

#### Section 64.1.d Media Act

(d) shall, after consultation with those of their employees charged with the editorial aspect of programme services, draw up a programme service statute in which the journalistic rights and obligations of said employees are regulated.

### Commercial Broadcasting

The regulations applicable commercial broadcasters concerning the distribution of advertising are largely based on the TV-Directive.

The greater part of the regulations can be found in the Media Decree (Mediabesluit), but their base is laid down in Section 71g.2 Media Act.

Commercial broadcasters may distribute advertising. They must meet two conditions when they do: 1) they have to be covered by the Dutch Advertising Code (Section 52b Media Decree), and 2) they must have a program statute, in order to guarantee the independence of

the programme makers toward commercial interests of third parties. (Section 71g 1 jo 64.1d Media Act).

#### Section 71g.2 Media Act

2. In the case of commercial broadcasting establishments, rules may be laid down by Order in Council in implementation of the European Directive. In this context, deviating rules may be issued as regards still to be defined categories of commercial broadcasting establishments, in so far as permitted under Sections 9 and 20 of the European Directive. An Order in Council may also serve to lay down parallel rules for radio programme services.

#### Section 52b Media Decree

A commercial broadcasting establishment which provides programmes consisting of advertising messages shall ensure that it is covered by the Advertising Code (*Nederlandse Reclame Code*) or some other comparable scheme established by the Advertising Code Foundation (*Stichting Reclame Code*) and, in that context, that it is subject to the supervision of the Advertising Code Foundation. The commercial broadcasting establishment shall be required to prove that this is the case by submitting a written statement from the Advertising Code Foundation to the Media Authority.

#### Section 71g.1 Media Act

1. Sections 52d, 53, 59 and 64, subsection 1 (d) shall apply *mutatis mutandis* to commercial broadcasting establishments and to the programme services they provide.

#### Section 64.1.d Media Act

1. Broadcasting associations which have obtained national broadcasting time:  
(d) shall, after consultation with those of their employees charged with the editorial aspect of programme services, draw up a programme service statute in which the journalistic rights and obligations of said employees are regulated.

#### c) General rules on the content of TV advertising

The TV-Directive contains the following rules on the content of television-advertising:

#### Section 10.3

Advertising and teleshopping shall not use subliminal techniques.

#### Section 12

Television advertising and teleshopping shall not:

- (a) prejudice respect for human dignity;
- (b) include any discrimination on grounds of race, sex or nationality;
- (c) be offensive to religious or political beliefs;
- (d) encourage behaviour prejudicial to health or to safety;
- (e) encourage behaviour prejudicial to the protection of the environment.

#### Section 16

Television advertising shall not cause moral or physical detriment to minors, and shall therefore comply with the following criteria for their protection:

- (a) it shall not directly exhort minors to buy a product or a service by exploiting their inexperience or credulity;



- (b) it shall not directly encourage minors to persuade their parents or others to purchase the goods or services being advertised;
- (c) it shall not exploit the special trust minors place in parents, teachers or other persons;
- (d) it shall not unreasonably show minors in dangerous situations.

The only rule on the content of TV advertising that is laid down in the Media Act, is a prohibition of subliminal techniques (public broadcasters: Section 50.8 Media Act, commercial broadcasters: Section 52c.1 Media Decree). The fact that the rules of Sections 12 and 16 of the Directive are not implemented in the Media Act, does not mean that the Dutch regulation is not in accordance with the minimum claim of the Directive. The norms of the Directive are put into practice through other regulations (Dutch Advertising Code a.o.).

General rules on the content of advertising (Section 12 Directive) can be found in Section 1 of the Dutch Advertising Code. In this Section 'respect for human dignity', 'the prohibition on discrimination on grounds of race, sex or nationality' and the protection of 'religious or political beliefs' (Sections 12a, b and c Directive) are not mentioned as such. The prohibition on discrimination on grounds of race, sex or nationality' can be found in Article 1 of the Constitution and is liable to punishment on the basis of Article 137d of the Penal Code. It uses more vague terms, for example that advertising should be 'conform to the law, the truth and requirements of good taste and decency' (Section 2 DAC) and 'not contravene the public interest, public order or morality' (Section 3 DAC).

The protection of the environment (Section 12 (e) Directive) is regulated in a separate part of the DAC, the Code for environmental advertising, which actually gives a broader protection than the Directive.

The protection of minors against 'moral or physical detriment' (Section 16 Directive) is regulated in Section 13.2 DAC, which is a literal implementation of the Directive.

#### Section 50.8 Media Act

8. The Radio and Television Advertising Foundation shall use its broadcasting time to provide a programme service consisting of advertising messages supplied by third parties. A maximum of one third of the Radio and Television Advertising Foundation's broadcasting time may be used for filler items before, after and between the advertising messages. The Radio and Television Advertising Foundation 's programme service shall be recognizable as such and must be clearly discernable from the programmes of the other establishments which have obtained broadcasting time. Subliminal techniques shall not be used in the Radio and Television Advertising Foundation 's programme.

#### Section 52c.1 Media Decree

1. Advertising messages or teleshop messages included in the programme service provided by a commercial broadcasting establishment shall be recognizable as such and shall be clearly distinguishable from the other programmes by optical or acoustic means. Subliminal techniques shall not be used.

#### Sections 2-6, 13 Dutch Advertising Code

2. Advertising shall conform to the law, the truth and the requirements of good taste and decency.

3. Advertising shall not contravene the public interest, public order or morality.

4. Advertising shall not be gratuitously offensive or constitute a threat to mental and/or physical public health.

5. The form and content of advertising shall not undermine confidence in the advertising.

6. Without justifiable cause, advertising shall not arouse feelings of fear or superstition.

13.1 Advertising which is manifestly aimed wholly or partly at minors - that is, children up to the age of 12 - shall contain no speech, sound or image which in any way could mislead them about the capacity and qualities of the product concerned.

*Note on Article 13.1*

When advertising is aimed at children - that is, minors under the age of 12 – account should be taken of their intellectual grasp and expectations, especially with respect to playing pleasure and the performance of the product.

13.2 Advertising on television shall cause no mental or physical harm to minors and for their protection, shall therefore satisfy the following criteria:

- a. it shall not encourage minors to buy a particular product by taking advantage of their inexperience or credulity;
- b. it shall not directly encourage minors to persuade their parents or others to buy advertised products;
- c. it shall not take advantage of the special confidence which minors have in parents, teachers or others;
- d. it shall not, without reason, depict minors in dangerous situations.

#### Code for Environmental Advertising

##### 1. Applicability

This Code applies to all environmental claims, in other words, to all advertising messages referring implicitly or explicitly to environmental factors connected with the production, distribution, consumption or waste processing of goods, or with related services (hereinafter known collectively as 'products').

##### 2. No Misrepresentation

Environmental claims shall contain no statements, pictures or suggestions that may mislead the consumer concerning environmental aspects of the products recommended or the contribution of the advertiser to maintaining and promoting a clean and safe environment in general.

##### 3. Demonstrability

All environmental claims shall be demonstrably correct. The burden of proof rests on the advertiser. The more absolute the formulation of the claim, the more stringent are the requirements with respect to evidential material.

##### 4. Constituent Parts and Aspects

Should environmental claims relate exclusively or virtually exclusively to particular constituent parts or aspects of the products recommended, this limitation shall be stated clearly.

##### 5. Absence or Reduction of Constituent Parts

An environmental claim which relates to the absence or reduction of constituent parts that are environmentally harmful is permissible only in the following cases

- any replacement parts are less environmentally harmful
- and no wrongful assertion or suggestion is made that comparable products do possess the environmentally harmful constituent parts that are absent or reduced.

##### 6. Comparisons

Environmental claims in which the recommended products are compared implicitly or explicitly with other products shall relate to all the relevant environmental aspects of the products compared.

##### 7. Designations and Symbols

Environmental designations and symbols shall not be used unless the origin of the designation or symbol is clear and no confusion can arise on the meaning of the designation or symbol.

#### 8. Scientific Works

Quotations from, and reference to scientific works shall be representative and demonstrably correct. Should the scientific works not be generally accessible, the advertiser shall submit such works on request when a complaint is handled.

#### 9. Testimonials

Testimonials used in environmental claims shall be based on the expertise of the person or body giving them.

#### 10. Waste Processing, Collection and Recycling

Environmental claims that relate to waste collection (separate or otherwise) and/or waste processing are permissible only if the recommended method of collection or processing is sufficiently available to the target group for which the advertising claim is intended. Environmental claims which relate to the recycling of products or parts of products are permissible only if a sufficient proportion of the recommended products or parts are actually recycled.

#### 11. Environmentally Unfriendly Behaviour

Advertising messages shall not set as an example environmentally unfriendly behaviour that is avoidable, nor shall such behaviour be encouraged.

#### 12. Official Rules

Notwithstanding the provisions of sections 1 to 11, environmental claims are permissible if they comply with specific advertising rules issued by government authorities in connection with environmental issues.

#### d) Rules on duration of advertising and insertion in or between programmes

##### *Identification of advertising (Section 10.1/2 Directive)*

Rules on identification are laid down in Section 10.1/2 of the TV-Directive:

1. Television advertising and teleshopping shall be readily recognisable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means.
2. Isolated advertising and teleshopping spots shall remain the exception.

The requirement of recognizability of advertising (Section 10.1/2 Directive) is laid down in Section 50.8 Media Act (public broadcasters) and with respect to commercial broadcasters in Section 52c.1 Media Decree. The Radio and Television Advertising Foundation's (STER) programme service shall be recognizable as such and must be clearly discernable from the programmes of the other organizations which have obtained broadcasting time. Section 50.8 Media Act does not specify, like the Directive and Section 52c.1 Media Decree, that the discernability should be accomplished by optical and/or acoustic means. Section 10 DAC, which is applicable to the audiovisual media, provides that advertising should be recognizable by virtue of its layout, presentation, content and so forth.

#### Section 50.8 Media Act

8. The Radio and Television Advertising Foundation shall use its broadcasting time to provide a programme service consisting of advertising messages supplied by third parties. A maximum of one third of the Radio and Television Advertising Foundation's broadcasting time may be used for filler items before, after and between the advertising messages. The

Radio and Television Advertising Foundation 's programme service shall be recognizable as such and must be clearly discernable from the programmes of the other establishments which have obtained broadcasting time. Subliminal techniques shall not be used in the Radio and Television Advertising Foundation 's programme.

#### Section 52c.1 Media Decree

1. Advertising messages or teleshop messages included in the programme service provided by a commercial broadcasting establishment shall be recognizable as such and shall be clearly distinguishable from the other programmes by optical or acoustic means. Subliminal techniques shall not be used.

#### Section 10 Dutch Advertising Code

Advertising shall be recognizable as such by virtue of its layout, presentation, content and so forth, taking account of the public for which it is intended.

The appearance in advertising on radio and television of people who may be deemed, by virtue of their participation in broadcast programmes, to carry authority with, or instill confidence in certain sections of the public is prohibited.

The use of subliminal techniques in audiovisual advertising is also prohibited.

#### Insertion between programmes

Section 11.1 of the Directive contains the following general rules on insertion of advertising:

1. Advertising and teleshopping spots shall be inserted between programmes. Provided the conditions set out in paragraphs 2 to 5 are fulfilled, advertising and teleshopping spots 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.

Of course, the definition of a programme in this respect is important. Section 1g Media Act defines a programme ('programma-onderdeel') as follows: "a clearly distinct and as such recognisable part of a programme service", 'programme' being defined more generally in Section 1f in order to distinguish the services of radio and television media from the services of the information society.

#### Section 1f Media Act

programme service: an electronic product with visual or audio content intended to be broadcast to and to be received by the general public or a part thereof, with the exception of data services, services available only on individual demand, and other interactive services;

programme: a clearly distinct and as such recognisable part of a programme service;

There exists only one specific rule in the Media Act or the Media Decree regarding the interruption *between* different television programmes for commercial breaks. This rule is restricted to public broadcasting on Sundays. Section 41a lays down the following rule:

#### Section 41a Media Act

(T)he broadcasting time of the Radio and Television Advertising Foundation shall be scheduled in such a way that (...)

(c) on Sundays, the programmes of the Radio and Television Advertising Foundation do not immediately precede or follow programmes of a religious or spiritual nature, unless the

establishment which has obtained broadcasting time and which is responsible for that programme has lodged no objections against such practice;

### Insertion during programmes

The TV-Directive contains the following specific rules on the insertion of advertising and teleshopping spots during programmes:

#### Section 11.2/3/4 Directive

2. In programmes consisting of autonomous parts, or in sports programmes and similarly structured events and performances containing intervals, advertising and teleshopping spots shall only be inserted between the parts or in the intervals.

3. 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 45 minutes, may be interrupted once for each period of 45 minutes. A further interruption shall be allowed if their scheduled duration is at least 20 minutes longer than two or more complete periods of 45 minutes.

4. Where programmes, other than those covered by paragraph 2, are interrupted by advertising or teleshopping spots, a period of at least 20 minutes should elapse between each successive advertising break within the programme.

### \*Public Broadcasting

Only a few programmes can be interrupted by advertisement from the Radio and Television Advertising Foundation. This possibility has been codified in Section 41a.1 (d) Media Act with respect to (1°) programmes containing a report or a coverage from a sporting event, a stage performance or similar events or performances; (2°) programmes including a complete report of the event or performance.

The interruption has to take place during the natural breaks or between separate parts of the event or the performance and the responsible broadcaster has not made objections to the interruption because of the integrity, the character or the coherence of the programme. A natural break is for example the switch over from the television studio to the event on location (CvdM October 20, 1998 *NOS/Olympische Spelen Nagano*, O&C 1998, p. 148-150; CvdM March 9, 1999 *NOS/WK Voetbal '98*, O&C 1999).

Specific rules regarding the timing of interruptions during the programmes are further laid down in Section 41 and the Media Decree. On the basis of Section 41a.2 Media Act, the Media Decree (Section 11.1 and 2) describes the following rules:

- the television programmes can only be interrupted once every 45 minutes (Section 11.1);
- the duration of the television programmes has to be longer than 90 minutes and the programmes must continue for 20 minutes or longer after the commercial break (Section 11.2a);
- the duration of the interruption must be 2 minutes or longer (Section 11.2b);
- the interruption must not affect the rights of the rightholder (Section 11.2c), for example the copyright (moral rights) on a programme.

#### Section 41a Media Act

1. Subject to Section 39b, the broadcasting time of the Radio and Television Advertising Foundation shall be scheduled in such a way that:

(d) any programme of another establishment which has obtained national broadcasting time will only be interrupted by Radio and Television Advertising Foundation programmes if:

1° the programme is a report on or coverage of a sporting event, a stage performance or some other similarly structured performance or event;

2° the programme contains a full report on the entire performance or event;

3° the interruption takes place during natural breaks occurring in the performance or event or between separate parts of the performance or event; and

4° the establishment which has obtained broadcasting time and which is responsible for the programme has no objections to the interruption on the grounds of it having an adverse affect on the integrity, the character or the coherence of the programme in question.

2. Further rules governing the interruption of programmes referred to in subsection 1 (d) may be laid down by Order in Council.

### Section 11 Media Decree

1. Programmes of establishments which have been allocated national broadcasting time may not be interrupted by a programme of the Radio and Television Advertising Foundation more frequently than once every forty-five minutes in the case of television broadcasting or once every thirty minutes in the case of radio broadcasting.

2. A programme may only be interrupted by a programme of the Radio and Television Advertising Foundation if:

(a) the length of the programme to be interrupted is more than ninety minutes in the case of television broadcasting or more than forty-five minutes in the case of radio broadcasting;

(b) the interruption lasts at least two minutes in the case of television broadcasting or at least one minute in the case of radio broadcasting; and

(c) the interruption does not affect the rights of rights holders.

### \*Commercial Broadcasting

Pursuant to section 52e.1 of the Media Decree, regarding commercial broadcasting, the interruption is allowed, unless it damages the integrity, nature or coherence of the programme, or infringes the rights of rights holders. This means, for example, that the programme can not be interrupted during a conversation.

There are different rules for different sorts of programmes:

- news programmes (including talk shows about the news); programmes of religious or spiritual nature (not the ones mentioned in paragraph 2 of Section 52e); programmes for children younger than 12 years old and non dramatized documentaries can only be interrupted if the programme has a duration of 30 minutes or longer (Section 52e.3 Media Decree);
- television films have to last 45 minutes or more for a legally allowed interruption (Section 52e.4 Media Decree) and the commercial break can only take place once every 45 minutes. After two periods of each 45 minutes, the film can be interrupted again if it will last another 20 minutes or more (Section 52e.5 Media Decree).
- It is possible that a programme can fall under paragraph 3 and paragraph 4 or 5 of Section 52e Media Decree. In this situation paragraph 4 and 5 will prevail.

Television programmes containing the report of sporting events, stage performances and others can only be interrupted during the natural breaks or between separate parts of the event or the performance (Section 52f.2 Media Decree).

There exists one general rule for all television programmes: if the programme is interrupted more than once for a commercial break, there must be at least 20 minutes between the interruptions (Section 52f.1 Media Decree).

The duration of the programme is determined by the length of the programme or the film itself, without the commercial breaks and any other break (the so-called net-approach). This provision is based on Section 11.3 of the TVWF Directive, but is more severe.

#### Section 52e Media Decree

Programmes of commercial broadcasting establishments shall only be interrupted by advertising messages or teleshop messages if the interruption does not affect the integrity, nature or coherence of the relevant programme or infringe the rights of rights holders.

(...)

3. The following programmes shall be interrupted by advertising messages or teleshop messages only if they last more than thirty minutes:

- (a) programmes consisting of news or news commentaries;
- (b) programmes of a religious or spiritual nature other than those referred to in paragraph 2;
- (c) programmes aimed at minors under the age of twelve.
- (d) nondramatised documentaries.

4. Films shall be interrupted by advertising messages or teleshop messages only if they last at least forty-five minutes.

5. Without prejudice to paragraph 4, films shall not be interrupted by advertising messages or teleshop messages more frequently than once every forty-five minutes. If a film has a remaining length of more than twenty minutes after two or more full segments of forty-five minutes, the film may be interrupted once more.

#### Section 52f Media Decree

1. Where one television programme is interrupted by more than one advertising or teleshop break, the intervals between them shall be at least twenty minutes.

2. Notwithstanding paragraph 1, television programmes consisting of a report on a sporting event, a stage performance or some other similarly structured performance or event shall only be interrupted by advertising messages or teleshop messages during natural breaks occurring in the performance or event or between separate parts of the performance or event.

#### Prohibition to insert advertising

The TV-Directive contains also prohibitions on the insertion of advertising:

11.5. Advertising and teleshopping 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 30 minutes, shall not be interrupted by advertising or by teleshopping. If their scheduled duration is 30 minutes or longer, the provisions of the previous paragraphs shall apply.

#### \*Public Broadcasting

For the public broadcaster, there is a specific prohibition on interruption during programmes directed at children younger than 12 years old, and on programmes of a religious or spiritual nature (Section 11.3 Media Decree).

#### Section 11.3 Media Decree

3. Programmes of a religious or spiritual nature and programmes mainly targeted at minors under the age of twelve shall not be interrupted by programmes of the Radio and Television Advertising Foundation.

#### \*Commercial Broadcasting

There is one prohibition on the commercial broadcaster regarding the interruption for advertisement: programmes related to gatherings of religious or other beliefs shall not be interrupted by any commercial break (Section 52e.2 Media Decree).

#### Section 52e.2 Media Decree

2. Programmes covering gatherings relating to religious or other beliefs shall not be interrupted by advertising messages or teleshop messages.

#### Duration (Section 18 Directive)

Section 18 of the Directive contains the following rules on the duration of advertising.

1. The proportion of transmission time devoted to teleshopping spots, advertising spots and other forms of advertising, with the exception of teleshopping windows within the meaning of Article 18a, shall not exceed 20 % of the daily transmission time. The transmission time for advertising spots shall not exceed 15 % of the daily transmission time.

2. The proportion of advertising spots and teleshopping spots within a given clock hour shall not exceed 20 %.

3. For the purposes of this Article, advertising does not include:

- announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived from those programmes;
- public service announcements and charity appeals broadcast free of charge.

#### \*Public Broadcasting

Yearly, the Radio and Television Advertising Foundation (STER) may use a maximum of 6,5 percent of the broadcasting time for its commercials (and the settings for the commercials) (Section 39b Media Act jo. Section 7 Media Decree).

Per period of twenty-four hours, the STER is allowed to use a maximum of 15 percent per programme service network for its commercials (Section 41a.1 (a) Media Act).

Per 60 minutes, the STER can use a maximum of 12 minutes (20 percent) for commercials (Section 41a.1 (b) Media Act).

The percentage will be determined on the basis of the broadcasting time actually used.

The minimum duration of commercial breaks for public broadcasting has been codified in Section 12 Media Decree and Section 11.2 (b) Media Decree. The blocks of commercials from the STER (including the settings of it) has to last at least 2 minutes.

#### Section 39b Media Act



Each year, the Radio and Television Advertising Foundation shall have at its disposal such a percentage of the total amount of time used for national broadcasting purposes as shall be laid down by Order in Council. This percentage shall be no higher than ten per cent and may vary for television and radio.

#### Section 7 Media Decree

Each year, the Radio and Television Advertising Foundation shall have at its disposal 6.5 per cent of the total time used for national television or radio broadcasting.

#### Section 41a.1 Media Act

1. Subject to Section 39b, the broadcasting time of the Radio and Television Advertising Foundation shall be scheduled in such a way that: on a daily basis, the Radio and Television Advertising Foundation's broadcasting time on any programme service network never amounts to more than fifteen per cent of the total broadcasting time used on that programme service network; in any given clock hour, the Radio and Television Advertising Foundation's broadcasting time never amounts to more than twelve minutes.

#### Section 12 Media Decree

The television broadcasting time of the Radio and Television Advertising Foundation shall be scheduled with due observance of a minimum length of two minutes per block.

#### Section 11 Media Decree

A programme may only be interrupted by a programme of the Radio and Television Advertising Foundation if: the interruption lasts at least two minutes in the case of television broadcasting or at least one minute in the case of radio broadcasting.

#### \*Commercial Broadcasting

In a period of twenty-four hours, the commercial broadcasters can use a maximum of 15 percent of the total length of their complete programme service for their commercial breaks (Section 52d.1 Media Decree). If the commercials go together with teleshop messages, the maximum is 20 percent (Section 52d.3 Media Decree).

Per hour, they may use a maximum of 12 minutes (20 percent) for advertisement (Section 52d.4 Media Decree).

Section 52d.5 provides the minimum duration for commercial breaks on television: every break has to last at least 2 minutes. This paragraph also specifies that the commercials must be put in blocks together.

#### Section 52d Media Decree

1. No more than fifteen per cent of the total length of the entire programme service provided by a commercial broadcasting establishment on a given day shall consist of advertising messages.

(...)

3. No more than twenty per cent of the total length of the programme service provided by a commercial broadcasting establishment on a given day shall consist of a combination of advertising messages and teleshop messages.

4. No more than twelve minutes per hour of the programme service provided by a commercial broadcasting establishment shall consist of advertising messages or teleshop messages.

5. Advertising messages in television programme services, or teleshop messages shall be broadcast exclusively in blocks which, including the filler items before, after and between the advertising messages, shall be at least two minutes in length.

e) Surreptitious advertising

Public Broadcasting

Section 10.4 of the TVFW Directive describes the prohibition on surreptitious advertising. This form of advertising is defined only in the Media decree with regard to commercial broadcasting (Section 52j). The rules for public broadcasting are constructed on the following basis:

- Section 52.1 Media Act restricts the broadcasting of advertising messages to an authorization by the Media Act. This authorization of course is given to the STER and to regional and local public broadcasting organizations.
- Advertising messages should be broadcast only in blocks (Section 12 Media Decree). Then it is clear that the public is submitted to advertisement.
- Section 52.2 prohibits any other advertising expression (than advertising messages) included in the programmes of public broadcasters except when this is unavoidable. The concept of unavoidability and the cases in which the presence of advertising expressions is permitted are laid down in Sections 26-32 of the Media Decree.
- Section 52.3 provides for a possibility of not applying the ban on avoidable other advertising expressions in special cases.

Section 52.2 Media Act and the Sections 26-32 of the Media Decree together form the basis for the assessment of product placement and the like. We will deal with these forms of so-called non-spot advertising (product placement and the like) later on.

Section 52.1-3 Media Act

1. The programmes of establishments which have obtained broadcasting time shall not include any advertising messages unless this is expressly permitted by this Act.
2. Furthermore, the programmes referred to in subsection 1 shall not include any other advertising expressions except where this is unavoidable. Provisions regarding the cases in which an advertising expression in a programme service is to be regarded as unavoidable as well as provisions as to when the presence of advertising expressions in a programme service is permitted may be laid down by Order in Council.
3. In special cases, Our Minister may waive application of the provisions of the first sentence in subsection 2. He may decide to delegate this power to the Media Authority.

Section 12 Media Decree

The television broadcasting time of the Radio and Television Advertising Foundation shall be scheduled with due observance of a minimum length of two minutes per block.

Commercial Broadcasting

Surreptitious advertising also is prohibited with regard to commercial broadcasters. This prohibition is of course based in the first place on the general rule that an advertisement must be recognizable as such (Section 52c.1 Media Decree). The commercials furthermore must be

broadcasted in blocks (Section 52d.5 Media Decree) beginning or ending with an announcement that there will be advertisement by the commercial broadcaster. Section 52c.1 of the Media Decree also determines that subliminal techniques are prohibited.

Surreptitious advertising is defined in Section 52(j) of the Media Decree.

#### Section 52j Media Decree

1. Without prejudice to the provisions laid down in Articles 52g, , 52h, paragraph 2 and 3 and 52i, paragraph 1, programmes of commercial broadcasting establishments may not refer to or display any names, trade-marks, logos, brand images, products, services or activities of persons, companies and establishments if it can be reasonably assumed that the commercial broadcasting establishment has included such a reference or display either to encourage the public to purchase a certain product or service or to influence public opinion in a positive manner as regards a specific business, branch of industry or establishment in order to promote the sale of products or the use of services.
2. A reference to or display of the name, trade-mark, logo, brand image, product, service or activity of a person, company or establishment in any individual programme shall be deemed to have been made with the intention described in paragraph 1, if the commercial broadcasting establishment is paid for the inclusion of such a reference or display.

Section 1d of the TV-Directive defines surreptitious advertising as follows:

‘surreptitious advertising’ means 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 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;

Compared to the definition of surreptitious advertising in the TV-Directive, it seems remarkable that the condition that “the advertising might mislead the public as to its nature”, has been deleted. Whereas commercial broadcasters from other EC-Countries, broadcasting to the Netherlands, are not necessarily subject to the same rule but to the definition of the TV-Directive, a different regime exists between Dutch commercial broadcasters and broadcasters from other EC-Countries. In the case of a Dutch commercial broadcaster, in order to assess a breach of the ban on surreptitious advertising, no evidence is required of the element “might mislead the public etc...”

In the explaining memorandum of Article 52j of the Media Decree it is set out in what way Article 10.4 of the TV-Directive is implemented in the Media Act. The Articles 52g, 52h and 52i of the Media Decree contain rules on teleshopping, sponsoring of programmes or events. When these rules are followed it is clear that ‘misleading of the public’ (and thus surreptitious advertising) cannot be assumed. If names and products are mentioned in a way which is not covered by the Articles 52g-i of the Media Decree, in principle ‘misleading of the public’ and ‘surreptitious advertising’ can be assumed. That is the reason why, without prejudice to the provisions of Article 52g-i, the Article 52j of the Media Decree prohibits the mentioning of names and products as far as the broadcaster intends to advertise. The intention to advertise is not assumed in cases of unavoidable advertising.

#### Section 52c.1 Media Decree

1. Advertising messages or teleshop messages included in the programme service provided by a commercial broadcasting establishment shall be recognizable as such and shall be clearly distinguishable from the other programmes by optical or acoustic means. Subliminal techniques shall not be used.

#### Section 52d.5 Media Decree

5. Advertising messages in television programme services, or teleshop messages shall be broadcast exclusively in blocks which, including the filler items before, after and between the advertising messages, shall be at least two minutes in length.

### **B. Regulation for Specific Products**

The TV Directive contains the following rules on the advertising for certain specific products (tobacco, medicines and alcoholic beverages).

#### Section 13

All forms of television advertising and teleshopping for cigarettes and other tobacco products shall be prohibited.

#### Section 14

1. Television advertising for medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the broadcaster falls shall be prohibited.
2. Teleshopping for medicinal products which are subject to a marketing authorisation within the meaning of Council Directive 65/ 65/EEC of 26 January 1965 on the approximation of provisions laid down by law, regulation or administrative action relating to medicinal products (1 ), as well as teleshopping for medical treatment, shall be prohibited.

#### Section 15

Television advertising and teleshopping for alcoholic beverages shall comply with the following criteria:

- (a) it may not be aimed specifically at minors or ,in particular, depict minors consuming these beverages;
- (b) it shall not link the consumption of alcohol to enhanced physical performance or to driving;
- (c) it shall not create the impression that the consumption of alcohol contributes towards social or sexual success;
- (d) it shall not claim that alcohol has therapeutic qualities or that it is a stimulant, a sedative or a means of resolving personal conflicts;
- (e) it shall not encourage immoderate consumption of alcohol or present abstinence or moderation in a negative light;
- (f) it shall not place emphasis on high alcoholic content as being a positive quality of the beverages.

Except for the general bans on TV-advertising for tobacco products and for medicines, other specific product regulation is of a more general nature and mostly regulated in self-regulation. These self-regulating standards are conform the content advertising standards of the Directive. The descriptions of these standards will follow below under paragraph C.

## 1. Tobacco

According to Section 13 of the TV-Directive all forms of television advertising for cigarettes and other tobacco products are prohibited. Conform this Section, all the advertising on television in the Netherlands for cigarettes or other tobacco products is prohibited. This ban on tobacco advertising on television is laid down in Section 4 of the Tobacco Act. Other forms of advertising for tobacco products are submitted to the Advertising Code for Tobacco Products.

## 2. Medicines

Section 14.1 TVFW Directive prohibits any television advertising for medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the broadcaster falls. Section 5 of the Advertising Decree on Medicines likewise prohibits all public advertising messages for medicines available only on prescription.

## 3. Media

There are no specific rules for television advertisement on other media.

## 4. Religions, politics and parties, social issues and groups

There are no specific rules in the Media Act with regard to television advertisement and religions, politics and parties etc. Of course, this form of advertisement is submitted to the general Dutch Advertising Code. More specifically Section 52e.2 of the Media Decree prohibits the interruption by advertising messages of programmes, or parts of programmes, relating to religious or other beliefs gatherings, broadcasted on television,.

Section 52e.2 Media Decree

2. Programmes covering gatherings relating to religious or other beliefs shall not be interrupted by advertising messages or teleshop messages.

The STER employs its own (contractual) conditions on television advertising. These conditions provide in Section 2.4 that the STER may refuse advertisements if these advertisements conflict with the interests of STER itself, of the public broadcasting companies or with the interest of other advertisers. Generally speaking STER's policy regarding the acceptance of messages by political parties or other issue groups is reserved.

## **C. Self-Regulation**

### 1. Alcohol

Section 15 TV-Directive prohibits some forms of advertising for alcoholic beverages on television. The Dutch general standards for alcohol advertisement are set down in the Code for Alcoholic Beverages (hereinafter: CAB). This code, part of the Dutch Advertising Code, applies to all media and advertising messages specifically directed at the Netherlands.

Section 15a of the Directive prohibits alcohol advertising directed at or related with minors. The Sections 14-23 of the Code for Alcoholic Beverages contain the rules for alcohol advertising and minors: (a.o.) advertising messages shall not be pointed to minors specifically (Section 14); the messages shall not show minors in combination with drinking alcohol (Section 20) or their idols in combination with drinking alcohol or encouraging the consumption of alcohol (Section 21) and at least will not suggest that drinking alcohol is a sign of maturity (Section 22). The Directive has been literally implemented in these Sections . There are a number of other Sections in the code which are related to advertising messages and minors. Television commercials for alcohol beverages shall not be specifically directed at minors. This means that the commercial shall not be broadcasted just before, during or directly after a programme which interests minors (Section 16 CAB). Alcohol commercials are not allowed at all on the youth channels (Section 17 CAB). The promotion or sampling of alcoholic beverages cannot be pointed at minors (Section 18 and 23 CAB).

#### Section 14 CAB

Advertising for alcoholic beverages shall not be aimed specifically at minors.

#### Section 20 CAB

Advertising messages shall not show minors, or persons who appear to be minors, drinking or encouraging the consumption of alcoholic beverages.

#### Section 21 CAB

Advertising messages shall not show young people's idols drinking or encouraging the consumption of alcohol beverages, if their message is aimed specifically at minors.

#### Section 22 CAB

Advertising messages shall not suggest that the consumption of alcoholic beverages is a sign of maturity and that not drinking is a sign of immaturity.

#### Section 16 CAB

Advertising messages for alcoholic beverages in the form of commercials and printed advertisements shall not be placed, shown or broadcast, as the case may be: on radio and television immediately before or immediately after programmes which are intended for, or are known to be listened to or watched primarily by minors.

According to Section 15b of the Directive, the advertisement shall not associate the consumption of alcohol with enhanced physical performance or to driving. These standards will be found in Section 27, 9 and 11 of the Code for Alcoholic Beverages. Drinking alcohol shall not be associated with driving or riding in any advertising message, unless the commercial contains a specific warning against this danger (for example an informative film) (Section 27). Drinking alcohol shall not be associated with an enhanced physical or psychological performance (Section 9). Also, advertising messages regarding the consumption of alcohol, shall not be positively associated with a performance at work (Section 11).

#### Section 27 CAB

Advertising messages shall not associate drinking and driving or riding. This provision does not apply if, and in so far as the advertising message contains a warning against driving or riding after consuming alcoholic beverages.

#### Section 9 CAB

Advertising messages shall not, in a positive way, associate drinking with physical or psychological performance.

#### Section 11 CAB

Advertising messages shall not, in a positive way, associate drinking with performance at work.

The advertising messages shall not suggest that the consumption of alcohol will contribute to any social or sexual success (Section 15c TV-Directive). This paragraph has been reproduced in Section 12 of the Code for Alcoholic Beverages.

#### Section 12 CAB

Advertising messages shall not create the impression that the consumption of alcoholic beverages can contribute to social or sexual success.

Alcohol advertisement may not claim that the consumption of alcohol has therapeutic qualities or is a stimulant, a sedative or a means of resolving personal conflicts (Section 15d Directive). The Code for Alcoholic Beverages contains the prohibition for advertising messages which associate (in a positive way) alcohol consumption with health (Section 9 CAB). The advertising messages shall not suggest that drinking alcohol is a stimulant, a sedative or a means of resolving personal conflicts (Section 7 CAB).

#### Section 8 CAB

Advertising messages shall not, in a positive way, link the consumption of alcoholic beverages with health.

#### Section 7 CAB

Advertising messages shall not suggest that drinking alcohol is a stimulant, a sedative or a means of resolving personal conflicts.

According to Section 15e of the TV-Directive television, advertising for alcohol shall not encourage immoderate consumption of alcohol or present abstinence or moderation in a negative light. In the Netherlands, these standards are to be found in Section 1 and 2 of the Code for Alcoholic Beverages. The suggestion towards an irresponsible and immoderate consumption of alcohol is prohibited (Section 1 CAB). Besides that, the advertisement shall not give the impression of excessive alcohol consumption (Section 2 CAB).

#### Section 1 CAB

Since the consumption of alcoholic beverages can cause problems, restraint shall be exercised in all messages for such beverages. Any suggestion of the irresponsibility and immoderate consumption of alcohol of any kind shall therefore be avoided in such messages.

#### Section 2 CAB

Advertising messages shall not depict situations where the predominant impression is one of large scale and excessive alcohol consumption.

Section 15f TV-Directive contains a prohibition with regard to all advertising messages on television which place emphasis on high alcoholic content as being a positive quality of the beverages. This paragraph is codified in Section 5 of the Code for Alcoholic Beverages.

## Section 5 CAB

Advertising messages shall not (put, *add. JJCK*) emphasis on high alcoholic content as being a positive quality of the beverages. The advertising messages shall also not suggest that the risks will disappear if the alcoholic content is lower.

Section 33 CAB obliges advertisers to put educative slogans with their advertisements like warnings for excessive use of alcohol or exhortations to responsible consumption.

## 2. Cars

In the Netherlands, broadcasters are bound by norms of self-regulation regarding advertising and cars: the Code for Passenger Cars (CPC). Besides the general section of the Advertising Code, the advertising and other activities to promote the sales of new cars is submitted to this special code. The purpose of this code is to attune advertising messages to government policy on traffic safety, the environment and energy savings. All the advertising messages in this sector shall conform to the Code for Environmental Advertising as well.

### Section 1 CPC

Advertising messages shall not use speed, acceleration and engine power as arguments to promote sales. Any mention of engine power shall be in kilowatts (kW).

### Section 3 CPC

Advertising shall not appeal to, or elicit aggressive, environmentally-unfriendly or unsafe traffic behavior. Terms which commend the car as an environmentally-friendly product shall be avoided in advertising messages. Qualifications concerning contributions to, or the promotion of a clean environment shall under no circumstances be used in an absolute sense.

### Section 4 CPC

The use of terms which commend the car as an absolutely safe product shall be avoided in advertising messages.

## II. Teleshopping

### A. **General regulations**

#### 1. General law on consumer protection applicable to all media

The Directive 97/7, Pb. EG 1997, L 144/19 concerning consumer contracts concluded at a distance has been implemented in the Book seven, section 9A of the Dutch Civil Code. This section among others contains rules for consumer protection with regard to the distance sale. One of the provisions given here is the obligation for the seller to give the buyer information before the agreement is concluded. The commercial intention has to be clear in the given information and it needs to be understandable for the public. All the advertisement that does not relate to an agreement, is not submitted to this law, but to the general law on advertising.

The Dutch Advertising Code contains a provision about advertising directed at children younger than 12 years old (Section 13). The advertising may not mislead the children in anyway about the capacity and qualities of the product involved. The advertising may cause



no mental or physical harm to the children and therefore it has to satisfy four criteria (Section 13 paragraph 2). Paragraph 3 of this Section contains the obligation for broadcasters to meet the requirements given in paragraph 2 and moreover, they must not encourage minors to conclude agreements for purchasing or renting products.

#### Section 13 DAC

1. Advertising which is manifestly aimed wholly or partly at minors – that is, children up to the age of 12 – shall contain no speech, sound or image which in any way could mislead them about the capacity and qualities of the product concerned.
2. Advertising on television shall cause no mental or physical harm to minors and for their protection, shall therefore satisfy the following criteria:  
it shall not encourage minors to buy a particular product by taking advantage of their inexperience or credulity;  
it shall not directly encourage minors to persuade their parents or others to buy advertised products;  
it shall not take advantage of the special confidence which minors have in parents, teachers or others;  
it shall not, without reason, depict minors in dangerous situations.
3. Teleshopping shall meet the requirements stipulated in and shall moreover not encourage minors to conclude agreements for purchasing or renting products.

## 2. Specific audiovisual regulation

### a) Definition

The definition in the Media Act of teleshopping on television appears in Section 1xx of the Media Act. The specific message is characterized as teleshopping when the advertising is done with the intention of delivery and payment of the product or service involved.

#### Section 1 Media Act

In this Act and the provisions based upon it, the terms set out below shall have the following meanings:

xx. *teleshop message*: advertising expression in a television programme consisting of a direct offer to the public with a view to the supply of products or services for payment.

### b) Authorization

#### Public Broadcasting

According to Sections 26.1 and 52.1 and 2 of the Media Act, public broadcasters are not allowed to transmit teleshopping messages. Also the Radio and Television Advertising Foundation is not allowed to transmit teleshopping messages.

#### Section 26 Media Act

1. The Radio and Television Advertising Foundation shall provide a programme service for general broadcasting purposes consisting of advertising messages supplied by third parties, as well as filler items before, after and between the advertising messages.

#### Section 52 Media Act

1. The programmes of establishments which have obtained broadcasting time shall not include any advertising messages unless this is expressly permitted by this Act.
2. Furthermore, the programmes referred to in subsection 1 shall not include any other advertising expressions except where this is unavoidable. Provisions regarding the cases in which an advertising expression in a programme service is to be regarded as unavoidable as well as provisions as to when the presence of advertising expressions in a programme service is permitted may be laid down by Order in Council.

### Commercial Broadcasting

Commercial broadcasters are allowed to transmit advertising in the form of teleshopping messages (Section 52g Media Decree). This is one of the exceptions of the prohibition on surreptitious advertising in Section 52j.1 of the Media Decree. Within the commercial broadcasting area, there are two categories of broadcasters: the broadcasters who transmit advertising spots, teleshopping spots and other sorts of advertising (*general broadcasters*) (Section 52d.2-6 Media Decree) and the broadcasters who transmit only teleshopping spots (*teleshopping channels*) (Section 52g.3 Media Decree).

#### Section 52j Media Decree

1. Without prejudice to the provisions of Section 52g, Section 52h, paragraphs 2 and 3, and Section 52i, paragraph 1, the programme services of commercial broadcasting establishments may not refer to or display any names, trademarks, logos, brand images, products, services or activities of persons, companies or establishments if it can be reasonably assumed that the commercial broadcasting establishment has included such a reference or display either to encourage the public to purchase a certain product or service or to influence public opinion in a positive manner as regards a specific business, branch of industry or establishment in order to promote the sale of products or the use of services.

#### Section 52d Media Decree

2. No more than twenty per cent of the total length of entire programme service provided by a commercial broadcasting establishment on a given day shall consist of teleshop messages.
3. No more than twenty per cent of the total length of the programme service provided by a commercial broadcasting establishment on a given day shall consist of a combination of advertising messages and teleshop messages.
4. No more than twelve minutes per hour of the programme service provided by a commercial broadcasting establishment shall consist of advertising messages or teleshop messages.
5. Advertising messages in television programme services, or teleshop messages shall be broadcast exclusively in blocks which, including the filler items before, after and between the advertising messages, shall be at least two minutes in length.
6. The programme service of a commercial broadcasting establishment shall consist of no more than eight blocks of teleshop messages per day; each block, without interruptions, shall last at least fifteen minutes and the total length shall be no more than three hours per day. Paragraphs 2 to 5 shall not apply to these blocks of teleshop messages.

#### Section 52g Media Decree

3. Notwithstanding Section 52d, paragraphs 2 to 6, a commercial broadcasting establishment shall be permitted to provide a programme service consisting exclusively of teleshop messages.

## c) General rules on content

### General Broadcasters

The existing rules for advertising messages (easy recognizability, interruption regime) are applicable to teleshopping advertisements. The blocks of teleshopping messages must be recognizable as such by optical means and be clearly distinguishable from the other programmes by optical or acoustic means (Section 52c.2 Media Decree). Also the rules for teleshopping messages regarding the interruption of programmes are the same as for normal advertising on television (Section 52e and 52f Media Decree).

#### Section 52c.2 Media Decree

2. The blocks of teleshop messages referred to in Section 52d, paragraph 6 shall, throughout the transmission, be recognizable as such by optical means and be clearly distinguishable from the other programmes by optical or acoustic means.

#### Section 52e Media Decree

1. Programmes of commercial broadcasting establishments shall only be interrupted by advertising messages or teleshop messages if the interruption does not affect the integrity, nature or coherence of the relevant programme or infringe the rights of rights holders.
2. Programmes covering gatherings relating to religious or other beliefs shall not be interrupted by advertising messages or teleshop messages.
3. The following programmes shall be interrupted by advertising messages or teleshop messages only if they last more than thirty minutes:
  - (a) programmes consisting of news or news commentaries;
  - (b) programmes of a religious or spiritual nature other than those referred to in paragraph 2;
  - (c) programmes aimed at minors under the age of twelve.
  - (d) nondramatised documentaries.
4. Films shall be interrupted by advertising messages or teleshop messages only if they last at least forty-five minutes.
5. Without prejudice to paragraph 4, films shall not be interrupted by advertising messages or teleshop messages more frequently than once every forty-five minutes. If a film has a remaining length of more than twenty minutes after two or more full segments of forty-five minutes, the film may be interrupted once more.

#### Section 52f Media Decree

1. Where one television programme is interrupted by more than one advertising or teleshop break, the intervals between them shall be at least twenty minutes.
2. Notwithstanding paragraph 1, television programmes consisting of a report on a sporting event, a stage performance or some other similarly structured performance or event shall only be interrupted by advertising messages or teleshop messages during natural breaks occurring in the performance or event or between separate parts of the performance or event.

### Teleshopping Channels

According to Section 52g.4 of the Media Decree, the content of the advertising messages in teleshopping programmes are submitted to the same rules applicable to normal broadcasting.

#### Section 52g.3-4 Media Decree

3. Notwithstanding Section 52d, paragraphs 2 to 6, a commercial broadcasting establishment shall be permitted to provide a programme service consisting exclusively of teleshop messages.

4. A programme service as referred to in paragraph 3 may include advertising messages, having regard to the provisions applicable to the broadcasting thereof.

#### d) Rules on duration and insertion in and between programmes

##### General Broadcasters

The rules on duration and insertion for teleshopping spots in and between programmes are generally the same as the rules for advertising on television. However, according to Section 52d.6 of the Media Decree, general broadcasters are allowed to transmit a maximum of 8 blocks per day of teleshopping messages which last (per block) at least 15 minutes without interruption. The total duration of these blocks must not exceed 3 hours per day. Besides this, a commercial general broadcaster has the right to broadcast a maximum of 20 percent of his total transmitting time per day for teleshopping messages (Section 52d.2 Media Decree).

#### Section 52d.2/6 Media Decree

2. No more than twenty per cent of the total length of entire programme service provided by a commercial broadcasting establishment on a given day shall consist of teleshop messages.

6. The programme service of a commercial broadcasting establishment shall consist of no more than eight blocks of teleshop messages per day; each block, without interruptions, shall last at least fifteen minutes and the total length shall be no more than three hours per day. Paragraphs 2 to 5 shall not apply to these blocks of teleshop messages.

##### Teleshopping Channels

As described above, teleshopping channels may transmit teleshopping messages 24 hours per day (Section 52g.3 Media Decree). It is allowed to transmit other advertising messages during or between the teleshopping messages as well, but these messages are submitted to the rules for advertising messages in general (easy recognizability, interruption regime) (Section 52g.4 Media Decree).

## **B. Regulation for Specific Products: Law and Self-Regulation**

All the rules on specific products, described above under Part I (advertising), Section B and C are applicable to all sorts of media, including teleshopping on television. The fact that teleshopping includes advertising expressions means that all the rules for specific products as mentioned above (television advertising and specific products) are also applicable to specific products named or shown in teleshopping messages.

There are no specific rules for media advertising in teleshopping messages, or teleshopping messages regarding religions, politics and parties, social issues and groups. Of course, all the advertisements in the teleshopping messages are submitted to the general Dutch Advertising Code. More specifically, Section 52e.2 Media Decree contains the prohibition on the interruption by teleshopping messages of programmes, or parts of programmes, relating to gatherings on religious or other beliefs, that are broadcasted on television.

### **III. Sponsorship**

The TV Directive contains the following rules on sponsorship.

#### Section 1.e

(e). 'sponsorship' means any contribution made by a public or private undertaking not engaged in television broadcasting activities or in the production of audio-visual works, to the financing of television programmes with a view to promoting its name, its trade mark, its image, its activities or its products;

#### Section 17

1. Sponsored television programmes shall meet the following requirements:

(a) 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;

(b) they must be clearly identified as such by the name and/or logo of the sponsor at the beginning and/or the end of the programmes;

(c) they 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.

2. Television programmes may not be sponsored by undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products.

3. Sponsorship of television programmes by undertakings whose activities include the manufacture or sale of medicinal products and medical treatment may promote the name or the image of the undertaking but may not promote specific medicinal products or medical treatments available only on prescription in the Member State within whose jurisdiction the broadcaster falls.

4. News and current affairs programmes may not be sponsored.

#### **A. General regulation**

##### 1. General law on consumer protection applicable to all media

There is no specific provision under Dutch law on consumer protection regarding sponsoring in the media. The general rules on misleading advertising and on the identification of advertising may be applicable.

##### 2. Specific audiovisual regulation

###### a) Definition

According to the Media Act, sponsorship of a programme means the financial or other contribution towards the programme, by a government institution or a private company who is not involved in broadcasting or in the making of audiovisual productions (the sponsor), with a view facilitating the broadcasting of the programme (Section 1.11-11n).

By the term ‘government institution’ is meant an institution which is not directly entrusted with governmental responsibilities. Note therefore that the regulations on sponsorship in principle are not applicable to governmental agencies like a Department of Education, Culture & Science or a Department of Health, Welfare and Sports and the like. As a matter of fact, these bodies do contribute to the making of TV-productions on a regular basis. The Department of General Affairs however has issued guidelines for governmental bodies that act as sponsors for the making of TV-productions. Moreover, the Media Act itself declares in Section 52b.4 that the rules on information to the public and the ban on product placement in sponsored programmes are also applicable to government agencies.

#### Section 1 Media Act

In this Act and the provisions based upon it, the terms set out below shall have the following meanings:

(ll) sponsorship of a programme: the provision of financial or other contributions by a government institution or private company not normally involved in broadcasting activities or in the making of audio-visual productions, towards the production or purchase of a programme for the purpose of facilitating or enabling its broadcast;

(mm) sponsor: the public or private undertaking which sponsors a programme;

(nn) sponsor's contribution: the contribution provided by a sponsor;

#### Section 52b.4 Media Act

4. Subsections 1 to 3 shall apply *mutatis mutandis* to a programme for which a government agency or an organisation other than those referred to in section 1 (ll) has made a financial or other contribution for the making or purchase of that programme, in order to promote or make possible its transmission as a programme.

#### b) Authorization

##### Public Broadcasting

The sponsor regime within the public broadcasting is codified in Section 52a of the Media Act. Sponsoring of programmes in public broadcasting is not allowed (paragraph 1), unless it concerns programmes of a cultural nature, sporting events or a report of events for charity purposes (paragraph 2). News programmes or programmes about current affairs or political information shall not be sponsored at all, like programmes which are directed specifically at minors (paragraph 3).

#### Section 52a Media Act

1. Programmes of establishments which have obtained broadcasting time shall not be sponsored.

2. Subsection 1 shall not apply to:

a. programmes of a cultural nature;

b. programmes consisting of a report on or coverage of one or more sporting events or sporting competitions;

c. programmes consisting of a report on or coverage of events for charity purposes.

3. Programmes as referred to in subsection 2 shall not be sponsored if:

a. they consist wholly or in part of news, current affairs or political information; or

b. are specifically aimed at minors under the age of twelve.

Authorization for sponsoring of public television programmes is subject to rules which are aimed at a direct relationship (and therefore a direct responsibility) between the sponsor and the public broadcasting company. Furthermore the board of directors of the Dutch (public) Broadcasting Foundation is competent to consider the compliance of a sponsorship agreement with the common interests of Dutch public broadcasting.

According to the ban on sponsorship by undertakings the principal activity of which is the manufacture or sale of cigarettes and other tobacco products, the Media Act declares in Section 56a.5 that public broadcasting organisations may not accept sponsorship contributions from the said undertakings. The acceptance of financial contributions by other undertakings, using tobacco trademarks and the like, so-called indirect advertising or parallel use of a tobacco trademark, is also prohibited.

#### Section 56a

1. Without prejudice to section 52a, subsections 1 and 3, establishments which have obtained broadcasting time may only stipulate or accept sponsorship contributions directly from the sponsor and by means of a written agreement.
2. Establishments which have obtained national broadcasting time shall send a copy of any agreement as referred to in subsection 1 to the board of directors within one week of its conclusion and, in any event, before the planned transmission date of the programme to which the agreement relates.
3. If the board of directors considers that such an agreement conflicts with the common interests of national broadcasting, and the establishment which has submitted the agreement is informed in writing of this finding by the board of directors within two weeks of it having received a copy of the agreement and, in any event, before the planned transmission date of the programme to which the agreement relates, the establishment in question shall not include the relevant programme in its programme service unless the agreement is dissolved or amended.
4. If such an agreement is amended, the provisions of subsections 2 and 3 shall apply *mutatis mutandis*.
5. Establishments which have obtained broadcasting time shall not stipulate or accept any sponsorship contributions from persons, companies or organisations:
  - (a) whose main activities include the manufacture or sale of cigarettes or other tobacco products; or
  - (b) that use names, trademarks, logos or brand images which are also used by persons, companies or organisations as referred to at (a) or which bear such a strong resemblance to the said names, trademarks, logos or brand images as to make it reasonable to expect that the public will get the impression that the name, trade mark, logo or brand image in question is also that of a person, company or organisation as referred to at (a).
6. If a sponsored programme has been purchased abroad and has already been broadcast as a programme service to a foreign audience, this section shall apply only in so far as the sponsorship money has been furnished to facilitate the purchase of that programme by the establishment which has obtained broadcasting time.

#### Commercial Broadcasting

The television programmes of commercials broadcasters shall only be sponsored if the broadcaster has drawn up a programme statute in which the editorial independence of the employees involved in this programme are protected against interference by sponsors (Section 52h.1 Media Decree).

#### Section 52h Media Decree

Programmes of a commercial broadcasting establishment shall be sponsored only if that establishment has drawn up a programme statute which in any event protects the editorial independence of those of their employees charged with the editorial aspects of the programme services against interference by sponsors.

#### c) General rules on content

##### Public Broadcasting

The mention of the sponsor(s) is very strictly regulated in the Media Act and supplemented by rules from the Media Authority (Commissariaat voor de Media). It has to be purely informative. This is one of the exceptions on the prohibition for public broadcasters to transmit advertising expressions (Section 52.2 Media Act). The purpose of the mentioning of the name(s) is to inform the viewers of the programme about the sponsoring. The TV-Directive has another basis for the mentioning of the sponsors: because of the financial or other contribution by the sponsor, the sponsor receives a good exposure.

Besides this, every public broadcaster is responsible for the editorial independence of the employees of their programmes and they may not be influenced by the interests of third parties (Section 64b.1 Media Act).

#### Section 52 Media Act

1. The programmes of establishments which have obtained broadcasting time shall not include any advertising messages unless this is expressly permitted by this Act.
2. Furthermore, the programmes referred to in subsection 1 shall not include any other advertising expressions except where this is unavoidable. Provisions regarding the cases in which an advertising expression in a programme service is to be regarded as unavoidable as well as provisions as to when the presence of advertising expressions in a programme service is permitted may be laid down by Order in Council.

#### Section 64b Media Act

1. Without prejudice to Section 64, subsection 1 (d), establishments which have obtained broadcasting time shall draw up a programme service statute which must in any event safeguard the editorial independence of those of their employees charged with the editorial aspects of the programmes against interference by sponsors.
2. This Section shall not apply to government agencies, religious or other spiritual organizations and political parties.

##### \* Place

Public broadcasters are obliged to mention the names of the sponsor(s) at the beginning or at the end of the programme (Section 52b.1 Media Act). Both at the beginning and at the end of the programme is also possible. It is important to be aware of the fact that the Media Act uses the word *programme* instead of *programme service* (Section 1 (f and g) Media Act) when it comes to sponsoring, because a programme in the Media Act means a part of the total programme service of a broadcaster (see before under Section 1 (ll, mm and nn) Media Act).



In this report we refer to sponsoring of a programme, which actually means a part of the complete programme. We refer to our remarks on the term “programme”, mentioned above.

\*Sponsoring of events and TV reporting

It is not allowed to mention the sponsor(s) during the programme, unless there is a report of an event in the programme (which does not cover the whole programme) and this event only is sponsored. The sponsoring of the event can be mentioned at the beginning or at the end of the report of the event (Section 31.1 Media Decree). This exception is not allowed if there is any relation between the sponsoring and tobacco products (paragraph 2). The broadcasters are not obliged to mention the sponsor(s) in an announcement of the programme.

Section 1.f-g Media Act

(f) programme service: an electronic product with visual or audio content intended to be broadcast to and to be received by the general public or a part thereof, with the exception of data services, services available only on individual demand, and other interactive services;

(g) programme: a clearly distinct and as such recognizable part of a programme service

Section 52b.1 Media Act

1. Notwithstanding the first sentence of Section 52, subsection 2, the names of all the sponsors of a programme of an establishment which has obtained broadcasting time shall be mentioned either at the beginning or end of the programme in question for the information of the public.

Section 31 Media Decree

1. A television programme covering or showing an event which is not primarily designed to be broadcast as a programme service may contain a maximum of five seconds of avoidable advertising expressions at the beginning or end of the programme, consisting of the names, trademarks, logos or brand images of persons, companies or establishments which have made a significant contribution to the realization of the event, stipulated by written agreement. The reference or display shall be such that it is not an advertising message as defined in Section 1 (kk) of the Media Act. If the programme is intended for television broadcasting and consists of a report on or coverage of an event that is produced by or for an establishment which has been allocated broadcasting time and that is not primarily designed to be broadcast as a programme service, the reference or display shall consist of static images only.

2. Paragraph 1 shall not apply to persons, companies or establishments:

(a) whose main activities involve the manufacture or sale of cigarettes or other tobacco products; or

(b) that use names, trademarks, logos or brand images which are also used by persons, companies or establishments as referred to at (a), or which bear such a strong resemblance to any of these items as to make it reasonable to expect that the public will gain the impression that the name, trademark, logo or brand image involved is also that of a person, company or establishment as referred to at (a).

\*Elements

The appearance of the sponsor may include the shape of his name, logo, brand or trade-mark. A static image is allowed, unless it appears in the introductory or final credits. The appearance may not fill the whole screen or include an advertising message (Section 52b.2 Media Act). If the sponsor cannot be identified sufficiently by the appearance, it is possible to mention the

main activity and/or the domicile. Additional or fewer elements in the appearance are not allowed, because then it will be either not informative or too commercial.

#### Section 52b.2 Media Act

2. In the case of sponsored television programmes, the names of the sponsors shall appear for a maximum of five seconds. The appearance may be in the shape of a name, trade-mark, logo or image brand. In so far as this does not take place in the introductory or final credits, only a static image may be used. The appearance shall not fill the whole screen and shall be shaped in such a way that it does not fulfil the criteria of the definition of advertising messages as referred to in Section 1 (kk).

The appearance of the sponsor(s) shall not fill the whole screen (Section 52b.2 Media Act), which means that the mention of the sponsor(s) (including the main activity and domicile) shall not be the only appearance on the screen, otherwise the public will not be aware of the sponsorship related to the programme and they will think that it is an advertising message. In practice the broadcaster has to use a line as: “This programme has been sponsored by .....” on a billboard or on the final credits). If the sponsor is mentioned at the beginning of the programme, this announcement shall appear on a billboard.

The appearance of the sponsor(s) on television has to be either on a billboard or on the final credits. The billboard has to stand still on the screen (Section 52b.2 Media Act), otherwise the appearance will be too commercial.

The last element is the prohibition of an advertising message in the appearance of the sponsor(s) on the screen (Section 52b.2 and Section 1 (kk) Media Act). In practice, this means that there shall be no slogans and advertising tunes within the appearance, and that the product or service of the sponsor(s) will not be shown in figure on the screen.

#### Commercial Broadcasting

The rules for sponsoring in Section 52h.2 are more severe than the interpretation of the European Court of Justice of Section 17.1.b of the TV-Directive. It is not allowed to mention the sponsor(s) during the programme, unless there's a report of an event in the programme (which does not cover the whole programme) and this event only is sponsored. The sponsoring of the event can be mentioned at the beginning or at the end of the report of the event (Section 52i.1 Media Decree). This exception is not allowed if there is any relation between the sponsoring and tobacco products (paragraph 2). The broadcasters are not obliged to mention the sponsor(s) in an announcement of the programme.

#### Section 52h.2 Media Decree

2. The names of all the sponsors shall be mentioned by means of a name, trademark, logo or brand image either at the beginning or end of the sponsored programme for the information of the public. The names of sponsors may not be presented in such a way as to meet the definition of an advertising message laid down in Section 1 (kk) of the Media Act.

#### Section 71f Media Act

Without prejudice to the provisions laid down in or pursuant to this Act, each commercial broadcasting establishment shall determine, and be responsible for, the form and contents of its programme service.

#### Section 52i Media Decree

1. A programme of a commercial broadcasting establishment covering or showing an event as referred to in

Section 26 (a) and not primarily intended to be broadcast as a programme service may refer to or display the

names, trademarks, logos or brand images of persons, companies or establishments which have made a

significant financial or other contribution to the realization of the event, either at the beginning or the end of the

programme. The reference or display shall be such that it does not meet the definition of an advertising message

laid down in Section 1 (kk) of the Media Act.

2. Paragraph 1 shall not apply to persons, companies or establishments:

(a) whose main activities involve the manufacture or sale of cigarettes or other tobacco products; or

(b) that use names, trademarks, logos or brand images which are also used by persons, companies or

establishments as referred to at (a), or which bear such a strong resemblance to any of these items as to

make it reasonable to expect that the public will gain the impression that the name, trademark, logo or

brand image involved is also that of a person, company or establishment as referred to at (a).

#### \*Place

If a programme is being sponsored, the sponsor has to be mentioned at the beginning or at the end of the programme (Section 52h.2 Media Decree). Both at the beginning and at the end of the programme is also possible.

#### Section 52h.2 Media Decree

2. The names of all the sponsors shall be mentioned by means of a name, trademark, logo or brand image either at the beginning or end of the sponsored programme for the information of the public. The names of sponsors may not be presented in such a way as to meet the definition of an advertising message laid down in Section 1 (kk) of the Media Act.

#### \*Elements

The appearance of the sponsor(s) shall include the shape of his name, logo, brand or trademark (Section 52h.2 Media Decree). If the sponsor cannot be identified sufficiently by the appearance, it is possible to mention the main activity and/or the domicile. This last rule is codified in sections 9 and 10 of a policy guideline of the 'Commissariaat voor de Media' concerning sponsoring of programmes of commercial broadcasters. Additional or fewer elements in the appearance are not allowed, because then it will be either not informative or too commercial.

#### Section 52h.2 Media Decree

2. The names of all the sponsors shall be mentioned by means of a name, trademark, logo or brand image either at the beginning or end of the sponsored programme for the information of

the public. The names of sponsors may not be presented in such a way as to meet the definition of an advertising message laid down in Section 1 (kk) of the Media Act.

In practice, the broadcaster has to use a line as: “This programme has been sponsored by .....” on a billboard or on the final credits. If the sponsor will be mentioned at the beginning of the programme, it must appear on a billboard.

The appearance of the sponsor(s) on television has to be either on a billboard (a notice board) or on the final titles.

The names of sponsors may not be presented in such a way as to meet the definition of an advertising message laid down in Section 1 (kk) of the Media Act (Section 52h.2 Media Decree and Section 1kk Media Act). In practice this means that there shall be no slogans and advertising tunes within the appearance, and that the product or service of the sponsor(s) will not be shown in figure on the screen.

#### d) Rules on duration and insertion in and between programmes

##### Public Broadcasters

The appearance of a sponsor may last not longer than 5 seconds, even if there is more than one sponsor (Section 52b.2 Media Act).

##### Section 52b.2 Media Act

2. In the case of sponsored television programmes, the names of the sponsors shall appear for a maximum of five seconds. The appearance may be in the shape of a name, trade-mark, logo or image brand. In so far as this does not take place in the introductory or final credits, only a static image may be used. The appearance shall not fill the whole screen and shall be shaped in such a way that it does not fulfil the criteria of the definition of advertising messages as referred to in section 1 (kk).

##### Commercial Broadcasting

The appearance of the sponsor(s) by a commercial broadcasting enterprise has no legal maximum duration. The appearance lasts as long as it takes to inform the public properly about the sponsoring.

## **B. Regulation for Specific Products**

### 1. Alcohol

There are no specific rules regarding the sponsoring of television programmes by companies which manufacture alcoholic beverages in the Media Act and in the Media Decree. However, there is self-regulation which will be discussed under paragraph C.

### 2. Tobacco

##### Public Broadcasting

According to the ban on sponsorship by undertakings the principal activity of which is the manufacture or sale of cigarettes and other tobacco products, the Media Act declares in Section 56(a) subsection 5 that public broadcasting organisations may not accept sponsor contributions from said undertakings. The acceptance of financial contributions by other undertakings, using tobacco trademarks and the like, so-called indirect advertising or parallel use of a tobacco trademark, is also prohibited.

As described before under paragraph A, the public broadcasters are not allowed to mention sponsor(s) related to tobacco products before or after reporting an event in a programme (Section 31.2 Media Decree).

### Commercial Broadcasting

Commercial broadcasters are not allowed to accept any financial contribution from producers, sellers or others relating to cigarettes or other tobacco products (Section 52h.4 Media Decree). Moreover, the acceptance of financial contributions by other undertakings, using tobacco trademarks and the like, so-called indirect advertising or parallel use of a tobacco trademark, is also prohibited.

#### Section 52h.4 Media Decree

4. Commercial broadcasting establishments shall not stipulate or accept any sponsorship contributions from persons, companies or establishments:

whose main activities involve the manufacture or sale of cigarettes or other tobacco products;  
(...)

(c) that use names, trade-marks, logos or brand images which are also used by the persons, companies or establishments as described in (a) and (b) above, or which bear such a strong resemblance to any of these items as to make it reasonable to expect that the public will gain the impression that the name, trademark, logo or brand image involved is also that of a person, company or establishment as described in (a) and (b) above.

As described before under paragraph A, commercial broadcasters are not allowed to mention sponsorship(s) related to tobacco products before or after the reporting of events in a programme (Section 52i.2 Media Decree).

#### Section 52h Media Decree

4. Commercial broadcasting establishments shall not stipulate or accept any sponsorship contributions from

persons, companies or establishments:

(a) whose main activities involve the manufacture or sale of cigarettes or other tobacco products; or

(b) that use names, trademarks, logos or brand images which are also used by persons, companies or establishments as referred to at (a), or which bear such a strong resemblance to any of these items as to make it reasonable to expect that the public will gain the impression that the name, trademark, logo or brand image involved is also that of a person, company or establishment as referred to at (a).

### 3. Medicines

As a result of the deletion in the revised TV-Directive of the prohibition of sponsoring by pharmaceutical companies, this prohibition has also been deleted in the Media Act and the Media Decree for both public and commercial broadcasters.

#### 4. Cars

There are no specific rules regarding the sponsoring by car companies on television.

#### 5. Media

Article 1 (ll) defines sponsorship of a programme as “the provision of financial or other contributions by a government institution or private company **not normally involved in broadcasting activities or in the making of audiovisual productions**, towards the production of purchase of a programme for the purpose of facilitating or enabling its broadcast”.

#### 6. Religions, politics and parties, social issues and groups

The programmes including news, current affairs and politics and parties shall not be sponsored within both the public and the commercial broadcasting (Section 52a.3 Media Act and Section 52h.5 Media Decree).

##### Section 52a.3 Media Act

3. Programmes as referred to in subsection 2 shall not be sponsored if:

- (a) they consist wholly or in part of news, current affairs or political information; or
- (b) are specifically aimed at minors under the age of twelve.

##### Section 52h.5 Media Decree

5. Programmes of commercial broadcasting establishments which have obtained permission shall not be sponsored if they consist of news, current affairs or political information.

### C. **Self-Regulation**

#### 1. Alcohol

Section 30 of the Code for Alcoholic Beverages (CAB) contains a provision regarding the sponsoring of sports and events. Regarding the sponsoring of sports and other events, all given provisions in this Code are applicable. It is not prohibited to use the name of an alcoholic beverage for an event.

##### Section 30 CAB

When sponsoring sports and events, all given provisions in this Code are applicable. It's allowed to name an event after the trademark of an alcoholic beverage.

#### 2. Tobacco and event sponsoring

According to the Code for Tobacco Products (CTP), sportsponsoring is prohibited concerning certain sports mentioned in an annex to the Code. This includes the sponsoring activities around and nearby the area where the sports are being practiced. There is one exception: the

race circuits in Zandvoort and Assen (Section 21.1 CTP). If the sponsoring concerns other sports than those mentioned in the annex, it is allowed to use advertising messages (use of the trademark itself or of another characteristic element), unless the message relates to the use of tobacco with any practice of sport (Section 21.2 CTP). The tobacco industry shall refrain from using a medium for advertising expressions when it is not known if that medium is related to the sports mentioned in the annex (Section 22 CTP).

#### Section 21 CTP

3. If the industry sponsors the sports referred to in Annex 4, no advertising messages are permitted except those relating to events at the racetracks of Zandvoort and Assen. With the exception of the above racetracks, this prohibition also applies to grounds or places where the sports referred to in Annex 4 are played.
4. If the industry sponsors sports other than those referred to in Annex 4, advertising messages shall be permitted only in so far as they establish no connection between the use of tobacco products and the playing of these sports.

#### Section 22 CTP

With respect to advertising messages, the industry shall refrain from using media about which it is not known whether they will be devoted primarily to the sports referred to in Annex 4.

#### 3. Other

With regard to sponsoring in combination with medicines, cars, media, religions and politic related issues, there is no specific self-regulation.

### **IV. Self-promotion**

#### *Public Broadcasting*

Public broadcasters are, in principle, not allowed to advertise for themselves (Section 52.4 Media Act). Under certain conditions, public broadcasters may promote themselves. This sort of advertisement is divided in 1) programme- and broadcasting promotions, 2) messages to attract new members and 3) other sideline activities. All three sorts of promotion can also be transmitted by the Radio and Television Advertisement Foundation (STER).

The programme- and broadcasting promotions are television spots including advertising regarding the programmes of the broadcaster involved or other broadcasters. The promotions are divided in categories: evening view; image spots; spots which refer to a certain programme (directly after the programme); promo's (recommendations) and cross-promo's (referring to programmes of another public broadcaster). These promotions are considered as advertising messages under the Media Act.

#### Section 52.1/4 Media Act

1. The programmes of establishments which have obtained broadcasting time shall not include any advertising messages unless this is expressly permitted by this Act.
4. Without the consent of the Media Authority, programmes of establishments which have obtained broadcasting time shall not include any messages in connection with attracting new members, association activities or any sideline activities.

#### Section 55 Media Act

1. Without prejudice to the provisions of Sections 26, 43a, 52 and 52b, establishments which have obtained broadcasting time shall not use any of their activities in the service of realizing profits for third parties. If so requested, they shall prove this is the case to the satisfaction of the Media Authority.

The messages regarding the broadcasting association and the messages to attract new members are of two sorts. Activities regarding the association may include the organisation of meetings and the release of a magazine. The release of a magazine is allowed if it is directed only at members and includes information regarding the association itself or its policy. This sort of promotion is allowed if The Media Authority gives her permission (Section 52.4 Media Act). The messages regarding the attraction of new members are allowed (with permission of The Media Authority) if they are directed only to members, under the conditions that

- a new membership lasts for at least 1 year and financial contribution has to be paid;
- the message does not include any indication of economic profit within the membership;
- the message will take place once every commercial break between different programmes;
- the message shall not last longer than 30 seconds and
- the total duration will last no longer than 24 minutes per 3 months and no longer than 2 minutes every day per transmitting channel.

Messages regarding other sideline activities require a permission by the Media Authority (Section 52.4 Media Act). In principle, The Media Authority does not give permission, so the public broadcasters have to pay the radio and Television Advertising Foundation for this transmission. The permission in Section 52.4 is an exception.

### Commercial broadcasting

According to Section 52g.1 of the Media Decree, commercial broadcasters are allowed to transmit self-promotion and advertising for themselves. These messages are considered as advertising messages as in the Media Act.

#### Section 52g Media Decree

1. Notwithstanding Section 52d, paragraphs 1, 4 and 5, a commercial broadcasting establishment shall be permitted to provide a television programme service consisting exclusively of advertising messages transmitted for self-promotion purposes.
2. A programme service as referred to in paragraph 1 may include other advertising messages, having regard to the provisions applicable to the broadcasting thereof.

#### Section 52d.1/4-5 Media Decree

1. No more than fifteen per cent of the total length of the entire programme service provided by a commercial broadcasting establishment on a given day shall consist of advertising messages.
4. No more than twelve minutes per hour of the programme service provided by a commercial broadcasting establishment shall consist of advertising messages or teleshop messages.
5. Advertising messages in television programme services, or teleshop messages shall be broadcast exclusively in blocks which, including the filler items before, after and between the advertising messages, shall be at least two minutes in length.



## V. Other promotion techniques

### ➤ Product Placement c.a.

Public broadcasters are not allowed to name or show the products or services of the sponsor(s) (Section 52b.3 Media Act). This kind of *in-script-sponsoring* is prohibited.

#### Section 52b.3 Media Act

3. None of the sponsor's products or services may be mentioned or shown in a sponsored programme if the sponsor's sponsorship consists of a financial contribution.

An exception of the general prohibition on other advertising expressions (than advertising messages) by public broadcasters appears in Section 52.2 of the Media Act and Section 27 of the Media Decree. Unavoidable advertising messages are allowed if they fit the normal street scene and do not last longer than a few seconds. The Media Authority keeps a very strict policy when it comes to this issue. Dramaturgical need for instance could not be argued as a defence.

#### Section 52.2 Media Act

2. Furthermore, the programmes referred to in subsection 1 shall not include any other advertising expressions except where this is unavoidable. Provisions regarding the cases in which an advertising expression in a programme service is to be regarded as unavoidable as well as provisions as to when the presence of advertising expressions in a programme service is permitted may be laid down by Order in Council.

#### Section 27 Media Decree

Advertising expressions which form part of the normal street scene and which appear for several seconds in an individual programme without premeditation and without emphasis being placed on them shall be regarded as unavoidable.

There are also advertising messages which are avoidable, but allowed (Section 28 of the Media Decree). Naming or showing the products or services of a company is allowed if it fits the context of the programme, does not damage the formula or the integrity of the programme, it is not exaggerated and the products or services are not specifically recommended. Paragraph 2 makes an exception for minors, unless the programme is informative for the youth.

#### Section 28 Media Decree

1. Programmes of an informative and educational nature may contain avoidable advertising expressions that involve displaying or referring to a product or service, provided that:

- (a) such a display or reference is in keeping with the context of the programme service;
- (b) such a display or reference does not affect the formula or integrity of the programme service;
- (c) such a display or reference does not take place in an exaggerated or excessive way;
- (d) the product or service is not specifically recommended.

2. Paragraph 1 shall apply *mutatis mutandis* to other programmes, except for programmes which are predominantly targeted at minors under the age of twelve.

In informative and educational programme's it is allowed to name the trademarks, logo's or brand images of companies or their products or services (Section 29.1 of the Media Decree).

The programmes are submitted to the same conditions as mentioned in Section 28.1 of the Media Decree. Also the announcements of books, video tapes, cd's etc. are permitted in informative and educational programmes (Section 29.2 of the Media Decree).

#### Section 29 Media Decree

1. Without prejudice to Section 28, programmes of an informative or educational nature may contain avoidable advertising expressions that involve displaying or referring to names, trademarks, logos or brand images of certain products or services or to names of companies or establishments. Section 28, paragraph 1 (a to d) shall apply *mutatis mutandis* to these types of advertising expressions.

2. Notwithstanding Section 28, paragraph 1 (d), programmes of an informative or educational nature may contain avoidable advertising expressions consisting of announcements and reviews of books, video tapes, compact discs and similar cultural products, as well as of plays, musical performances and films, shows and similar events of an artistic nature.

According to Section 52h.3 of the Media Decree, commercial broadcasters are allowed to name or show the products or services of the sponsor(s). The 'Commissariaat voor de Media' clarifies forementioned Section of the Media Decree in section 11 of the policyguideline concerning sponsoring of programmes of commercial broadcasters.

#### Section 52h.3 Media Decree

3. A sponsored programme may refer to or display products or services of persons, companies or establishments, provided that the public is not, by way of specific recommendations or otherwise, encouraged to purchase or hire such products or to purchase such services.

### **A. Co-production or co-financing with promotional intent**

Co-financing without co-production is the same as sponsoring and will therefore be treated the same. Co-production with a promotional intent raises quite another problem, because the definition of sponsoring is restricted to sponsors which are not engaged in television broadcasting activities or in the production of audio-visual works. Therefore, the rules on sponsoring are not applicable to the co-financing of programmes by co-producers. Nevertheless, the rules on surreptitious advertising and product placement could offer sufficient means to suppress possible unwanted publicity for the co-producer's company. Of course, the rules on authorship and copyright remain fully in force, especially the moral rights on the basis of which the co-producer is legitimised to have his credits mentioned. This however presupposes a real commitment as a producer, that is a person engaged in television broadcasting or in the production of audiovisual works. The Dutch Media Act lacks a definition in this respect; the TV-Directive also, for that matter. Dutch law only contains a definition with regard to copyright law (Section 45a Dutch Copyright Act).

### **B. Merchandising**

One may distinguish between direct and indirect merchandising. Direct merchandising related to the sale of the copyrights on television-programmes to third (broadcasting) parties is allowed and there are no specific provisions concerning this form of merchandising. Indirect merchandising relates to the secondary exploitation of broadcasting time and programme's,

programme names and other popular spin-offs of primary broadcasting activities. With these form of merchandising activities, publicity for third parties could go hand in hand.

➤ **Logo-Licensing**

A Dutch case, the *Belfleur* case (CvdM 20 August 1990, in: Jan J.C. Kabel and Margreet M. Reijntjes (eds.), *Publieke Omroep en Commercie, Adviezen en uitspraken 1988-1992*, Otto Cramwinckel: Amsterdam 1993, p. 236-238), has been judged by the *Commissariaat voor de Media* (The Dutch Media Authority). The trade mark 'Belfleur', being the name of a television programme by the public broadcasting organisation TROS, had been licensed in return for payment to a commercial publisher who edited a magazine, called Belfleur also, and containing the same subjects as the television programme. By broadcasting the programme Belfleur, a continuous promoting of the magazine with the same name resulted. This construction was considered by the Dutch Media Authority as a breach of the ban on using public broadcasting activities for realising third party profit (Section 55 Media Act).

**VI. New advertising techniques**

➤ **Split screen techniques**

Split screen techniques are not used in the Netherlands. There is one case known in which a broadcaster requested the Commissariaat to allow the use of the split screen technique in a advertising block. During the advertising block the advertiser wanted to show (in a small frame) a relevant part of a programme. In his reaction the Commissariaat pointed on the blurring of the distinction between programmes and advertising blocks (Section 50.8 of the Media Act). The showing of a part of a programme in an advertising block is also contrary to Section 52c of the Media Decree, relating to commercial broadcasters, which states:

1. Advertising messages or teleshop messages included in the programme service provided by a commercial broadcasting establishment shall be recognisable as such and shall be clearly distinguishable from the other programmes by optical or acoustic means. Subliminal techniques shall not be used.
2. The blocks of teleshop messages referred to in article 52d, paragraph 6 shall, throughout the transmission, be recognisable as such by optical means and be clearly distinguishable from the other programmes by optical or acoustic means.

Section 50.8 Media Act (public broadcasters)

8. The Radio and Television Advertising Foundation shall use its broadcasting time to provide a programme service consisting of advertising messages supplied by third parties. A maximum of one third of the Radio and Television Advertising Foundation's broadcasting time may be used for filler items before, after and between the advertising messages. The Radio and Television Advertising Foundation's programme service shall be recognisable as such and must be clearly distinguishable from the programmes of the other establishments which have obtained broadcasting time. Subliminal techniques shall not be used in the Radio and Television Advertising Foundation's programme.

The use of the split screen technique therefore is prohibited on ground of Section 50 (subsection 8) of the Media Act and section 52c of the Media Decree.

➤ **Interactive advertising**

Interactive advertising is not subjected to specific rules, other than those relating to surreptitious advertising, sponsoring and teleshopping. iTV Teleshopping in combination with internet.

➤ **Virtual advertising**

Virtual advertising is as yet not used by broadcasters under jurisdiction of the Netherlands. The Media Act and Media Decree contain no specific rules on virtual advertising. Virtual advertising should be considered as advertising. So all the directions in the Media Act and Media Decree concerning advertising also apply to virtual advertising. According to Section 48 of the Media Act, the broadcasting organisation is responsible for the form and the content of its programmes, so the organisation would be also responsible for the insertion of (virtual) advertising messages. The rules on the insertion of advertising messages between and during programmes are applicable.

Section 48 Media Act

Without prejudice to the provisions laid down by or pursuant to the law, each establishment which has obtained broadcasting time shall determine the form and content of its programme service and be responsible for everything broadcast during its broadcasting time.

➤ **Other advertising techniques**

A recent case, CvdM/ZeeLandNet-Delta TV (not yet published), shows how innovating combinations of Internet and television are hampered by the existing broadcasting law. ZeelandNet, a cable company, offers a library of (commercial) streaming video content on its website. Delta TV, a subsidiary company of ZeelandNet, broadcasts an unabridged reproduction of the streaming video content on its (commercial) TV-channel. The content consists of commercial messages about the services of ZeelandNet itself but also about restaurants in the Zeeland area and about shopping possibilities and the like. Delta TV does not claim any editorial responsibility; their activities restrict themselves to the mere passing on of the website content. Of course, this kind of media innovation breaches every rule on advertising and sponsoring which could be imagined and could not be framed in the existing model of broadcasting law.

## RADIO

The rules on television advertising and sponsoring as described above are also applicable to radio. Section 76a of the Media Act provided for an advertising regulation for Radio Nederland Wereldomroep (Radio The Netherlands, World Broadcasting Organisation), a radio-programme service directed to Dutch people living or travelling abroad.

### Section 76a Media Act

1. The programme services of Radio Netherlands shall be allowed to include programmes of the Radio and Television Advertising Foundation consisting of advertising messages supplied by third parties as well as filler items before, after and between them.
2. The provisions laid down by or pursuant to section 39b, 41a and 50, subsection 8 regarding the Radio and Television Advertising Foundation's broadcasting time, shall apply *mutatis mutandis* to the inclusion of the programmes referred to in the preceding subsection in the programme services of Radio Netherlands.

## CINEMA

Besides the general rules pertaining to all advertising media, there are some specific rules relating to tobacco advertising and the advertising for alcoholic beverages. Advertising for alcoholic beverages must carry an educational slogan, containing a warning against excessive use or an exhortation for responsible consumption (Section 34 CAB). Institutional advertising which is directed to the forming of public opinion on the use of tobacco products shall not be shown in cinema theatres between 06.00-20.00 hours (Section 5.3 Advertising Code for Tobacco products).

## INTERNET

As yet no specific rules exist for advertising on the Internet.

Concerning unsolicited direct marketing by e-mail, the situation is as follows:

### **A. General**

Sending of e mails is, in principle, not subject to any legal restrictions. Exceptions:

1. Par. 435<sup>e</sup> Criminal Code (Wetboek van Strafrecht) prohibits promotional, public use of the *telephone*, if products or services are offered, suggesting that the proceeds will be destined for charitable purposes. Given the *nullum crimen sine previa lege poenale* principle, this provision will not be applicable to e mail. Discussion about recent promotional e mail actions for charitable purposes in the Netherlands does confirm this principle.
2. Par. 11.7, Section 1 and 2 of the Telecommunications Act (*Telecommunicatiewet*) includes rules on so-called “cold calling”. *Automated* calls are only allowed after the prior approval of the addressee (opt in). The object of Par. 11.7. relates to commercial and non-commercial (political, charitable) purposes. Automatic number generators however nowadays do not longer imply the use of automated messages, but instead connect possible respondents to personal messages by individual telemarketers. It is therefore doubted whether this provision has any significance at all.<sup>1</sup> As far as e mail is concerned, I am not acquainted with the existence of automated e mail address generators and I doubt whether a system like that is technically possible. Non automated calls are subjected to an opt out system and if personal data are being processed, also to the general provisions of paragraph 41 of the Wbp.

*The processing of personal data* must meet rules concerning the quality of the processing, the notification to the Data Protection Authorities and the notification to the data subject.

According to Par. 27 Section 1 Wbp, “(t)he fully or partly automated processing of personal data intended to serve a single purpose or different related purposes, must be notified to the Data Protection Commission or the Officer before the processing is started.” Exceptions to this paragraph will be laid down in secondary law. Processing which includes on a commercial base the making available of data to third parties, will be subjected to this kind of notification duties.

1. Par. 33, Section 1 Wbp describes the information duty to the data subject, as far as relevant, as follows: “1. Where personal data are to be obtained from a data subject, the responsible party shall provide the data subject with the information referred to under (2) and (3) prior to obtaining the said personal data, unless the data subject is already acquainted with this information.
  2. The responsible party shall inform the data subject of its identity and the purposes of the processing for which the data are intended.
  3. The responsible party shall provide more detailed information, where given the type of data, the circumstances in which they are to be obtained or the use to be made thereof, this

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<sup>1</sup> See G.N.M. Sciarone-Gorgels, ‘Hoofdstuk 11 van de Telecommunicatiewet. Rijp voor revisie’, *Privacy & Informatie* 1999, nr. 5, p. 203.

is necessary in order to guarantee with respect to the data subject that the processing is carried out in a proper and careful manner.”

2. Par. 41 of the Wbp contains an *opt out* system with corresponding notification duties in relation to the processing of personal data. This system is applicable to all sort of communications, e mail included. Par. 41 runs as follows: “1. Where data are being processed in connection with the creation or maintenance of a direct relationship between the responsible party or a third party and the data subject with a view to recruitment for commercial or charitable purposes, the data subject may register an objection to such processing with the responsible party at any time and at no cost to himself.  
2. In the case of an objection, the responsible party shall take the steps required to stop this form of processing with immediate effect.  
3. Responsible parties, who are planning to provide personal data to third parties or to use such data at their account for the purposes referred to under (1), shall take appropriate steps to notify the data subjects of the possibility of registering objections. This notification shall be made via one or more newspapers or free-sheets, or in some other suitable way. In the case of regular provision to or use at the account of third parties, the notification shall take place at least once a Year.  
4. Responsible parties processing personal data for the purposes referred to under (1), shall make sure that data subjects are notified of the possibility of registering objections, whenever a direct message is sent to them for the said purposes.”

## **FAQ's**

### *Which type of consent -- opt-in or opt-out -- is necessary for the lawful sending of commercial e-mails?*

According to Par. 41 Section 1 of the Wbp, a data subject may register an objection to the processing of his or her data with the responsible party *at any time* and at no cost to himself. So, the respondent must be given the possibility to opt out, even after prior consent to the processing of his or her data.

According to Par. 41 Section 3, responsible parties, who are planning to provide personal data to third parties or to use such data at their account for commercial, or charitable purposes, shall take appropriate steps to notify the data subjects of the possibility of registering objections. According to Par. 41 Section 4, the responsible party shall make sure that data subjects are notified of the possibility of registering objections, whenever a direct message is sent to them for the said purposes. The obligation to “make sure, etc...”, implies a notification of the opt out possibility which should be explicit, f.i. by building in the possibility of explicit accepting the privacy policy by a mouse click, before being able to participate in the rest of the process.

### *Are there information obligations that should be met in each individual e-mail (such as informing about the existence of the right of access or the right to object to the processing)?*

According to Par. 33, Section 1, the responsible party shall inform the data subject of its identity and the purposes of the processing for which the data are intended. This information duty has to be fulfilled prior to obtaining the said personal data, unless the data subject is already acquainted with this information. The law does not exclude simple communication data, like name, or (e mail) address. In order to be exempted from this duty, the data subject must be in fact already acquainted with this information; it is not to be supposed that data



subjects in general are acquainted with the making available of their personal data to third parties. The right to object has been dealt with above. The existence of the right of access to the data processing, needs to be communicated.

*Are there other information requirements which might arise from consumer protection laws or marketing laws, such as the obligation to include in the header of the e-mail a reference to the fact that the e-mail is a commercial communication? Would this e-mail be considered as a commercial communication?*

One could hold different opinions as to the nature of market research with respect to the borderlines between commercial communication or advertising and other forms of communication. However, misleading statements in general, independent of their commercial or non-commercial nature, could be qualified unlawful on the base of the general Paragraph on unlawful behavior (Par. 6:162 Civil Code). This requires at least an indication of the e mail which should be sufficient as to let the respondent know what kind of mail he or she receives. The law on misleading advertising (Par. 6:194-196 Civil Code) comprises every public announcement made in the course of trade and includes also the asking of services. Competitors on the Dutch marketplace could take actions, based on the said laws, because misleading statements may qualify as acts of unfair competition.

## MOBILE TELEPHONE

The Code for Telephone Information Services, which is part of the Dutch Code on Advertising, contains a detailed regulation for the use of telephone information services. Certain information services are delineated to certain numbers; violations of these delineations are prohibited. Moreover, the Code contains rules on information, which is of an erotic, sexual or pornographic nature. This kind of information shall not be aimed at or make use of minors.

### Literature

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