



Comparative study of the impact of regulatory measures on television advertising markets

Final report – summary

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This study analyses the impact of regulatory measure on television markets in the member states of the European Union, countries of the EEE, candidate countries and certain other countries outside Europe (cf. II).

This study concerns exclusively chapter IV of TVWF Directive, dealing with regulatory measures relative to advertising, teleshopping and other forms of advertising mentioned in articles 10 to 20 of the TVWF Directive, the economic impact of which has been systematically analysed in 18 countries (cf. III).

Although the objective was not to examine the other provisions of the Directive, including its range of application, it nevertheless seemed important to look at this study in the wider context of the evolution of television advertising in Europe. This perspective has been given by taking into account the economic parameters (in particular the historical stagnation of net television advertising revenues) as well as technological factors such as the advent of iDTV and the development of media consumption over the long term (cf. IV).

This study on the impact of regulatory measure on television advertising markets (cf. V) has led the consultants to develop the following conclusions:

1 On the economic impact of advertising identification regulatory measures (Article 10, TVWF Directive)

- Concerning the means of advertising identification, several member states and candidates have opted for stricter or more detailed identification regulatory measures.

These European regulatory measures, mostly adapted as national law in European Union members and candidate countries, achieve their objective by ensuring that there is a clear distinction between editorial content and advertising.

On the other hand, in non-regulated countries outside Europe, the absence of identification of advertising versus other programming leads to a confusion of content. This finding is especially striking in the American audiovisual market.

The regulatory measures in Article 10 of the Directive therefore have a direct impact on programmes and advertising. But the economic impact resulting from the absence of identification regulatory measures is difficult to measure.

- As far as **isolated spots** are concerned, although regulatory measures exist both as European and national law, there is no available tool that enables us to identify them.

Moreover, an isolated spot can meet the interests of the TV viewer, the right holder and the broadcaster.

The combination of European regulatory measures on advertising identification, insertion and volume appears to be sufficient to ensure complete protection of the consumer. Broadcasters submitted to all these regulatory measures are therefore already bound to limit the number of advertising breaks in their programmes. These regulatory measures naturally and inevitably lead the broadcaster to optimise the performance of its advertising interruptions by grouping the spots in a single break.

In the vast majority of cases, isolated spots are therefore not the result of the broadcaster's desire, but rather the consequence of either a lack of programme or channel appeal to the audience, or insufficient demand from advertisers.

The absence of impact of the regulatory measure on isolated spots is further underlined by the fact that, in non-regulated markets, we do not see a significant increase in the number of interruptions by spots of less than 60 seconds in length.

We can therefore question the use of regulatory measure to limit the appearance of isolated spots.

- All countries studied have adopted the regulatory measure on the prohibition of **subliminal advertising** including third party countries, except Canada.

It should however be added that this technique does not appear to be attractive to advertisers.

- The definition and prohibition of **surreptitious advertising** have generally been well incorporated in national regulatory measures by member and candidate countries.

The Commission's interpretative communication of April 2004, reminds us of the cumulative character of the conditions which qualify advertising as being "surreptitious":

- the broadcaster's intention
- the advertising's objective
- the risk of misleading the viewer

This study has clearly highlighted the existing disparities between European Union and candidate countries in the application of this definition.

These disparities could constitute an obstacle to the free circulation of programmes within the Union, particularly since American programmes marketed in Europe already include product placement which does not qualify in the United States as "surreptitious" advertising. (cf. 1.4) The evolution of new advertising techniques forces us to question the definition of surreptitious advertising and the application of its prohibition in relation to these new techniques (cf. 1.5)

- By means of a flexible interpretation of the principle of separation, notably spatial separation, the regulatory measures on identification make good sense in a **non-linear** environment where the consumer's protection must be ensured.

2 On the economic impact of insertion regulatory measures

(Article 11, TVWF Directive)

It is clear from the economic data obtained from this study that insertion regulatory measures stipulated in Article 11 of the Directive have a direct impact on advertising practices in television markets of the European Union.

- The effect of this regulatory measure is felt on the number of interruptions, even though this frequency is not regulated in itself.
Thus, the number of breaks is lower in countries where the regulatory measure is severe and higher in deregulated countries (UK versus USA).

In countries outside Europe, the high number of advertising breaks is nevertheless compensated by a **shorter average length** of breaks (105 seconds in Japan, 141 seconds in USA versus a European average of 185 seconds).

- Concerning programmes that are specifically protected by the Directive, we find an advertising investment level that is lower in proportion to the broadcasting time of children's programmes, documentaries, information programmes and religious broadcasts.

This lower investment is however also found in countries outside Europe which are not regulated.

It is therefore difficult to attribute this lower investment solely to regulatory measures in Article 11.5.

For feature films, TV films and series, the investment level is proportionally superior to the broadcasting time in spite of restrictive European regulatory measures, sometimes even more restrictive inside certain member countries. The restrictive effect of European regulatory measures vis-à-vis audiovisual works is surely compensated by production investment obligations imposed on European television broadcasters.

This level of advertising investment in and around audiovisual productions is also largely influenced by programme popularity and the advertising tariffs it commands.

The broadcasting time of audiovisual productions is significantly inferior in countries outside Europe, compared to the European average. The purchase price of these productions is surely a critical factor.

- **Lastly, based on replies to the questionnaire included in this study, we conclude that broadcasters wish a simplification, or even abolition of Article 11 which they judge too complicated in implementation.**

Indeed, with the present regulatory measure, broadcasters are forced to build their programme schedule more in function of advertising regulatory measures than viewer's demand.

It would also seem that the addition of legal constraints on a specific type of programme would limit advertising investment around this type of programme and, as a result, reduce the broadcaster's interest in airing this type of programme.

Again, based on replies to the questionnaire, it appears that although the simplification of Article 11 is a major objective for broadcasters and advertisers, this cannot be achieved by substituting existing rules with a fixed number of advertising breaks per hour.

This type of modification would certainly lead to a simplification of the wording of the text, but would also lead to more constraints and even less flexibility in programme scheduling.

- **Contrary** to regulatory measures in Article 10, insertion regulatory measures would be difficult to adopt in a **non-linear environment**. Indeed, the main principle of an advertising insertion between programmes is incompatible with “on demand” consumption of programmes.

3 On the economic impact of quantitative regulatory measures

(Article 18, 18 bis and 19, TVWF Directive)

- **Analysis shows that quotas foreseen in Article 18 (advertising spots, teleshopping spots and other forms of advertising) and Article 18 bis, ensure a good balance between viewer protection and market needs.**

However, replies to the questionnaire indicate that the regulatory measures in Article 18 are too complicated. In particular, it appears superfluous to foresee an hourly maximum and a daily maximum.

It would probably be sufficient to stipulate an hourly limit of 20% for advertising spots, teleshopping spots and other forms of advertising. The proportion of each category of advertising in the total of 20% could be decided freely by the broadcaster.

The operation of a single hourly quota would simplify the implementation and control of quotas. The global hourly quota of 20% seems sufficiently large to satisfy both advertiser demand and broadcaster revenue, while protecting the viewer from an excessive weight of advertising.

- It should also be noted that these quantitative limits were established for application to audiovisual services with **linear programming** and cannot easily be applied to on-demand audiovisual services and to other purchase and sale facilities offered by interactive television. Here, the viewer will decide individually the amount of commercial content he wishes to see, the type of content he wants to explore more deeply, and the messages he wishes to refuse.

Taking into account these possibilities and the active role played by the viewer, quantitative limits for advertising and teleshopping outside linear programming do not appear necessary.

Likewise, it could be useful to question why teleshopping channels (Article 19) are subjected to quotas defined in Article 18 bis. Since these channels broadcast commercial content exclusively, they are selected and watched as such by viewers, who choose freely to see nothing but commercial content.

- On average in European Union countries, **teleshopping programmes** represent only 1.9% of total broadcast time.

Certain countries clearly exceed the European average but in these countries teleshopping programmes tend to be concentrated on specific private channels. Even in countries that exceed the European average, the maximum of 3 hours per day is rarely reached.

Since the vast majority of channels examined fall well under the quotas stipulated in Article 18 bis, it seems logical to withdraw these provisions. A certain control of the volume of teleshopping programmes could be maintained, as necessary, on a national level for mixed-programme channels. The withdrawal of quantitative limits foreseen in Article 18 bis could thus allow the creation of hybrid channels, consisting of an intermediate format that combines a specific thematic content for approximately 50% of programming and teleshopping for the remainder.

Instead of withdrawing Article 18 bis, it could also be decided to limit its application to channels that are not primarily devoted to teleshopping, so as to encourage the creation of intermediate formats mentioned above.

- Concerning **regulatory measures on self-promotion** mentioned specifically in Article 18.3 of TVWF Directive, this study singles out Spain, which does not consider products directly related to programmes as self-promotion, and Turkey which includes self-promotion in advertising time.

Taking into account the fragmentation of the audiovisual offer, largely due to decisions made by operators - both private and public, belonging to audiovisual groups or independent - it would seem justifiable to permit the broadcaster to undertake self-promotion of all of its own programmes and of products directly linked to them. To achieve this, a suitable definition could be inserted in Chapter 1 of the Directive, ensuring that it incorporates the principles stated in the preamble 35 of Directive 97/36/CEE of the European Parliament and European Council, to ensure that it avoids distorting competition.

4 On the economic impact of sponsoring regulatory measures (Article 17 TVWF Directive)

- **Data from this study indicate that the volume of sponsoring is not necessarily proportional to the revenue associated with it. It also appears that the existence of fairly strict legal conditions on sponsoring does not necessarily have an impact on sponsoring volume or revenue, with the exception of the USA, where sponsoring volume is clearly higher due mainly to the almost-total absence of sponsoring regulatory measures and to saturation of the advertising market.**

- Almost all countries of the European Union apply regulatory measures on sponsoring which are more detailed than those foreseen by Article 17 of the Directive. National differences exist in regulatory measure of the message content, the place where it may be inserted and its maximum duration. The result is regulatory measure with little consistency across the European Union. Nevertheless, replies to the study questionnaire suggest that detailed national regulatory measures are judged sufficient and that there is no need to include more precise or stricter regulatory measures than the ones in the Directive.
- As far as volume is concerned, in most countries sponsoring is not included in the quotas foreseen by Article 18 of the Directive. **It does not appear to be necessary to include sponsoring in these quotas or to otherwise regulate the volume.** From economic data, it seems that sponsoring volume is relatively small and represents only 7.3% of total European commercial communication volume, including advertising and sponsoring. It is also clear from the questionnaires that national regulatory measures concerning the maximum duration of messages and their insertion in programmes are sufficient to maintain an acceptable level of sponsoring.
- In many European Union countries, **product placement** is considered as surreptitious advertising. In this respect, it should be remembered that one of the cumulative conditions for qualification as surreptitious advertising is the “risk of misleading the public on the nature of such a presentation”. **Therefore clear and precise information to the public on the presence of advertiser’s products placed in a programme could avoid the qualification as surreptitious advertising and validate it instead as the sponsorship of a programme by products from the sponsor.**
- It is therefore essential not to confuse the clandestine placement of products and services in a programme and the sponsorship of a television programme – without undue prominence – by products and services of the sponsor which correspond to editorial needs of that programme and of which the viewer has been clearly informed, at least at the beginning and end of the sponsored programme and during each interruption.

As a consequence, if sponsorship of programmes by sponsors’ products needs to be authorised, it would be recommended to complete Article 17 b) or to insert a specific provision in Article 17.

In this hypothesis, all necessary steps should be taken to protect the viewer. It would also be important for the broadcaster to maintain total control of the editorial content of the sponsored programme. Such sponsoring could only be envisaged with the broadcaster’s consent and under his complete control.

It may also be judged necessary to limit the number of insertions of the sponsor’s products and services in a programme, in order to preserve programme quality and avoid viewer irritation. Nevertheless, the conditions “without undue prominence” or meeting the “editorial needs of the programme” should lead to a natural restriction in the use of sponsoring.

Lastly, it could be necessary to prohibit the sponsoring of certain categories of programmes by products or services of the sponsor, due to the specific nature of the content or audience, such as news, information or children's programmes.

- Directive regulatory measures on sponsoring could be applied in a **non-linear** environment if they authorise the mention of the sponsor's name, brand and logo, as well as its products and services, not only before and after the programme, but also during the sponsored programme, and that this mention during the programme should not be accompanied by promotional arguments.

5 On the economic impact of regulatory measures on new advertising techniques

The three techniques examined below are at an early stage of development.

- The interpretative communication of April 2004 has ratified the **split screen** technique in respect of the principles of identification and separation.

This ratification, which could be confirmed in a revised Directive, is even more significant in that this technique can be used for entry into an interactive environment.

- These same rules of identification and separation should also be relaxed if we wish to encourage the development of **virtual advertising** which, by definition, is often placed in the middle of programmes. This relaxation should necessarily be accompanied by clear consumer information in order to avoid the risk of being qualified as surreptitious advertising. Virtual advertising could also be qualified as a sponsoring technique.
- **Interactive advertising** can be considered as a bridge between the linear universe governed by the Directive and the environment of information society services.

It is therefore in the heart of the current technological evolution and is bound to grow in line with broadcasters' development of interactive applications and audience equipment

This "gate" towards the non-linear universe should be accompanied by comprehensive consumer information on this change of environment.

6 On the economic impact of content regulatory measures.

(Article 12, TVWF Directive)

Although not measurable quantitatively, the impact of regulatory measures in Article 12 is nevertheless undeniable. Clearly, in view of their vital importance, these general principles should be applied in a wider sense to all linear media and non-linear media.

7 On the economic impact of regulatory measures concerning specific products and targets

(Article 13, 14, 15 and 16, TVWF Directive)

In general, we may consider that regulatory measures on specific products and targets have an economic impact.

- For advertising in favour of **tobacco products**, the prohibition contained in the Directive logically produced effects.
- For advertising in favour of **alcoholic drinks**, there is no doubt that measures which impose a total prohibition (Turkey), or an almost-total prohibition (France), or even those which impose a well-applied self-regulatory measure code (USA), have an economic impact on advertising investment.

On the other hand, in countries where regulatory measure is more restrictive or more detailed, advertising investment is not lower than in countries applying regulatory measure equivalent to the Directive.

It should be noted that in candidate countries, in the early stages of their economic development, advertising investment in alcohol drinks remains strong despite regulatory measure which is equivalent or more severe than the Directive. In fact, the alcoholic drinks industry appears at the very top of TV media investors. This is the case in the Czech Republic and Romania, while Poland is closer to the European average due to its more severe regulatory measures.

- A comparison of advertising investment levels in “**OTC products**”^{*} and in “Cosmetics & Hygiene” sectors identifies an economic impact on advertising investment and volume in OTC which represent, on average, one third of advertising investment levels in the “Cosmetics & Hygiene” category.

However, this is a secondary effect of regulatory measure, whose primary objective is not to control the volume of OTC advertising investment but rather to protect the consumer.

It should also be noted that in countries outside Europe where advertising for medical prescription products is authorised, the ratio of “Medicines” to “Cosmetics & Hygiene” products is totally different and even reversed.

It would appear therefore that existing regulatory measures on advertising medicines are adequate.

^{*} Over The Counter: medical products provided without medical prescription.

- Concerning **minors**, the study highlights the dichotomy between economic definitions of the target group “children” and legal definitions of minors.

In fact, there is either an absence of definition or an absence of concordance between the legal definition and the economic definition. There is therefore no harmonisation in the definition of children, any more than there is for the definition of children’s programmes or products. On this last point, the study reveals that restrictive national regulatory measures do not necessarily have a direct negative impact on advertising investment for children’s products.

This being the case, the different situations that exist in the European Union countries do not appear to favour the adoption of uniform regulatory measures via a Directive. National provisions or self-regulatory measure codes appear to be more adequate.

- Regulatory measures concerning specific products and targets, in as much as they aim to protect fundamental basic interests and apply to advertising content, could and should also be applied to **non-linear services**.