

VDZ German Federation of Magazine Publishers

Position on the Green Paper

“Promoting healthy diets and physical activity: a European dimension for the prevention of overweight, obesity and chronic diseases“ (COM (2005) 637 final)

VDZ Verband Deutscher Zeitschriftenverleger is the umbrella organization of German magazine publishers and their online services. It represents some 400 publishers, including Hubert Burda Media, Axel Springer Verlag, Bauer Verlag, Gruner + Jahr, Jahreszeiten Verlag, SPIEGEL-Verlag and – with a share of more than 95% – many small and medium-sized publishing houses. The members of VDZ publish over 3,000 magazines and hence account for around 90% of the German magazine market. The share of supplementary electronic issues is growing continuously here, and so is the share of independent electronic media services. The purpose of VDZ is to protect and represent the common ideal and economic interests of magazine publishers.

VDZ is also convinced that healthy diets and physical activity have a positive role to play and must be promoted. We explicitly welcome initiatives, such as the "Diet and physical activity" platform (www.ernaehrung-und-bewegung.de), concepts for promoting healthy living, and large parts of the Green Paper. Please note that, *in exercising their fundamental right of editorial freedom*, magazines – both in their traditional formats as well as online – have for some time now already been giving extensive coverage to this content and have come to recognise it as a central and important editorial topic. This is a fact that is not mentioned in the Green Paper.

There is one point, however, which is cause for concern among magazine publishers and on which we will focus in the following (concerning other points, please refer to the ZAW position also supported by us).

As much as we share the opinion that a healthy lifestyle is desirable and should be promoted, we also believe that restricting communications is neither a suitable nor an acceptable means of promoting this goal.

The same applies here as to other problems of social relevance: The free shaping of public and private opinion alone, nourished by the diversity of conflicting statements, can "answer" questions such as the issue of the "right" diet is. In contrast to this, government intervention in social communications with the objective of influencing such attitudes and behaviour is usually not a legitimate approach. In this respect, we consider the assumptions concerning the political desirability and acceptability of restrictions on advertising as implied in section V.1. of the Green Paper to be very questionable. Because the question there is not *"whether"* bans on certain advertising for certain foods are to be restricted, but only *"how"* this is to take place. This, however, means it is assumed *that* bans on communications

which are legal under current law, i.e. in particular, neither misleading nor otherwise illegal, could be both desirable and acceptable from a fundamental rights perspective. For the sake of completeness only, we would like to point out that commercial communications, including advertising, are a protected fundamental right both under national and European legislation. This fundamental right protection is not only rooted in the freedom of profession and trade, but also in freedom of speech and communication.

I. Further advertising restrictions would be wrong, unreasonable and a violation of fundamental rights

The additional advertising restrictions which the Green Paper assumes to be legitimate would have to go beyond the restrictions currently in place. Any misleading or otherwise unfair advertising especially is already banned. The recipient horizon of specifically addressed consumer groups is considered here.

This means that commercial, non-misleading and otherwise fair advertising for certain foods would have to be restricted on the grounds that the foods in question would not only be consumed within the scope of a healthy lifestyle, but also as part of an unhealthy diet. If, however, the possibility and sometimes actual consumption of a foodstuff (or other product) within the scope of unhealthy behaviour (or any behaviour considered to be otherwise hazardous) would suffice to ban advertising for such a product, the legislator would be able to practically restrict and ban any advertising largely at random. Because almost every product is used in positive and negative contexts. The mere fact that certain forms of behaviour are politically non-desirable cannot suffice in a free society to restrict advertising for products used by citizens with this politically undesired consequence, but also – and probably primarily – within the framework of politically endorsed behaviour. Otherwise the EU would ultimately assume the right to educate its citizens by controlling communications.

Fundamental rights guaranteed at European level demand, in particular, the proportionality of every restriction on protected freedoms. In light of the foregoing the proportionality of further restrictions on communication would have to be denied. In free and democratic societies, communication bans always require special justification. On no account can educating citizens about lifestyles and diets be a goal which democracies pursue through such bans.

Furthermore, even a minimum precondition for restricting communications of this type is lacking. There is no evidence and there is unlikely ever to be any that a causal relationship exists between certain non-misleading and otherwise fair advertising and an unhealthy diet among recipients (see below for further details). *But notwithstanding this, the assumption appears to be more than obscure that massive damage to both active and passive fundamental communication rights could in any way whatsoever be offset by any educational benefits resulting from the absence of certain advertising.* Because the permissibility of such communication restrictions would return to government what liberal societies fought hard for as part of public opinion-shaping, i.e. the sovereignty to determine which of the many opinions voiced on any subject whatsoever may in fact be voiced. This would essen-

tially mean claiming the right of the respective political majority to control social developments considered to be desirable *by banning public communications*.

As already mentioned, it is not possible to furnish the mandatory evidence that restricting communications will in fact *cause* the desired consequence of a healthier diet. Even a *correlation* of this kind, i.e. a statistically significant relationship between the respective advertising bans and lower consumption of the foodstuffs in question as part of an unhealthy diet without substitution by other foodstuffs or unhealthy habits, cannot be established.

But even if such a *correlation* were to be assumed, the *causal relationship* would still remain a mere hypothesis as there would be too many concurring and more probable *causes*. We mention in particular the many initiatives designed to promote sports, healthier diets, etc., which are welcomed and which are often supported and/or made possible in the first place by media content. Evidence is more likely to be found to support the opposite view according to which advertising bans do not cause any significant change in behaviour.

Irrespective of the foregoing, the positive benefits of further advertising restrictions would have to be proven in a positive and plausible manner at least by impact assessment within the framework of the "Better Regulation" initiative *before* the sense and/or legitimacy of such a restriction is claimed, even if only implicitly.

Furthermore, advertising restrictions require justification not just as restrictions on public communications protected by fundamental rights. Advertising restrictions also affect the economic foundation of the media. The press, for instance, finances itself to around fifty percent from advertising and fifty percent from sales. Any further government-imposed restriction on advertising and on the related revenue will hence limit the possibilities of editorial reporting by the press.

We would also like to point out that pursuant to Article 152 (4) lit. c of the Treaty Establishing the European Community the harmonisation of legislation is ruled out in the field of health policy. Any advertising restrictions designed to combat obesity, etc. belong to the field of health policy and hence may not be harmonised.

II. Voluntary self-regulation for advertising and co-regulation (regulated self-regulation)

If legal restrictions on certain advertising content are to be rejected for political reasons and on the grounds of fundamental rights, the question remains as to whether self-regulation for advertising can go further than the legislator.

A distinction must be made here which is in our opinion not always made to a sufficient extent: **Voluntary self-regulation** is an effective and widely tried-and-tested model which permits business to refrain also from legal advertising content, i.e. content permitted by law. Compared to this, **co-regulation** mixes, in a manner which is often difficult to recognise, government-imposed restrictions and civil freedom by controlling communications. In as far as the control of content protected by law is questioned, co-regulation jeopardises any freedom of communications.

Before briefly explaining, we would first like to point out the following. If advertisers voluntarily refrain from certain legal advertising, this is, first of all, part of the daily process in which advertising permanently adapts itself to changing social values, preferences and dislikes. *This process has nothing to do with any regulation at all; it is the free forming of public opinion on the field of advertising.* Much of what was considered ten years ago to be good and "accepted" advertising is today no longer suitable for use. Society and its "public opinion" is, in other words, the legitimate jury which ultimately decides which advertising has a future and which does not.

In addition to the described natural process of changing advertising there is no problem if advertisers subject themselves to more far-reaching restrictions through real, **voluntary self-regulation** and hence deliberately refrain from using other legal advertising content.

It is, however, also obvious that any government-imposed requirements for voluntary self-regulation (**co-regulation or regulated self-regulation**) transforms the voluntary waiver of communications, which is protected and permitted as fundamental rights, into government intervention in the respective freedom of communication. If the government requires **for example** that citizens involve third parties in their decision on whether or not to publish legal content, this then constitutes illegitimate intervention in fundamental rights. This would also hold true if the government requires that citizens use sanctions as a means of enforcing the voluntary decision to refrain from using advertising protected by law. What was said in section I. above applies analogously.

III. Conclusions

VDZ welcomes efforts by the EU and other players to promote healthy activity and diets within the scope of their responsibility and means. We are, however, firmly convinced that it is neither effective, politically sensible nor in compliance with fundamental rights to also restrict advertising beyond the general advertising barriers currently in place. We believe that such restrictions would instead be a form of political histrionics that would neither promote our common goal nor generate any other positive effects. In view of existing restrictions, communications would be banned that are neither misleading nor unfair. This would not only mark a first step towards an understanding of government that is less orientated towards the free citizen than towards consumer subjects who are not even considered capable of deciding what to eat. It would also badly damage the freedom of communications. And by hitting the media, this would economically affect those who, in exercising their fundamental right of editorial freedom, make it possible to discuss the issue of healthy lifestyles as well as any other problem.

This also holds true if such restrictions on advertising were to be introduced by way of co-regulated self-regulation (regulated self-regulation).

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