The Treatment of Advertising in the EU's Television Without Frontiers Directive

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The aim of this article is to follow the process and evolution of the treatment given to television advertising in the Television Without Frontiers (TWF) Directive. It analyses the current situation after a long process that includes: the modification of the Directive, some independent studies, public consultation and finally a document from the European Commission. It also focuses on different issues: the implications of these rules on the television advertising market; the evolution of television advertising formats as regards changes in the advertising and audiovisual market; the participation of different advertising organisations and the 'legal jungle' that impacts advertising in the European Union.

To the extent that the provision of television services and television advertising can be considered, generally speaking and with few exceptions, to be complementary products, it stood to reason that the Council of Europe, when it came to establishing regulatory legislation for the EU television market, should not limit itself to only regulating television programming but include a whole series of measures to regulate the presence of any type of TV advertising. As proof, and at the same time, effect, of this complementarity of the two products, Council Directive 89/552/EEC of 3 October 1989, known as the Television Without Frontiers Directive, dedicated a good many articles – a dozen out of a total of 27 – to establishing the regulatory framework for television advertising.

However, this Directive cannot currently be contemplated, either in terms of advertising content or total content, without bearing in mind a series of subsequent actions that have been carried out within European institutions to update it or at least update some interpretations.

The main actions subsequent to the Directive are:

1. Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.
2. The Fourth Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 89/552/EEC 'Television Without Frontiers', COM (2002) 778 final.
3. The public consultation developed in 2003 and 2004 on the revision of the Television Without Frontiers Directive.
4. The Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the future of European Regulatory Audiovisual Policy, COM (2003) 784 final.
5. The Commission's interpretative communication on certain aspects of the provisions on television advertising in the 'Television Without Frontiers' Directive on television advertising (2004/C 102/2) of 28 April 2004.

As can be seen, although this is not an exhaustive list of the regulatory, consultative or interpretative activity of the Union organisations in relation to issues about television,

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audiovisual policy or advertising[i], the activity that refers to the issue we are concerned with here has been notable and has mainly been motivated by the speed of the evolution of European markets in the audiovisual sector, as well as the appearance of new types of television advertising. In other words, the regulation has been frequently exceeded, which has made it necessary to carry out continual updating procedures that have ended for the moment, in terms of advertising content, in an interpretative communication (which succeeded a public consultation about the amended Directive) as the end (who knows if it will be provisional) of a process that has been going on for 15 years.

1. Market Questions

Firstly, we will make a general market consideration about the treatment of advertising in the Directive and its consequences. The Directive is very explicit, both in the initial considerations and the whole of Chapter III, when it comes to defining and even promoting the creation of a European audiovisual market governed by the rules of freedom of expression and the free market. However, it regulates in a slightly protectionist fashion firstly the broadcasting of European works, to which it reserves 'a majority proportion of air time'[ii] and secondly the European works of independent producers, which are also reserved 10% air time and 10% of programming budget[iii]. It aims to promote the distribution and production of television programmes made in the Union, by them reserving particular shares of viewing figures. The aim of promoting the European television industry, including independent production, by intervening in the market, is clear. On the other hand, it does not regulate television advertising in the same market terms. In fact, neither the amended Directive nor the modifications nor subsequent interpretations refer at any time to issues involving the advertising market in order to protect, for example, European advertising production. It does not establish transmission shares for television advertising developed in the Union and ignores the fact that the European advertising industry – or what remains of it – is also affected by the hegemony of US advertising, to the same degree or even more than the audiovisual industry. This fact, which we do not intend as a criticism or claim, but rather a confirmation, as there has been no claim for intervention of this type from the local advertising industry itself, does show unequal treatment.

It could be that, when the Directive makes these references to the television sector, it tacitly includes advertising production. In any case, there should be a clarification on this point that has not been made. In general, it is important to make people aware that, even if the Directive has ignored them, there is a European advertising industry, a European audiovisual-advertising production sector and independent European advertising companies and that they are generally SMEs that receive no type of support.

In short, although the Directive includes regulatory elements and measures to promote markets and programming with regards television services, in the articles referring to advertising it only sets out regulatory elements of television advertising programming and does not have the double intention (or so it seems) of promoting the European advertising sector in the same way as it does for television.

2. From the Directive to the Amendment

Article 26 of the Television Without Frontiers Directive says the Commission must review the Directive five years after its adoption. This important point, together with other things that occurred between when the Directive was passed and when it was reviewed, like some sentences from the European Court of Justice on audiovisual issues, other aspects relating to the shoring up and promotion of the audiovisual and television sector[iv], the appearance of new advertising regulations[v] and the expansion of new formats of commercial communication, lead to the adoption of the Directive of 1997, which amended some aspects of the previous one.

The amendment of the Directive affected the articles that referred to advertising in a number of aspects. The most important was the inclusion in nearly all the articles of Chapter IV, 'Television Advertising and Sponsorship', of an emerging type of commercial communication, i.e., teleshopping. We use the term 'commercial communication' rather than 'advertising' because, from a strictly technical point of view, these two types of commercial communication are quite different. In fact, the amended Directive suggested this in initial consideration No. 37, which discusses 'teleshopping spots' on the one hand and 'advertising spots' on the other. This difference is explained in publications such as the *Diccionari de comunicació empresarial-publicitat, relacions públiques y màrqueting* published by Termcat[vi] and other specialised professional literature. Teleshopping as a commercial format was justified, as initial consideration No. 36 said, "in view of the development of teleshopping, an economically important activity for operators as a whole and a genuine outlet for goods and services within the Community". It therefore benefited the income of operators and the sales of companies that manage teleshops, but in no case the advertising sector as, generally speaking, teleshops are established as a joint venture between the operators and the suppliers of the products offered on these mini-programmes of a commercial nature. By including teleshopping transmission times within clock-hour advertising times, the amended Directive reduced the transmission time of the conventional advertising that the advertising industry manages. In reality, the key point in this question centres on whether teleshopping should be considered an advertising space or a sales space as, from the strictly technical point of view, it is the same as the difference between a shop and a hoarding: the two are found on the street, but they do not serve the same purpose.

On the other hand, the regulation bans the telesales of particular drugs and medical products and, surprisingly, excludes station promos from advertising time, as if they should not be considered a consumer product.

To end this section, we should say that before the Directive was amended in 1997, there were already new emerging formats of commercial communication on television and in the cinema, e.g., product placement, which, oddly enough, is not given specific consideration in the Directive.

3. The Fourth Report

The process of reviewing the Directive never ends. The evolution of markets, technology, techniques and advertising formats and the need to control whether the measures for promoting the distribution and production of European works have borne fruit have meant the Directive forces the European Commission to constantly review its content, which leads to the preparation of EC reports, independent studies and public consultations.

A part of this process that related to advertising and other forms of commercial communication was the Fourth Report[vii]. The section of the report that tackled advertising aspects was based on studies commissioned to independent companies on two main subjects: the impact of television advertising and teleshopping on minors and the new emerging advertising techniques[viii]. Fruit of this study on minors and television advertising, the Fourth Report confirmed the diversity of situations in EU countries, the need for some clarifications about the application of the regulation and, especially, the fact that the Member States had adopted more restrictive regulations than the Directive. It also emphasised that, in this regard, there were very few complaints - which contrasted with the hypersensitivity of some social sectors with regards this issue.

In terms of the new forms of commercial and advertising communication, the Fourth Report also certified a disparity of treatment with regards emerging forms of commercial communication among the Member States, such as interactive advertising, split screens and virtual advertising or sponsorship. However, it also emphasised the low economic impact these new techniques had on overall advertising income for the media.[ix]

As well as thee two issues, the Report attributed income of 22.5 billion euros from advertising to EU broadcasters, which represented their main source of financing, and anticipated a fall in television consumption and thus the potential of television advertising.

4. The Public Consultation

More interpretative difficulties with regard the articles on advertising, the constant evolution of the television and advertising markets and technological changes make it advisable to hold a public consultation in order to adapt the interpretations to the new reality. The EU anticipated carrying out this consultation with all the parties interested in and affected by the Directive in the 'Work Programme for the Revision of the Television Without Frontiers Directive and Timetable of Future Actions' which was attached to the Fourth Report. The public consultation was carried out in 2003 and early 2004, and the European Commission received 150 written contributions from institutions and organisations of very different characteristics and purposes.[10]

We will not go into detail about these contributions because there would not be enough room in this article. Instead, we will focus on the participation of advertising organisations. Firstly, the consultation highlighted the silence of Catalan and Spanish advertisers, and the little participation of European ones. Secondly, there was the professional level of the written contribution of the European Association of Communications Agencies (EACA) entitled 'Review of the Television Without Frontiers Directive' of July 2003[11].

The EACA's reflections focused fundamentally on aspects relating to surreptitious advertising and sponsorship, making considerations relating to the principles under which advertising is allowed and the limits established with regards transmission times and programming.

The EACA also added two general considerations to the debate: firstly, it established the appropriateness of the Directive upholding a technology-neutral position so it would last over time and not be easily overtaken by technological advances and the new communicative possibilities they could lead to, and secondly, it explained the need to observe and respect the self-regulation systems of the commercial communication industry, instruments that monitor practices that respect legal principles and professional ethics.

We thus understand that the EACA's contribution was aimed at defending a framework of professional action that did not endanger market freedom in the face of excessive interventionism that could result in the creation of new barriers to sector development. The EACA's work was based on a desire for the Directive to be consolidated as a set of guiding principles which, in line with market and industry reality, would facilitate compliance with its principles, both by the industry and the different subjects involved.

Surreptitious advertising was one of the points that warranted a specific reflection by the EACA. Its definition and prohibition in articles 1 and 10 of the Directive established a series of questions of indisputable importance for the commercial communication sector, advertisers and, especially, television operators, who would have to act, according to this point of view, as an entry filter, as they are the direct beneficiaries of the income generated by this activity.

The EACA's fear about the Directive in terms of surreptitious advertising was that it might mislead viewers as it could not be clearly identified as having an advertising purpose or commercial intent if it was included in conventional programming, while the operator would receive payment in exchange for it, just like with conventional advertising. The main problem with product placement is that it challenges the principles of identification and differentiation between advertising and other programming and could thus contravene the explicit ban on the practice of surreptitious advertising as set out in article 10 of the Directive.

To try to clear up the situation about this technique of commercial communication, the EACA suggested a way to get rid of the lack of definitions and mistakes about the practice of product placement, a technique that the Directive did not mention explicitly but which is used intensively in audiovisual production – even though it is banned in some Member States and tolerated in others – and which represents an importance source of funding for audiovisual productions. This major contradiction between the regulation and the reality illustrates the difficulty in regulating this practice. The EACA proposed transparency, with the adoption of measures that would clear up the practice of product placement in such a way that it would act in benefit of all the parties concerned (advertisers, broadcasters and viewers) and suggested that advertisers be included in programme credits. To shore up its argument, the EACA said a similar system was already practiced in the printed media and that it did not cause any type of problem[xii]. Finally, the EACA report underlined the importance of clearly identified product placement as a source of income and consequently a way of reducing public spending in the production, film and television industries; evaluated its economic contribution; and mentioned the Directive's concern with promoting European production and reducing the imbalance with production from the US.

With respect to sponsorship, the EACA recalled that the Directive had to focus on television programme sponsorship and abstain from interfering in sports events and teams, which are based on agreements between the sponsor and the sponsoree, agreements from which television operators are excluded. Although television broadcasting of sponsored activities has a multiplier effect with regards sponsorship, the EACA understood that the principles involving operators with regards sponsorship were different. In that case, it was clear that the Directive wanted to avoid a possible excess of sponsor influence which could affect the station's editorial independence, as can be discerned in a reading of the Directive.

In terms of teleshopping, the EACA did not have many comments to make, as it did not consider this activity part of its domain, something we mentioned earlier in a generic form and which, we should recall, is a type of commercial communication in which the advertising sector does not usually intervene.

Besides the previous reflections, the report established two additional questions: the differentiated consideration of interactive advertising and time limits on advertising scheduling.

With respect to the former, it said the Directive did not specifically cover interactive advertising and that it needed specific comment. The EACA considered that interactive advertising did not affect the principles of separation and differentiation between advertising and editorial content, as consumers choose to enter a new environment. The EACA suggested creating indications that allow and clarify to the consumer his or her move into the interactive environment, as when the consumer accesses such an environment, he or she interacts directly with the advertiser and thus the rules of separation, identification and differentiation of advertising do not apply. In short, the EACA asked for a separate definition and treatment of interactive advertising, as well as a different regulatory regime, such as that of e-commerce.

Finally, the second additional question we would like to mention referred to the regulation of the insertion of advertising. The EACA agreed with the idea of not increasing the time assigned to advertising spaces, as excesses can harm message effectiveness. However, it opposed the Directive trying to limit or define in detail the way in which blocks should be arranged and called for station flexibility in the programming of spaces.

5. The Interpretative Communication

The Fourth Report and the public consultation had a notable influence on the preparation of the 2004 Interpretative Communication, but it was the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the future of European Regulatory Audiovisual Policy[xiii] of December 2003 where, as well as commenting on the public consultation mentioned above, it was decided to issue a specific interpretive communication about advertising articles that has until now been the final step in this regulatory, consultative and interpretative process.

The effort of the people who drew up the interpretative communication was very positive in the sense that it cleared up the conceptual panorama, particularly with regard to two important issues about advertising. Firstly, regarding the duration of televised advertising in the 'advertising per hour per day' relationship and secondly, in terms of the definition of conventional and new forms of advertising. However, it was not so positive on the critical point of product placement, where it was imprecise.

In terms of regulating advertising times, limited in the Directive to 20% of advertising time per clock hour, the document interpreted the expression 'clock hour' in two senses, i.e., natural clock hour and overlapping clock hour. In other words, it made an open and flexible interpretation so long as the total daily volume of advertising did not exceed the established limits and at the same time understood the day as the programming day, which did not necessarily have to coincide with the calendar day. However, it is nonetheless surprising that it devoted 10 points to this issue which, in terms of advertising, is less important because, as we have already seen in the EACA's contribution, the advertising sector agrees with limiting advertising transmission times.

With regard to advertising and commercial-communication techniques, whether new or of common practice, it made a series of precisions ranging from the definition through to the clarification of doubts over interpretation that had been produced. Despite this, the interpretative communication followed a type of general rule (which is also logical) based on applying the articles that affect general advertising to any technique where possible. However, it is worth mentioning the following:

a) With regard to interactive advertising, it appeared to agree with the EACA in considering that when consumers enter an interactive service they move into the sphere of the information society and out of the sphere of the Directive, even though the interpretation made a series of very detailed precisions in order to protect consumers.

b) It was imprecise on the question of product placement, which, in our opinion, still needs to be definitively resolved.

c) It tended to delegate important aspects of advertising control to the Member States.

d) It emphasised, as the EACA had called for, codes of conduct and the system of advertising self-regulation.

6. General Conclusions about the Advertising Aspects of the Process

1. We could say that the Directive and the interpretative communication had, from the advertising point of view, interesting aspects (in some cases innovative and in others, controversial), and that, generally speaking, they could be positive if they managed to achieve a harmonisation and clarification of the rules on television advertising or general advertising in the different Member States. The particular case of Spain can be considered a true legal jungle that hinders the development of the advertising industry. As well, it is patently obsolete, in particular Act 34/1998 of 11 November on Advertising, which is inadequate in every way. But the incorporation into the Spanish legal system of the amended Directive[xiv], so long as there is no rational organisation of the law on advertising, only makes the jungle more complicated.
2. Even though, as the interpretative communication said, 'This Directive establishes the legal reference framework for the free provision of television services in the European Union with a view to promoting the development of a European market in television and related services, including television advertising and audiovisual programme production', if the body of documentation generated in the process was followed in detail, it would tend to promote the audiovisual and television sector but maintain a restrictive tendency on advertising and new advertising and commercial formats, but only up to the critical point of not harming the principal source of funding for sector companies.
3. The new television advertising formats can also be understood as a reaction of television operators and the advertising industry to the threat to income that excessive regulation could represent, something which would consequently force the legislator in turn to react in order to include these new advertising forms in the law.
4. The technological and business structure of the television industry (public and private) is complex and expensive, which urges operators on to capturing more funds by way of advertising in order to pay for the technology. Another effect is the competition between operators when it comes to sharing the audience and advertising pies, which exercise a downward pressure on the price of advertising. These two factors promote an excess of advertising that is needed to obtain more income. Meanwhile, the advertising industry is more affected by the ban on advertising certain products, as this is where investment is lost, rather than limiting the presence of advertising on TV.
5. The control about the amount of advertising, which is not excessive under the law, could lead to an improvement in quality, something which would obviously benefit the receiver, so long as it was within a framework of competition and free market which would determine the price of advertising and the distribution of audiences among the operators.

Notes

1 It is important to mention that there is an extensive amount of EU regulation that directly or indirectly affects advertising. Examples include Directive 98/43/EC on tobacco advertising; Directive 84/450/EEC on misleading advertising, Directive 79/112/EEC on the advertising of foodstuffs and Directive 92/28/EEC on advertising and medicinal products for human use.

2 Article 4 of the Directive.

3 Article 5 of the Directive.

4 Europe still has a trade deficit with regards television rights with the US and, as we will see later on, the situation is getting worse. This makes it is necessary to increase protection of the European industry.

5 Directive 92/28/EEC on advertising and medicinal products for human use.

6 TERMCAT. *Diccionari de comunicació empresarial - publicitat, relacions públiques, màrqueting*. Barcelona: Enciclopèdia Catalana, 1999. See entries 2283 *Telebotiga* and 2305 *Televenda*.

7 Fourth Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 89/552/EEC 'Television Without Frontiers', COM (2002) 778 final (<http//europa.eu.int/comm/avpolicy/regul/twf/applica/comm2002_778final_es.pdf>).

8 These studies can be consulted at: <http://europa.eu.int/comm/avpolicy/sat/studi_en.htm>.

9 The Fourth Report referred to the provisional conclusions to the study developed by Bird & Bird and Carat Cristal, which attributed to traditional advertising, as conventional advertising was called, 96-99% of the advertising income of the media.

10 See <http://europa.eu.int/comm/avpolicy/regul/review-twf2003/contribution.htm>.

11 EACA. *Review of the Television Without Frontiers Directive, Brussels, 15 July 2003.* See letter *e* at: <http://europa.eu.int/comm/avpolicy/regul/review-twf2003/contribution.htm>.

12 The EACA spoke of 'advertorials' when referring to this type of advertising. The reader is familiarised with an editorial product where strictly editorial material sits side by side with conventional advertising and the preparation or presentation of material of editorial interest but which is produced with a commercial purpose.

13 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the future of European Regulatory Audiovisual Policy, COM (2003) 784 final, 15 December 2003.

14 Television Without Frontiers Act. Consolidated text of Act 25/1994, of 12 July, incorporating into the Spanish legal system directive 89/552/EEC on Television Without Frontiers, amended by Act 22/1999, of 7 June, incorporating into the Spanish legal system Directive 97/36/EC.