

## **The Advertising Association response to DCMS Consultation on the review of Directive 89/552 – Television Without Frontiers**

The Advertising Association (AA) welcomes the opportunity to respond to the DCMS consultation on the revision of Directive 89/552 (Television Without Frontiers).

This response will give a brief outline of the Advertising Association's position on the revision of the Directive, as well as a more detailed response to the relevant questions put by the consultation. Attached at Annex 1 is a list of amendments which has been sent to Members of the European Parliament by the AA.

### **About the Advertising Association**

The Advertising Association is a federation of 31 trade bodies and organisations representing the advertising and promotional marketing industries including advertisers, agencies, media and support services. It is the only body that speaks for all sides of an industry worth almost £19 billion in 2005.

### **Summary of AA views on the revision of TVWF**

#### **General comment**

- The AA agrees that the revision is timely. The existing Directive is overly prescriptive regarding advertising and teleshopping rules and should be updated.
- As digital technology and convergence provide more services and choice to the consumer, greater flexibility to generate revenue is necessary for the industry. The AA therefore supports the principle of less prescriptive advertising rules in the revision of the Directive.

#### **Country of origin**

- Since the Directive is designed to ensure a properly functioning internal market in broadcast and is minimum harmonisation in its nature, a strong Country of Origin clause is necessary to guarantee the free movement of programming and advertising across the EU;
- Any disputes resulting from broadcasts out of one Member State into another should be resolved on a bi-lateral basis, using the Contact Committee. Extensive changes to Article 2 of the Directive, which would weaken the Country of Origin Principle, are not acceptable.

#### **Scope**

- The scope of the Directive should not be extended to internet content and new media services which do not provide scheduled audiovisual content. Radio broadcasts and non-scheduled online content provision of print media should also be excluded;
- It should be clear which services are within the scope of the Directive. The AA agrees with DCMS concerns that this is not the case at this stage in the legislative procedure and considerable amendment is needed to address the problem;

- The Commission heralds this Directive as an internal market measure, designed to ensure free movement. To achieve this aim it should be clear that all media services included in the scope of the Directive should not be subject to undue compliance burdens. Additional licensing requirements for example, would not be acceptable. Where possible, self-regulation should be allowed as an implementing tool for the Directive. The AA notes its concern at the potential compliance costs and legal uncertainty relating to the extension of advertising rules to new media services.

### **Self-regulation**

- The way in which the Directive is implemented in each Member State should be a matter of subsidiarity and all possible methods available for implementation should be open to them. This includes both self and co-regulation which should not be limited by insisting on the rigid wording incorporating the inter-institutional agreement;
- The UK advertising industry has a well-established system of self- and co-regulation in place. The current wording of the Directive relating to self-regulation would undermine that system. The text should therefore be amended to allow Member States to choose whether to use self-regulation or co-regulation as a permissible way of implementing this Directive. The current wording in this area put forward by the German government at Council seems like a sensible solution. For more detail please see the AA amendments appended to this response.

### **Local enforcement**

- The AA stresses that the rules contained in the revised Directive must be general in their nature. Their content and their detailed interpretation should be left to the discretion of Member States. This scenario, backed by a strong Country of Origin Principle, will ensure the free movement of programming.

### **Commercial communications**

- The modernisation of rules relating to product placement and sponsorship is welcome and necessary;
- The AA agrees that news and current affairs programming should not be sponsored or contain product placement;
- The AA welcomes the opportunity for companies which produce medicinal products and medical equipment to sponsor programming;
- The AA agrees that all product placement should be transparent and appropriately identified;
- The AA recognises that there is concern that product placement in programmes targeted at young children may be inappropriate, although it should be permitted in programming directed at teenagers, who have more developed media literacy skills;
- The AA agrees that commercial communications should be separate from editorial content.
- The AA disagrees with the Commission's decision to maintain limitations on isolated spots, as it is unclear what purpose this rule serves and it could inhibit greater flexibility in television advertising in future;
- The AA welcomes the abolition of the 20-minute rule and the move to modernise insertion rules.
- The AA is strongly opposed to the new '35-minute rule' for films, news and children's programmes, which is worse than the current Directive, as this will make these types of programme less commercially viable, discriminate against European content and diminish viewer choice without achieving any clearly

defined policy goal. Please see the AA's suggested amendments for further detail in this area;

- The AA welcomes the removal of the daily advertising quotas and agrees that it is still appropriate to maintain the hourly quota, though it favours greater flexibility in this area.

## **Response to Consultation Questions**

### Advertising – qualitative controls

- 14. Articles 3g c (iii), 3(d) and 3(e) contain controls on advertising via any audiovisual service which bear on health and safety. They are supplemented, for linear services only, by Articles 14 and 15. Would these controls between them be effective in achieving the right balance between commercial freedom and public health?**

These Articles aim to translate across to non-linear services the linear rules regarding protection of minors (existing Directive Article 22), incitement to hatred (existing Directive Article 22a) (now also expanded in 3e to include disability), and health and safety (existing Directive Article 12).

The AA supports these principles which are reflected in the self- and co-regulatory CAP and BCAP Codes. However, it would not be acceptable or proportionate for Member States to interpret these principles in such a way that they were allowed to block incoming services containing advertising to children because it was considered harmful to public health. The AA is therefore of the opinion that the basic rules contained in article 3 are sufficient to achieve a balance between health and safety and commercial freedom, with two caveats:

- The non-linear services to be covered by the rules of Article 3 must be strictly defined;
- There should be no creation of loopholes which would allow Member States to block children's programming containing advertising on the basis of its being a risk to public health.

### Advertising – quantitative controls

- 15. What will be the impact of allowing for isolated advertising and teleshopping spots in sports programmes (Article 10.2)?**

This represents a minor liberalisation of the advertising rules. It would be beneficial in so far as it would allow broadcasters to schedule short breaks during live sports programmes. But the maintenance of the current rule for all non sports programmes is highly regrettable.

The greater pressures on advertiser-funded television in future years mean audiovisual content providers will require greater flexibility in scheduling advertising. Single spots could well have an important role to play.

Maintaining the current arbitrary constraint inhibits that flexibility for no clear public purpose. Keeping an isolated spot rule while abolishing the 20 minute rule could lead to the anomaly that a commercial break with two 15 second advertisements would be acceptable but a break with one 30 second (or longer) advertisement would not be.

**16. What will be the impact of removing the prohibitions in Article 18 and 18a that put a limit on the amount of teleshopping allowed on a channel that was not ‘exclusively devoted’ to teleshopping?**

It is reasonable to give broadcasters more flexibility to schedule their commercial airtime. As with all commercial communications, it is in the interest of the broadcaster to ensure that schedules are acceptable to viewers. It is therefore sensible to allow the market to decide the frequency of teleshopping spots on channels not dedicated to teleshopping.

**What will be the impact of the rule (Article 11.2) that films made for television, cinematographic works, children’s programmes and news programmes may be interrupted by advertising or teleshopping once for every period of 35 minutes**

This is an unacceptable new restriction. The Commission has merged two of the existing rules in Article 11 without conducting a proper impact assessment and without taking into account that 35 minutes has no meaningful application to existing programme lengths.

As a result, the advertising breaks rules relating to children’s and news programmes are more restrictive than the previous rules – an absurdity in a Directive that is supposed to be future-proofing for a digital, converged media environment. Furthermore, the proposed rules for breaks in films provide no meaningful liberalisation. This discourages broadcasters from showing films, and has a disproportionate effect on films with more limited audience appeal, including many European films. Furthermore, without further liberalisation, investment by broadcasters in European films may also be at risk. The AA is concerned that these proposed rules could undermine the commercial rationale for these programme genres.

The proposal also lacks the “scheduled duration” wording contained in the current Directive. This is essential to provide clarity of application of the rules, based on existing practice. Any interpretation that these rules are based on the running time of the programme, instead of its scheduled slot, would be unworkable in practice.

The AA believes that a truly forward-looking Directive would no longer contain prescriptive rules on ad breaks relating to specific types of programmes. This should be left to the discretion of Member States.

Sponsorship

**17. Are the rules on sponsorship of audiovisual media services set out at Article 3h necessary and sufficient to safeguard the integrity of the services that are sponsored?**

These rules seem acceptable and the extension to allow sponsorship by companies which produce pharmaceutical products is to be welcomed. However, at this stage it is unclear how they will be applied to on-demand services. For this reason, a flexible approach to the identification of sponsorship is necessary and the AA supports the amendment from the Industry Committee of the Parliament which allows sponsorship to be flagged up at the beginning, end or during the programme.

Product placement

**18. Ofcom have consulted on the possibility of allowing product placement on TV services within the UK if the EU – as a result of this draft Directive – removes the current implicit EU-wide prohibition of**

**it. But the UK will retain its discretion not to allow product placement in programming made by and for UK broadcasters whatever the outcome of the EU discussion. If the UK were to continue not to allow product placement, but the EU allowed it, what practical impact would that have for UK broadcasters, UK programme makers, and the UK advertising industry?**

If the UK banned product placement despite its being permitted by the EU, it would deny broadcasters a supplementary source of commercial revenue at a time when new technology such as PVRs, and the drift of ad revenue towards new media, is putting pressure on traditional sources of advertising income.

“Prop” placement, whereby goods are placed in programmes at no cost to the broadcaster, already exists and viewers are already accustomed to product placement in US programming. The recent Ofcom consultation flagged that product placement is not expected to become a considerable source of revenue for broadcasters. However, with audience fragmentation and revenue pressures, broadcasters need to diversify their income streams in order to maintain levels of investment in programmes.

The method of identification of product placement should not be prescriptive and where in the programme it takes place should be left to the discretion of the Member States.

The AA believes a controlled liberalisation of the product placement rules, with clear identification to the viewer, is therefore important and if it is permitted within the Directive, the UK government should reflect this fact in its implementation.

#### Surreptitious and subliminal advertising

**19. Is the definition of surreptitious advertising at Article 1(h) sufficient to catch all possible forms of abuse?**

The AA believes this is comprehensive.

**20. Should there also be a definition of the ‘subliminal techniques’ which are to be banned (Article 3g(b))?**

A fuller definition has not previously been required and the AA does not see the need for one now. A list of ‘subliminal techniques’ would go rapidly out of date and a general prohibition such as that given at Article 1(h) is more effective.

#### **Conclusion**

The Advertising Association and its Members have been involved in the debate on the revision of the TVWF Directive from an early stage in its development. Although we welcome a revision which will make more sense in the rapidly changing audiovisual arena, we are concerned that the drafting of the Commission proposal could be ‘tighter’.

With this in mind the AA reminds the DCMS of its key issues relating to this Directive:

- The Country of Origin principle should not be weakened;
- Self- and Co-Regulation both play an important part in the legislative landscape surrounding this Directive and should both be considered as implementation tools for this Directive. Member States should have the discretion to decide how/if they will use these tools;

- Modernisation of advertising rules is to be welcomed but should go much further.

Attached at Annex 1 are the amendments which the Advertising Association has sent to Members of the European Parliament, based on the original Commission text.

Kerry Neilson

Head of European Public Affairs

The Advertising Association

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