National Broadcasting Council of Poland

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Regulations regarding advertising in audiovisual services

INTRODUCTION

It is important that the Community's new audiovisual regulation that will define the use of advertising in broadly understood audiovisual media takes into account the current technological development, general use of new types of audiovisual media and also the development of new forms of advertising and sponsorship.

A clear-cut and precise legal framework laying down the rules of advertising in a wide range of audiovisual services, both linear and non-linear, is an indispensable element needed to make the development of the European audiovisual market more dynamic. Interpretation problems that arise in connection with currently binding "Directive on Television Without Frontiers" as to the use of new forms of advertising should be finally clarified.

It is necessary to create a comprehensible legal framework facilitating the use of new forms of advertising. On the other hand, it is necessary to take every effort to ensure the protection of viewer interests in the context of new forms of advertising and new types of audiovisual services, both linear and nonlinear.

Steps should be taken to provide the designed directive with the most clear form possible, although the regulation by the Community law of the use of new forms of advertising will require detailed and comprehensive solutions.

I – RULES COMMON TO ALL AUDIOVISUAL COMMERCIAL COMMUNICATIONS

ISSUE 1: THE CONCEPT OF AUDIOVISUAL COMMERCIAL COMMUNICATIONS

We are of the opinion that basic requirements, the so-called „qualitative" rules applicable to television advertising, sponsorship and teleshopping should be maintained and their application should be extended to cover other audiovisual services than the traditional television, both linear and non-linear.

This holds, in particular, for the rules applying to a distinction adopted for the sake of the viewer between the contents of commercial character (advertising), and editorial content, and to other responsibilities of „qualitative" nature such as the bans to advertise specific products and services and obligations in the area of advertising addressed to minors.

It is a legitimate proposal to formulate a new definition of „audiovisual commercial communications" covering all kinds of advertising, sponsorship and teleshopping which would be governed by a common set of qualitative rules (identification principle, respect for human dignity, non-discrimination, protection of minors, public health rules).

Which does not rule out the need to maintain or adopt definitions of individual types of commercial communications, as they call for specific regulation (the so-called quantitative rules) which would be different for traditional advertising spots, virtual advertising, split screen and interactive advertising, sponsorship, teleshopping, etc.

ISSUE 2: RULES ON HUMAN DIGNITY AND THE PROTECTION OF MINORS

One should support a view that the so-called qualitative rules, i.e., also the rules on human dignity (Art. 12 of the Directive) and the protection of minors (Art. 16 of the

Directive) should apply to all forms of communications of advertising nature (including sponsorship), both linear and non-linear.

We welcome the idea of a general catalogue of rules applicable to various forms of audiovisual commercial communications.
Bearing in mind the diversity of those communications and the need to cover them by separate „quantitative" rules, a common catalogue of basic „qualitative" rules will contribute to greater transparency of intended legal regulations and will ensure higher extent of legal certainty in respect to protection of consumer interests.

ISSUE 3: RULES RELATING TO PUBLIC HEALTH CONSIDERATIONS (TOBACCO, ALCOHOL, MEDICINES)

Formulated in binding directive restrictions reffering to the advertising of medicines and pharmaceuticals available on prescription, cigarettes and tobacco products, and also of alcoholic beverages should be maintained and extended also to cover the new media. They should cover all audiovisual services, both linear and non-linear.

The bans are minimal (this particularly holds for alcohol advertising) and they regard a sphere which is crucial to public health. There should be no doubts that those rules should be included in the common set of rules binding on all forms of audiovisual commercial communications.

There are no reasons why more liberal regulations should apply to non-linear services, granted the Community's health protection policies and also in view of the fact that children and youth spend increasingly more time using „on-demand" services, which are of non-linear character, than to the traditional linear communication.

We are critical of the idea proposed by the Issues Paper to liberalize the rules applicable to advertising of medicines and pharmaceuticals available only on prescription in the case of non-linear services. It may be expected that authorizing of an undefined „objective information" complying with the standards laid down by national bodies responsible for self-regulation of the advertising of medicines and pharmaceuticals available only on prescription could pose a threat to appropriate pharmacotherapies and, in consequence, to public health. This kind of information - the way it is now – should be published by trade publications addressed to physicians who are knowledgeable enough to appraise it.

At this point it is worth to invoke the European Parliament's and the Council's Directive 2001/83/WE of November 6, 2001 on the Community code relating to medicinal products used by people, amended by other directives, including the Directive 2004/27/WE of March 31, 2004 which bans the advertising of general public range where it regards medicinal products which are available only on prescription.

It is also necessary to recall the provision of the Recital 44 of the preamble to the Directive 2001/83/EC which reiterates the importance of the provisions of the Directive on Television Without Frontiers and expresses its support for further changes in this direction: „Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities prohibits the television advertising of medicinal products which are available only on medical prescription in the Member State within whose jurisdiction the television broadcaster is located. This principle should be made of general application by extending it to other media."

When substantiating the Community rules on advertising of medicinal products the preamble to that act of law emphasizes that „advertising to the general public, even of non-prescription medicinal products, could affect public health, were it to be excessive or ill-considered. (…)"

Art. 88a of the Directive 2004/27/EC envisages that within three years of entry into life of that directive the Commission shall submit a report on current practice with regard to information provision – particularly on the Internet – and its risks and benefits for patients. Following the analysis of those data the Commission shall, if appropriate, put forward proposals setting out an information strategy to ensure good-quality, objective, reliable and non-promotional information on medicinal products and other treatments and shall address the question of the information source's liability.

One should not, however, second-guess the report and its conclusions. Accordingly, at this stage it is very difficult to speculate about the form of such information strategy whose likely launch is mentioned in Art. 88a of Directive 2004/27/EC.

ISSUE 4: GENERAL RULES OF IDENTIFICATION OF COMMERCIAL COMMUNICATIONS

It seems that the most fundamental obligation imposed by the TWF Directive with regard to the use of advertising has been laid down in Art. 10 Par. 1; advertising should be readily recognizable as such and should be kept separate from other parts of the program by visual and/or acoustic means. It should therefore be immediately recognizable and separated from the editorial part of a programme service.

In the light of the development of new advertising and sponsorship techniques it was examined whether it would be advisable to replace the rule of commercial communications separation from editorial contents by a rule of clear-cut identification leaving no grounds for doubts. One should be, however, very careful when considering this solution. The identification rule should rather complement the separation rule in well defined situations when due to the nature of an advertising technique, which may be admissible under the Community law, the separation rule cannot be enforced. This may be the case when virtual advertising is used at the time of sport event transmissions (and meet other specific criteria making this form of advertising permissible), in *scoreboard* advertising*,* various types of ads typical of the Internet environments, such as *banners*, *pop-ups,* etc*.,* or icons allowing to open an interactive advertisement, etc.

The above comments do not apply to *product placement* which is a form of surreptitious advertising and is most likely to mislead consumers as to the nature of communication. Mindful of that it would be inappropriate to legalize *product placement*.

As the Issues Paper is right to note various consultations have shown that there is a universal agreement that general rules of identification of commercial communications continue to be very important and even more justified in an environment when new and future forms of audiovisual commercial communication make more difficult to clear distinguish between what is an editorial content and commercial communication. And this is one more reason why such requirements should not be lifted.

As observed in the Commission Interpretative Communication on certain aspects of the provisions on televised advertising in the "Television Without Frontiers" Directive surreptitious advertising meets three criteria: it is intended by a broadcaster, it serves advertising and misleads customers as to the nature of the presentation. The document is right to note that the intentionality criterion is hard to prove and this is why it also introduces a criterion of undue prominence.
The same criteria also apply to *product placement*.

A new definition of surreptitious advertising proposed by the Issues Paper which reads: *„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 programs when such representation is intended as advertising and might*

mislead the public as to its nature. Such representation is not considered to be surreptitious advertising if the public is informed of its existence by any means."
- may also give rise to serious interpretation doubts, and it may even be viewed as legalization of surreptitious advertising granted that a communication meeting the foregoing criteria (*inter alia* the one that may mislead the public) is permissible in the situation when *„ the public is informed of its existence by any means"*.

Apart from the puzzling reference to „any means" of informing the public about the form and nature of the contents they are delivered, it should be noted that even if strict and restrictive obligations to inform in this regard are imposed on broadcasters, the risk that the public might be misled will not be eliminated. This especially holds for children and youth, as well as highly sensitive groups of society.

Despite its ban, the phenomenon of *product placement*, also known under the name of sponsorship by lending for use, should be viewed as highly disturbing. It may be approached in two ways. Firstly, by better monitoring of the implementation of the Community regulations banning surreptitious advertising and improved information exchange in this regard between the relevant competent authorities (this particularly applies to independent audiovisual market regulators). Secondly, by permitting it to some extent subject to strict and precisely defined conditions with a clear information offered at the beginning and end of the program that this form of commercial communication is presented in a broadcast and what types of products it regards.

When the second approach is selected one should remember about the rules protecting public health and the necessity to exclude specific types of products from such a form of promotion. Except that the range of products and services that could not be promoted by way of *product placement* should be wider than for traditional advertising spots and should also include, e.g., non-prescription pharmaceutical products, and an absolute ban should be imposed as regards alcoholic beverages. General rules (qualitative rules) should also be respected. This form of advertising should not be used in religious programs, news and children's programs.

A possible permission by the Community to use *product placement* in programs cannot limit the editorial independence of a broadcaster and its liability for the program it broadcasts.

ISSUE 5: IDENTIFICATION OF SPONSORED CONTENT – SPECIFIC RULES
It is presumed that the sponsorship rules laid down in Art. 17 of the Directive apply to all audiovisual services. These are minimal requirements and are meant to provide the consumer with clear information about the character of the communication, and also to protect public health to some extent (Par. 2 and 3 Art. 17 of the Directive).

One should be skeptical about the possibility of broader interpretation of the wording of Art. 17 Par. 1 letter c, including possible direct reference in the program to products or services of a sponsor or a third party. It seems that such an interpretation is too far reaching and goes beyond the objectives of the current version of the directive. Introduction of that such a solution in the new directive would rise serious doubts.

ISSUE 6: APPLICATION OF THE RULES
The qualitative rules laid down in the Directive are really necessary and commensurate with the envisaged goals. There do not seem to be any major problems with the implementation of the majority of them. It should be postulated that they are maintained in the new directive with regard to broadly understood audiovisual services.

The Member States may define the optimal way of their implementation in their national legal order. In view of the fact that those rules are of key importance to the protection of minors, health and public order, it seems that the regulation of basic advertising rules by

national law would be able to safeguard consumer interests in the best way. Efficient monitoring of those rules by competent state authorities will be vital to their effective application.

Apart from the transposition of basic advertising rules into national law, it is very important to develop more specific rules of complementary nature in the form of self-regulation and co-regulation. It is co-regulation in particular that deserves to be developed on a larger scale than until now, as it allows the organizations representing consumers and the representatives of the audiovisual sector, along with public authorities, to develop an internal system of ethical standards whose application should be later under an efficient control.

II – QUANTITATIVE RULES ON TELEVISION ADVERTISING

ISSUE 1: HOURLY AND DAILY ADVERTISING LIMITS

Art. 18 of the current Directive lays down the rules for the transmission time that may be devoted to teleshopping and advertising. Par. 1 of the same Article covers daily limits, and Par. 2 – hourly limits devoted to advertising blocks and teleshopping.

It will not be right to abolish the daily limit on advertising and teleshopping and leave only the hourly limit in place. Indeed, the limit set in Art. 18 Par. 1 of the Directive is very high and the observance of this rule should not be difficult to broadcasters, whereas it will continue to protect consumer interests.

It seems to be examined if similar advertising limits should apply to linear audiovisual services other than television. One should remember, however, that due to the specificity of new audiovisual media they make much smaller use of traditional advertising spots than television.

Now that new advertising techniques have developed and new linear audiovisual services have become widespread, one should think of another way of measuring time devoted to advertising in those media that will be commensurate with the degree of development of new media market that will not create barriers to their further development.

The constraints of this sort are not justified in non-linear audiovisual services („on demand"). Quantitative limits should not apply to them.

ISSUE 2: HOURLY AND DAILY LIMITS APPLIED TO TELESHOPPING

We believe that in the present wording of the directive the rules on teleshopping are justified, commensurate and should be maintained.

The development of new interactive services is a separate issue to which those limits do not apply. A user's free decision to access a commercial communication, i.e., a situation when it is up to the user to decide how much time he/she wants to devote to this form of commercial communication, should be left outside the scope of the directive. What is worth considering, perhaps, is the problem of how and how frequently an icon should appear on the screen allowing to open this form of commercial communication.

ISSUE 3: INSERTION OF ADVERTISING

The rules laid down in Art. 11 Par. 1 of the TWF Directive should continue to apply to television services for the sake of the attainment of general recognized public objectives.

In view of the specificity of linear audiovisual services other than television it is advisable to examine a more liberal regulation of those services. However, all linear audiovisual services should respect the basic rules that apply to the protection of religious programs, news and children's programs, and also ensure respect for integrity of cinematographic works.

The quantitative rules laid down in Art. 11 of the Directive do not apply to non-linear services.