

Audiovisual Media Services and the Unfair Commercial Practices Directive

by Jan Kabel

EDITORIAL

Are audiovisual media services totally unaffected by general legal principles? This IRIS *plus* article shows the not entirely unique position of an area of law that, at first glance, would seem to be regulated completely by technology-dependent regulations. Product placement, sponsoring and surreptitious advertising are, however, not only subject to specific media-related legislation, but also to general principles in the field of unfair commercial practices that protect consumer interests.

These interests have not yet been taken into account in discussions on the new Audiovisual Media Services Directive. Nevertheless, consumer interests will take a prominent place in the law of audiovisual media services. This IRIS *plus* explains to what extent and why. It also tells its readers how the general legal principles relate to media-specific legislation.

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1. Introduction

1.1. Consumer Interests and the TVwF Directive

The Recitals to the first television directive, the “Television without Frontiers” Directive (TVwF Directive), justified the system of minimum harmonisation by, in particular, finding that, in order to fully and properly protect the interests of the consumer as a viewer of broadcasts, Member States should retain the right to impose stricter regulations than those laid down by the Directive.¹ In the preparatory work for the TVwF Directive in the nineteen-eighties, the interests of the consumer as television viewer did indeed play a large role. The discussions covered, *inter alia*, the consequences for the consumer of cross-border television advertising and the amount of broadcasting time allocated to advertising. For example, the *Bureau Européen des Unions de Consommateurs* (international consumer organisation - BEUC) wished to include teleshopping in calculating the maximum amount of advertising time in order to protect consumers against an overload of television-advertising. Furthermore, the *Consumentenbond* (Dutch Consumer Association) “went Dutch” by proposing that television viewers should not be obliged to pay for public broadcasts that they had not requested.²

The more fundamental question as to whether consumer law can be applied to the scope of the media was not raised during these discussions. However, attempts to answer this question would quickly hit a blank wall. One should, for example, try to apply the familiar five fundamental consumer rights from the Initial Programme of the Council of the EC of 1975³ to the scope of television. If rights such as the right to protection of economic interests, the right to compensation of damages or the right to representation are consistently invoked, they are at odds with freedom of expression. For example, should there be financial compensations if television series do not fulfil the reasonable expectations of the average consumer? Should a majority of viewers define news selections? The answer to these questions should invariably be in the negative.

The only fundamental consumer right that appears significant in this context, strangely enough, does not appear as a separate right in the catalogue of the Council. In 1962, the American President John F. Kennedy presented a speech to the United States Congress in which he extolled four basic consumer rights, later called *The Consumer Bill of Rights*. One of these rights was the right to free choice among product offerings. This right states that consumers should have a variety of options provided by different companies from which to choose. On the basis of this right, the consumer must indeed have the possibility to choose among media of a different stature. However, that right is already guaranteed by an important element of the freedom of expression, namely the obligation of the government, inferred from this right, to ensure the principle of pluralism, especially in relation to audiovisual media, given that their programmes are often broadcast widely.⁴ Following on from the original discussions, little more mention was made of the fundamental rights of the consumer with respect to television broadcasting.

1.2. Consumer Interests and the AVMS Directive

The Audiovisual Media Services Directive (AVMS Directive)⁵ not only continues to regulate television broadcasts, but extends the scope to non-linear services like video-on-demand and catch-up TV. The principle argument for including non-linear services is that “[l]egal uncertainty and a non-level playing field exist for European

companies delivering audiovisual media services as regards the legal regime governing emerging on-demand audiovisual media services [...]”⁶

This argument is not very persuasive. It is by no means unlikely that legal uncertainty and unequal competition conditions will continue to exist. I mention some reasons. According to Article 3, para. 1 of the AVMS Directive, Member States shall remain free to require media service providers under their jurisdictions to comply with stricter rules than those of the Directive. This minimum harmonisation, of course, may lead to unequal competition between national providers and providers from other Member States that operate on a national audiovisual market. This had been for example the case in the Netherlands, with the Luxembourg-based RTL operating in the Dutch market under a liberal Luxembourg regime, in competition with Dutch commercial broadcasters operating under a much stricter regime with respect to product placement, sponsoring and other forms of non-spot advertising. Furthermore, according to the system under Article 3, para. 2-5, Member States can adopt measures to combat the circumvention of national regulations. The system does not make the adoption of such measures easy; nevertheless, the existence of the possibility impairs legal certainty. A third argument could be found in the option that, in Article 3e, para. 2, the Directive specifically clears the way for self-regulation. Given the already existing variety of self-regulation in the EU Member States, it should not come as a surprise that this also will not guarantee a high level of legal certainty as to the rules for advertising, product placement and sponsoring. Finally, to name some very specific rules, the Directive provides a facultative opportunity to prohibit, for example, a sponsor’s logo on a children’s programme or documentary or product placement otherwise permitted by the Directive. Under certain conditions, Member States may also dispense with the duty to provide information in the case of product placement. In view of all these points, it is by no means unlikely that legal uncertainty and unequal competition conditions will continue to exist. Such a situation could damage the interests of providers of audiovisual media services. Nevertheless, the main argument for the minimum harmonisation with respect to the TVwF Directive, already mentioned at the beginning of this article, should be recalled: the system of minimum harmonisation was justified by, in particular, the need to protect the interests of the consumer as a viewer of broadcasts.

The AVMS Directive, however, has nothing else to say about consumer interests. Nowadays, there is also little forthcoming from consumer organisations. This is strange; since so much has gone in favour of commercial interests as far as the major points on the consumer agenda during the nineteen eighties, such as the amount of advertising time and regulations governing commercial breaks, are concerned, one might have expected a response on their part. There is actually nothing in the AVMS Directive to counterbalance the liberalisation of the regulations governing commercial breaks and the blurring of the separation of programmes and advertising through the introduction of product placement.

The literature, however, pays greater attention to the situation. The previous discussion about consumer rights in relation to the TVwF Directive has now been re-ignited in response to the viewing options offered by non-linear (on-demand) services. The media-consumer again takes centre stage, but now in a more active role. Wilhelmsson has carried out an exercise, albeit in the context of the print media, whereby rules concerning consumer purchases or product liability are applied to the purchase of information offered in a newspaper or magazine.⁷ He justifies this approach by pointing

out that, due to developments in the modern consumer society, a newspaper is seen as a commercial product and a TV broadcast as a commercial service. He tries to imagine what, for example, a consumer's right to demand quality as to the content of a newspaper would mean in terms of consumer law. In the end, however, he does not get much beyond discussing the otherwise interesting question of whether advertising for the media should be in accordance with the range of media itself and whether freedom of expression presents a hurdle to any findings of misleading advertising for magazines and newspapers.

Helberger does something interesting. She regards the previously passive viewer as having become emancipated as an active consumer – a media-literate viewer – and tries to draw conclusions with respect to the nature of media law.⁸ But again, as in the past, the fundamental rights of the consumer are not dealt with in a structured way. These views have therefore not yet produced any practical legal results. The tone, however, has been set: the media consumer deserves a position in law. Regulations should no longer be introduced without consideration of this position. The view of Helberger connects with the technical developments that enable audiovisual content to be made available on demand. The passive television viewer is changing into an active purchaser of services, thereby behaving more as a consumer, i.e. the purchase of media services could be regarded in part as an economic transaction,⁹ in the context of which the relevant consumer right can apply.

2. Protection of the Viewer against Unfair Commercial Practices: the Unfair Commercial Practices Directive (UCP Directive).

Economic consumer transactions are the subject of the recent Unfair Commercial Practices Directive (UCP Directive).¹⁰ Adopted in 2005, this is a general framework directive intended to protect the consumer against misleading and aggressive commercial practices in economic transactions. It supports the assumption that the legislature should ensure that full and accurate information be provided before, during and after purchase decisions on behalf of the consumer, thus enabling, in principle, the economic interests of the consumer to be sufficiently guaranteed. To this end, the Directive provides a system whereby, firstly, inaccurate and incomplete information is prohibited on the grounds of being misleading. Secondly, traders are required to provide the consumer with essential information. Finally, situations are combated in which the average consumer's freedom of choice or conduct with regard to the product is likely to be impaired.

In itself, none of this is surprising, but what is unexpected is that, for the first time, the legal concepts applied, such as "misleading" and "aggressive commercial practices", are defined and codified. We therefore now have an instrument that can be applied very generally and that may allow a practical-legal approach to some of the developments in the field of audiovisual media described above.

2.1. Background to the Unfair Commercial Practices Directive

Since the 1960s, there has been a debate at the European level on the need to codify and harmonise unfair competition law in a way that enables all relevant interests to be taken into account. However, it is clearly not possible to reconcile the interests of consumers with the interests of competitors or the general interest in this process. The consumer may actually benefit from serious unfairness to competitors (dumping, cheap "look-alikes", copying expensive brands) or, indeed, consumer interests may not play any role at all in some forms of unfair competition (discrediting competitors in comparative advertising, bribing of competitors personnel, advertising that takes undue advantage of a competitor's reputation with the public). Furthermore, differences in approach can also form a stumbling block to the harmonisation of material rules.

Attempts, especially in Germany, to stick to unfair competition law despite these situations, through the harmonisation of the interests of consumers and competitors, as well as public interest,¹¹ have not succeeded in bringing about a *European* harmonisation of unfair competition law. Only with regard to two unfair commercial practices has this encountered any degree of success: misleading advertising and unfair comparative advertising. Misleading advertising is the subject of the Misleading Advertising Directive of 1984.¹² This Directive, however, does not create a harmonised area and leaves ample possibilities for the Member States to create their own regime for misleading advertising. The term "misleading" is not defined, while Member States may impose stricter regulations than those set by the Directive and not just upon their own subjects, but also upon the advertising of foreign advertisers, since the Directive includes no "internal market clause". The Directive was amended in 1997 with provisions concerning comparative advertising.¹³ The amendment was intended to allow comparative advertising in Europe through the complete harmonisation of the relevant rules. Consequently, according to Article 7, para. 2 of the amended Directive, Member States may not impose stricter rules for comparative advertising.

2.2 The Scope of the Directive as regards Media Services

Apart from the above, however, no further developments have taken place. The Commission would seem, for the time being, to have decided to abandon the road towards full harmonisation of unfair competition law, and opt instead for the harmonisation of only part of this field of law, namely the protection of the consumer against unfair commercial practices – a part that is less politically sensitive and more easily able to gather the support of the Member States.

At the heart of the UCP Directive is the requirement that the consumer be protected against commercial practices that significantly limit his capacity to make an informed decision about an economic transaction. The Commission identified quite a few discrepancies in the laws of Member States in this field¹⁴ and regarded this as sufficient reason to intervene. However, Recital 6 of the UCP Directive states that the Directive "neither covers nor affects the national laws on unfair commercial practices which harm only competitors' economic interests or which relate to a transaction between traders." In these areas, the Member States retain their own authority, although having regard, of course, to community legislation.

The UCP Directive likewise does not apply to provisions concerning misleading advertising that is targeted to traders nor to comparative advertising. These commercial practices remain subject to the Directive on Misleading and Comparative Advertising. In order to make clear that the Directive on Misleading and Comparative Advertising henceforth is restricted to unfairness against competitors and not against consumers, it has since been amended into a directive that applies only between traders.¹⁵

The term "trader" is defined in Article 2, sub (b) of the UCP Directive as "any natural or legal person, who, in commercial practices [...] is acting for purposes relating to his trade, business, craft or profession and anyone acting in his name or on behalf of a trader¹⁶" and may therefore also include platforms that provide audiovisual media services to audiovisual advertisers. Situations that are relevant for the applicability of the UCP Directive to constellations concerning traders but not consumers, would probably include discrediting competitors in advertising, unfairly exploiting a competitor's reputation, imitations that do not confuse or mislead the consumer and all kinds of other practices whereby it cannot be said that the ability of the consumer to take an informed decision about an economic transaction is significantly restricted.

I shall not deal further with the issue of unfair commercial practices between traders alone. Nevertheless, the definition of the term "trader" is significant, since it also applies, of course, when unfair commercial practices by traders against consumers are at stake.



3. Protection against Misleading Practices at the Presentation of Audiovisual Commercial Communications

3.1. The Relationship between the AVMS Directive and the UCP Directive

Both directives are intended to protect the consumer against misleading practices. This goal is principally served in the AVMS Directive by separating the commercial and editorial content and by imposing a duty to inform as concerns the sponsorship of programmes and product placement. The UCP Directive also serves this goal, since it aims to protect the consumer against misleading (and aggressive) commercial practices. The UCP Directive introduces a detailed codification of the term “misleading”, as well as a blacklist of practices that are by definition misleading.

Concerning the relationship between the two directives, Recital 56 of the AVMS Directive provides that activities covered by the scope of the AVMS Directive are not covered by the UCP Directive. These activities include the presentation of the advertising; namely sponsoring, surreptitious advertising, product placement, commercial breaks during programmes and the amount of advertising time. There are, however, three reasons that seriously impair the meaning of this Recital.

To begin with, we need to make a distinction between the activities of the provider of audiovisual media services and the activities of the advertiser, to whom the UCP Directive might nevertheless apply. In the context of a particular commercial message, the position of the provider of audiovisual media services is subject to the AVMS Directive *and* to the UCP Directive, insofar as this provider acts on behalf of the advertiser, since, as explained above, the definition of a “trader” in the UCP Directive includes *anyone acting in his name or on behalf of a trader*. This naturally, could include a provider of audiovisual media services, the service, in this case, being audiovisual commercial communications. The advertiser here is only subject to the rules set out in the UCP Directive. In the event of any breach of the rules concerning, for example, product placement, the provider of audiovisual services can thus be held liable by virtue of the rules of the AVMS Directive *and* of the UCP Directive. This double liability also means that, in principle, different enforcement systems could be applicable.

Secondly, Recital 18 of the UCP Directive specifically confirms the definition of the term “average consumer”, as developed by the Court of Justice of the European Communities in its *Gut Springenheide* decision,¹⁷ as the yardstick that enables the courts to decide whether there has been anything misleading. This notional consumer is defined as “reasonably well-informed, observant and circumspect”. The question then arises as to whether such a consumer ought also to be the yardstick for interpreting rules of the AVMS Directive regarding the prohibition or restriction of the presentation of commercial communication, such as the prohibition of surreptitious advertising or restrictions placed on sponsoring and product placement.

Thirdly, for the first time, the UCP Directive codifies the effect of an unfair commercial practice as a judicially-relevant condition for prohibition. Article 5, para. 2, sub (b) of the UCP Directive states that a commercial practice shall be unfair, if “it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed.” With respect to misleading commercial practices, this distortion is further defined in Article 6, para. 1 of the UCP Directive as a practice “that causes or is likely to cause him (i.e. the consumer) to take a transactional decision that he would not have taken otherwise.”

These two factors (the yardstick of the “average customer” and the effect of the commercial practice as a determinant for the disallowance of the practice) are relevant in community terms to the explanation of a term – “misleading” – that is equally determinant

for the application of the AVMS Directive and which, with a view to harmonising EU law, should preferably not be interpreted in different ways for different media. It seems sensible to investigate if the above is actually correct.

3.2. The Average Consumer and the Media-literate Viewer

As mentioned before, the average consumer is a term created by the Court of Justice of the European Communities and adopted by the European Commission. Recital 18 of the UCP Directive states that “It is appropriate to protect all consumers from unfair commercial practices; however the Court of Justice has found it necessary in adjudicating on advertising cases since the enactment of Directive 84/450/EEC to examine the effect on a notional, typical consumer. In line with the principle of proportionality, and to permit the effective application of the protections contained in it, this Directive takes as a benchmark the average consumer, who is reasonably well-informed and reasonably observant and circumspect [...]”.

In simple terms, this means that if we in Europe wish to create an internal market, then we can have no time for ignorant consumers who expect every jar of peanut butter from every manufacturer to taste the same. In other words: legislating for recipes, i.e. regulations at European level dictating how peanut butter must be made, is – putting health and safety regulations aside – totally unacceptable. Anyone can manufacture his own brand of peanut butter and market it internationally, providing that he specifies its ingredients. But this means that we automatically assume that the consumer will read the ingredients, i.e. is an informed consumer who is observant and circumspect. This idea of a notional consumer, considered essential in order that the internal market works well, has now become a term that, thanks to the UCP Directive, is also applicable to national law, with a few exceptions for categories of consumers that by definition are not observant and circumspect, such as children.

The yardstick of the well-informed consumer also appears to correspond with certain factual assumptions made in the AVMS Directive about consumer behaviour. The justification for relaxing the regulations for commercial breaks, for example, is set out in Recital 57: “Given the increased possibilities for viewers to avoid advertising through use of new technologies such as digital personal video recorders and increased choice of channels, detailed regulation with regard to the insertion of spot advertising with the aim of protecting viewers is no longer justified.”

Viewers are, after all, according to this Recital, media-literate and this implies, according to Recital 37 of the AVMS Directive that they “are able to exercise informed choices, understand the nature of content and services and take advantage of the full range of opportunities offered by new communications technologies.”

The purpose of introducing this term, in my opinion, was not its use as a yardstick for the interpretation of rules, but as a way of encouraging media-literacy amongst all strata of society. If this purpose is achieved, the media-literate consumer will, however, become a term to be considered in judicial matters when assessing whether to permit particular audiovisual media services. According to the recitals cited above, this goal is already achieved in the context of commercial breaks in the middle of TV programmes. Recital 57 makes it clear that rules on the insertion of spot advertising with the aim of protecting viewers are no longer justified, because viewers are supposed to be perfectly able to take advantage of the full range of opportunities offered by the new communications technologies, such as the possibilities for viewers to avoid advertising through use of new technologies.

3.3 The Effect of the Commercial Practice

As has been said before, the effect of an unfair commercial practice must be that the consumer made a decision that he otherwise (in the absence of inaccurate, incomplete or aggressive commercial

practices) would not have made or was placed in a position whereby making such a decision was possible. This condition is necessary so as to be able to establish any unfair commercial practice.

This judicially-relevant effect was set out as a condition early on by the Court of Justice of the European Communities in the *Nissan* case.¹⁸ That decision considered an advertisement for “new” cars which, even though intended for exportation to France, had already been registered in Belgium, although not actually driven. The cars were cheaper than those sold by official Nissan dealers in France, but they also had fewer accessories. This was a parallel import case by a seller not affiliated to the Nissan dealer network. Nissan tried to combat this parallel importing by relying on the doctrine of misleading. The Court held with regard to the claim of newness: “(15) It is for the national court, however, to ascertain in the circumstances of the particular case and bearing in mind the consumers to which the advertising is addressed, whether the latter could be misleading in so far as, on the one hand, it seeks to conceal the fact that the cars advertised as new were registered before importation and, on the other hand, *that fact would have deterred a significant number of consumers from making a purchase, had they known it.*”¹⁹

What the Court, therefore, did was to introduce an “effect-criterion”. The advertising of the lower cost of the cars would only be misleading, according to the Court, if a significant number of consumers at whom the advertisement was aimed decided to buy such a car without realising that the reason for the lower price of the cars sold by the parallel importer was that the cars had fewer accessories. Or, to quote the Court, “(16) On the second point, concerning the claim that the cars are cheaper, such a claim can only be held misleading if it is established that the decision to buy on the part of a significant number of consumers to whom the advertising in question is addressed was made in ignorance of the fact that the lower price of the vehicles was matched by a smaller number of accessories on the cars sold by the parallel importer.”

This is a rather strict interpretation of the term “misleading”. The advertiser can escape any finding of misleading conduct by demonstrating that a not insignificant number of consumers appeared not to care that the cars had previously been registered in Belgium and would have understood that the reason for the lower price was the fewer accessories. This is not at all improbable and would signify that there has indeed been a higher threshold for a finding of misleading advertising than was previously the case, when neither the legislation nor jurisprudence explicitly spelled out any such criterion as regards effects. However, this conclusion does not alter the fact that Nissan’s attempt to prevent what, from the point of view of the internal market, is desirable parallel importing, was smothered at birth by raising the bar for misleading conduct. To illustrate this point, I quote the relevant consideration: “(12) Before embarking on such an examination, it should be emphasized that these aspects of the advertising are of great practical importance for the business of parallel car importers, and that, as the Advocate General has pointed out in paragraphs 5 and 6 of his Opinion, parallel imports enjoy a certain amount of protection in Community law because they encourage trade and help reinforce competition.”

We must wait and see what the Court of Justice of the European Communities will do in this regard, but it is not unlikely, given certain other judgments in this area, that the Court will keep the requirements high, especially since the effect-criterion has been explicitly made subject to maximum harmonisation in the UCP Directive and, therefore, must be a leading principle in the interpretation of misleading cases by judges of the Member States.

3.4. Interpretation of the Concept of Misleading Practices in the AVMS Directive

The term “misleading” forms part of the prohibition of surreptitious audiovisual commercial communication in Article 3e of the AVMS Directive. After all, this prohibition only applies, conforming to its definition in Article 1(j) of the AVMS Directive, to the repre-

sentation in words or pictures of the goods, the name, the trademark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the media service provider to serve as advertising and *might mislead the public as to its nature.*”²⁰

If we apply the interpretation of the term “misleading”, adopted by the Court in its *Nissan* case, as mentioned above, and incorporated in the UCP Directive, to the prohibition of surreptitious advertising, then, according to Article 7, para. 2 of the UCP Directive, the representation, to be prohibited as surreptitious advertising, must “cause or [be] likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.”

In other words, the misleading representation must have consequences in terms of an effect with regards to the consumer’s decisions. The consumer’s belief that the relevant description is an editorial rather than a commercial description must lead him, or be able to lead him, to make a decision about a transaction that he would not have made had it not been for what he believed was an editorial description. Such an interpretation leaves open less room for a prohibition of surreptitious advertising than an interpretation that merely regards the omission of the fact that the information is commercial information as misleading. This latter interpretation, however, does not mesh with item (11) on the UCP Directive blacklist, which regards under all the circumstances as unfair: “Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial).”

Criteria like “the average consumer” or “the effect of the omission” that are inferred from the UCP Directive cannot, in this situation, be used to downgrade the application of this point (11) of the same Directive’s blacklist. The simple omission of information about the commercial nature of the message is clearly too serious an infringement in its own right. This argues in favour of an interpretation of the term “misleading” in the AVMS Directive in conjunction with the aforementioned provision in the blacklist, in such a way that the omission of information in itself can be regarded as misleading. Thus, Recital 60 of the AVMS Directive assumes that surreptitious advertising automatically has negative effects on the consumer.²¹ Under the AVMS Directive, the provider of the programme containing surreptitious advertising may therefore, just like the advertiser under the UCP Directive, be pursued merely by the omission of information, even if consumers are not actually being misled in the meaning of the UCP Directive.

So, neither providers of audiovisual commercial communications nor advertisers can plead that consumers are not being misled in terms of the general definitions of misleading advertising; simple presentation of audiovisual content as editorial, when in fact it is paid for by commercial advertisers, is sufficient to qualify that content as (prohibited) surreptitious advertising.

3.5. Interactive Advertising in Connection with the UCP Directive

Interactive advertising enables a viewer to click on an icon or object on the television screen with a “red button” on his remote control in order to access a website that, for example, advertises the object he has just clicked on. This facility gives rise to a number of fascinating legal problems, since it is covered by at least three different juridical fields: the AVMS Directive, the E-Commerce Directive and the UCP Directive – not forgetting the general rules on unfair competition.

For example, alcohol advertising is covered by various rules, whether long-existing rules concerning television advertising contained in Article 15 of the TVwF Directive (and retained in the AVMS Directive) or rules governing any other form of audiovisual commercial communications that form part of an on-demand audiovisual

media service. The rules governing the former (television advertising) are stricter than those governing the latter (audiovisual commercial communications in on-demand audiovisual services). The latter only contain a general prohibition in Article 3e, sub (e), that audiovisual commercial communications for alcoholic beverages shall not be aimed specifically at minors and shall not encourage immoderate consumption of such beverages. The specific article that rules television advertising, Article 15 of the AVMS Directive, is much more detailed. Moreover, Article 15 prohibits television advertising for alcoholic beverages from linking the consumption of alcohol to enhanced physical performance or driving. It provides that television advertising for alcoholic beverages shall not create the impression that the consumption of alcohol contributes towards social or sexual success. It defines that television advertising for alcoholic beverages shall not claim that alcohol has therapeutic qualities or that it is a stimulant, a sedative or a means of resolving personal conflicts. And, last but not least, the advertising should not place emphasis on high alcoholic content as being a positive quality of the beverages.

Does the interactivity icon on the television screen or the environment accessed by the viewer once the red button has been pushed determine which rules apply? The accessed environment could be covered by the AVMS Directive, but could also be a normal website regulated by the E-Commerce Directive, which simply regulates electronic transactions and has no provisions at all relating to alcohol advertising.²² If the interaction occurs via a television advertising message and the click is made within this advertising message, the regulations governing television advertising should apply. Otherwise it would be too easy to circumvent the advertising rules for alcoholic beverages. If the interaction occurs via an editorial television programme, the case is more complicated, because the question then arises as to whether product placement has occurred through the display of the icon or the object, with all the consequences to which such an event would give rise. In such a case, for example, one problem that might occur would relate to whether the viewer is informed about the fact that he has clicked on a commercial website.

These technology-dependent differences in regulations are absent if the UCP Directive is applied. This simplifies matters, since the aforementioned point (11) of the blacklist requires the *advertiser* to refrain from using any editorial content in the media to promote a product, without this being clear either from the content or from images or sound clearly identifiable by the consumer.

4. The Significance of the UCP Directive to the Content of Advertising and Other Audiovisual Media Services

4.1. Significance of the UCP Directive for Audiovisual Media Services

The subject of the UCP Directive is a “commercial practice”. According to Article 2, sub (d) of the UCP Directive a commercial practice means: “any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers”.

The AVMS Directive does not coordinate any commercial practices in the areas of unfair competition and misleading advertising. Nevertheless, these are practices that occur in the audiovisual media. Accordingly, the regulations of the UCP Directive do not only cover audiovisual commercial communications and other (audiovisual) practices in the sale of goods but also include practices such as “self-promotion” for the provision of audiovisual service providers. The term “commercial practice” is more broadly formulated, in line with this reasoning, enabling the UCP Directive to also be applied to the assessment of audiovisual media services other than commercial communications, such as misleading phone-in competitions.

One more step and the entire range of audiovisual media providers would lend itself to scrutiny for consumer interests. However, the term “commercial practice” is not quite that broad, since it requires a direct connection with the promotion, the sale or supply of a product to consumers. The interests dealt with in the UCP Directive are primarily concerned with the right of the consumer to full and accurate information relevant to a decision to enter into an economic transaction. Testing the editorial audiovisual media service itself against commercial practices legislation for, e.g., its reliability, authenticity, professionalism, completeness or independence, is only then appropriate if these characteristics are valued in commercial communications or if the editorial media service itself is actually a commercial practice in the guise of an independently presented editorial programme. This is as much as the UCP Directive can offer.

4.2. The Blacklist and Audiovisual Media Services

A number of commercial practices are deemed to always restrict the capacity of the consumer to make an informed decision and are therefore always unfair: the Annexes to the Directive contain a blacklist of 31 such practices. This list can only be revised at community level. Many of these practices are, generally speaking, already prohibited, such as pyramid selling, inertia selling, phantom invoices, advertising with quality marks within a quality mark system to which one is not associated or advertising something as “free” for which the consumer must actually pay. But the point here is that no further differentiation is required: one or two inaccuracies are sufficient to fall foul of the Directive, even if the average consumer would easily be able to see through them. The question as to whether the capacity of a consumer to make an informed choice really is limited is not relevant in assessing the unfairness of an act that fulfils the conditions of an item from the blacklist.

A number of these practices are particularly relevant to audiovisual service providers. With the aid of the blacklist, misleading and aggressive television phone-in competitions, for example, could be targeted. A characteristic of these competitions is the way the presenter repeatedly encourages the public to enter the competition with the promise that it is easy to win prizes, whereas in fact it is extremely difficult to reach the presenter by telephone and the cost of phoning in is very high. Such practices can be combated by items 19, 26 or 31 on the blacklist: Item 19 qualifies as misleading and thereby unfair “claiming in a commercial practice to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent”. Item 26 qualifies as aggressive and therefore unfair “making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media”. Item 31 qualifies also as aggressive and therefore unfair “creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize, or other equivalent benefit, when in fact either there is no prize or other equivalent benefit, or taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.”

It won't always be easy to apply the blacklist to these phone-in competitions. Nevertheless it would remain much less difficult as the method currently being employed to get rid of these competitions by seeking to categorise them as television advertising, self-promotion or teleshopping, as was the situation in the Austrian “Quick-Express” phone-in competition of Österreichischer Rundfunk.²³

4.3. Duty to Provide Information in the Case of Audiovisual Commercial Practices

At the core of the UCP Directive is the assumption that the consumer can best be protected through the provision of information that makes it unnecessary to impose other legal restrictions, like advertising bans, and thereby encourages a competitive market. The Directive, therefore, prohibits the omission of essential information that the average consumer needs so as to be able to make an informed decision about a transaction. It also contains a summary

of what information, and under which conditions, is deemed to be “essential”.

The UCP Directive recognises, however, in Article 7, para. 3, that this may involve limitations of space and time imposed by the medium used to communicate the commercial practice. Accordingly, these limitations and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted. However, where the consumer must be in possession of certain essential information because the advertising enables him to immediately order a product or service, this information is always required, since he needs to know with whom he is doing business and whether there are any pitfalls. Article 7, para. 4 of the UCP Directive therefore provides that, if there is an offer requiring immediate acceptance, an “invitation to purchase”, there must, at a minimum, be information about: the type of product, where the seller is based (geographical address), the price of the product (plus any extra costs) and whether practices are being employed that the consumer could not have expected. An example for unexpected practices would be an unusual form of making payment.

Article 2, sub (i) of the UCP Directive defines “invitation to purchase” as “a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase”. If every advertisement that specifies the price and the product should be deemed to be such an invitation, then many advertisements would have to contain even more information. To sidestep this obligation, many advertisers would resort to meaningless information – something which is likewise not in the interests of the consumer. The stress must therefore be put on the phrase “... and thereby enable the consumer to make a purchase”. The implementation of the UCP Directive in the Dutch Advertising Code takes this restricted interpretation into consideration by adding to the definition that there is a requirement for a payment mechanism or a situation in which the consumer can immediately enter into a transaction, either on location or remotely.

The defence that the information is communicated to the consumer through other channels is probably irrelevant to an invitation to purchase. Article 7, para. 4, sub (a) of the UCP Directive does indeed make reference to the medium by specifying that the main characteristics of the product should be indicated to the extent appropriate to the medium, but this is the only place where mention is made of the medium. One can deduce from this that restrictions of the medium play no role in the other information required to be included in any invitation to purchase. However, the matter will require clarification by the Court of Justice of the European Communities. In the case of on-demand services, restrictions of the medium do not, in my view, constitute a valid excuse for the omission of information, because additional information can always be supplied here.

Where offers can be immediately accepted via audiovisual commercial communications, these obligations to provide information must at any rate be met, because these offers could be qualified as connected with an invitation to purchase. This is true, for example, for teleshopping, a commercial practice defined in Article 1 sub (l) of the AVMS Directive as “direct offers broadcast to the public with a view to the supply of goods or services, including immovable property, rights and obligations, in return for payment”.

Accordingly, at a minimum, such invitations must always specify a geographical address. This, in my view, would be a great improvement. In the case of teleshopping, given its duration, the advertiser may not rely on the necessity to provide the information by other means, as he can do in view of the aforementioned interpretation of Article 7, para. 4 of the UCP Directive.

The AVMS Directive qualifies *product placement* and *sponsorship* as a form of audiovisual commercial communications. Product placement and sponsor publicity are permitted, but subject to a number

of conditions and the question arises whether the obligations to provide information under the UCP Directive also applies to these forms of audiovisual commercial communications. This would not be completely senseless, since it is clear that non-spot advertising is currently, to a large extent, replacing spot advertising and there is no reason why the usual rules on advertising should not apply to the replacement of spot advertising by non spot advertising.

4.4. Advertising for Audiovisual Media Services

In most cases, the viewer is not a consumer as defined by the UCP Directive, since the definition requires that he take a decision, as a viewer, to enter into a commercial transaction which he would not have taken without the unfair commercial practice of the media service provider. One could imagine that the viewer would be disappointed when choosing a programme that was so enthusiastically recommended to him by self-promotion spots from the provider. To be able to regard this choice as a decision concerning a transaction, by virtue of the definition under Article 2 sub (k) of the UCP Directive, there must be a “decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting”.

In the case of an open net where services are offered on a non-payment basis this is hard to imagine. The situation may be different if the viewer does figure as a consumer, by purchasing an on-demand audiovisual media service. The information about these audiovisual services can be tested against the rules governing unfair commercial practices, if the provider of the media services can also qualify as trader, as defined by the UCP Directive. We have mentioned this definition above. The definition applies in any event to commercial providers of media services. This position offers the potential for monitoring on the part of the viewer, in his role as media consumer, of the content of the service provided, whether this service does not match the manner of its promotion by the media service provider or whether it is being marketed aggressively. It is important to note that we are not concerned here with the monitoring of the content of the media service itself, but with the question of whether the information about the service matches the actual service.

4.5. Excessive Advertising and Aggressive Commercial Practices

The television viewer had already been given a role as consumer by Recital 27 of the TVvF Directive, which explicitly proposes the system of minimum standards and the option for stricter national regulations as a guarantee that the interests of consumers as viewers of broadcasts are fully and properly protected. Paragraph 27 of the judgment of the Court of Justice of the European Communities in the Austrian phone-in competition case states: “From that point of view, the provisions of Chapter IV of Directive 89/552, which define those rules and standards, express the intention of the Community legislature, as pointed out by Advocate General Ruiz-Jarabo Colomer at point 76 of his Opinion, to keep those promotional activities separate from those covered by the other parts of the programmes broadcast, to make them unambiguously identifiable to television viewers and to restrict the transmission time thereof. Thus the protection of consumers, as viewers, from excessive advertising is an essential aspect of the objective of Directive 89/552 (see to that effect, Case C-245/01 RTL Television [2003] ECR I-12489, paragraph 64).”²⁴

The RTL case cited by the Court concerns excessive advertising. The issue in this case was the interpretation of the term “series” as a means of determining what the *frequency of breaks* during a television programme may be. RTL broadcast a number of films, such as “*Schrei im Wald*” and “*Rache der Amy Fisher*”, each with a length of approximately 86 minutes, which they then established, through advertising, as forming part of a series entitled “*Gefährliche Leidenschaften*”. If the films are regarded as a series, it is possible to interrupt them with four breaks for advertising (one every twenty

minutes), whereas if they are regarded as films, only one break is possible (i. e. once every 45 minutes, where the film is longer than 45 minutes). The Court interpreted the term "series" with the aid of substantive criteria, such as the development of the same story in successive broadcasts or the repeated appearance of one or more characters in the various broadcasts. The Court explained the difference in advertising break frequencies between films and series on the ground that a series, precisely because of the basic elements that connect the various films comprising the series, requires less concentration from the television viewer than a film. Also of interest is the fact that the Court deemed the relevant restriction justified by virtue of Article 10, para. 2 of the European Convention of Human Rights. Consideration (70) of the decision states as follows: "The restriction at issue pursues a legitimate aim involving "the protection of the ... rights of others" within the meaning of that provision, namely the protection of consumers as television viewers, as well as their interest in having access to quality programmes. Those objectives may justify measures against excessive advertising."

The AVMS Directive changes this careful balance between the interests of the providers of audiovisual services and the viewing consumer. It is now up to the television broadcaster to decide on the amount of advertising breaks in its range of series, serials and documentaries. However, the broadcaster still has to take into account a number of factors, such as natural pauses, the nature of the programme and the moral rights of programme makers. Made-for-TV films are subject to a quantitative restriction on breaks: these broadcasts may only be interrupted once every half hour. This greater flexibility is justified, as explained above, by the increase in opportunities for viewers to avoid advertising through the use of new technologies, such as digital personal video recorders and the greater range of channels (Recitals 57 and 58 of the AVMS Directive). The viewer, therefore, apparently has no further need for protection in this area. The same applies to excessive product placement and sponsorship publicity. As long as the viewer is informed, no further restrictions to protect the consumer against excessive advertising are necessary. Does the UCP Directive then offer comfort? Item 26 on the blacklist identifies as an aggressive and therefore unfair commercial practice in all circumstances "[m]aking persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified under national law to enforce a contractual obligation. This is without prejudice to Article 10 of Directive 97/7/EC and Directives 95/46/EC and 2002/58/EC."

It may be difficult to compare the unwanted solicitations mentioned in this item to advertising breaks or product placement. Nevertheless, it could be held that breaks or product placements are not wanted by television viewers. Dependent upon the frequency of breaks or product placements in one and the same programme, some forms of this kind of commercial communications could be combated, if they fulfil the criterion of "persistent".

5. Summary

By way of summarising the principal finding: What does the UCP Directive offer the user of audiovisual media services, by way of protection, in comparison to the AVMS Directive? As has been noted, the AVMS Directive does not in itself offer the user any protection against excessive advertising and, in general, the user of these services as a consumer is actually disregarded. The relationship between the AVMS Directive and the UCP Directive is not, as the explanation to the AVMS Directive suggests, one of speciality: even in those cases that are governed by the AVMS Directive, the UCP Directive may apply and the provider of audiovisual media services may be liable for unfair commercial practices. This overlap is manifestly exhibited in the prohibition of surreptitious advertising. The AVMS Directive and the UCP Directive deal with this prohibition in the same way: the omission of the required information is in itself enough to justify prohibition. Through this method of *presentation of the advertising* and other methods such as product placement and sponsorship, it is interesting to see that, thanks to the UCP Directive, the advertiser can also now be held liable for breach of the relevant rules. Even the provider of audiovisual media services could, depending on the national competency rule, be held liable for unfair commercial practices, as the party acting on behalf of the advertiser.

The UCP Directive is restricted to economic transactions. Complaints about the *content* of a media service can only be considered if there has been unfair advertising about this content. The UCP Directive can be used in a defence – and better than the AVMS Directive – against unfair practices in phone-in competitions and other commercially-provided services. The provider of audiovisual media services is also indirectly bound by the obligation to provide information under the UCP Directive. Rules on advertising content should also apply to non-spot advertising, because this form of advertising is replacing the usual advertising messages.

1) Recital twenty-seven of the Directive 89/552/EEC of 3 October 1989: "Whereas in order to ensure that the interests of consumers as television viewers are fully and properly protected, it is essential for television advertising to be subject to a certain number of minimum rules and standards and that the Member States must maintain the right to set more detailed or stricter rules and in certain circumstances to lay down different conditions for television broadcasters under their jurisdiction".

2) See J.J.C. Kabel, "Televisie-reclame en de mediaconsument in het Europese omroeprecht", *Tijdschrift voor Consumentrecht* 1990, no. 1, pp. 3-19.

3) OJEC C 92 of 25 April 1975, pp. 1-12. These rights are (1) the right to the protection of health and safety, (2) the right to the protection of economic interests, (3) the right to compensation of damages, (4) the right to information and education and (5) the right to representation.

4) See, for example, ECHR 24 November 1993 (*Informationsverein Lentia and Others v. Austria*), *Series A NO. 276*.

5) Directive 2007/65/EC of 11 December 2007 amending Directive 89/552/EEC concerning the pursuit of television broadcasting activities, OJEC L 332 of 18 December 2007, p. 27.

6) Recital (7) of Directive 2007/65/EC.

7) Thomas Wilhelmsson, "The Consumer's Right to Knowledge and the Press", in: T. Wilhelmsson et al. (eds.), *Consumer Law in the Information Society*, Kluwer Law International, pp. 367-384.

8) N. Helberger, "The Media-Literate viewer", in: *Dommering-bundel*, Amsterdam: Otto Cramwinckel Uitgever 2008, pp. 135-149 (http://www.ivir.nl/publications/helberger/Dommering_bundel_Helberger.pdf)

9) Lowe and Bardoel here cite Poltrack: "In our research with consumers, content on demand is the killer app. They like the idea of paying only for what they watch". See Gregory Ferrell Lowe & Jo Bardoel (eds.), *From Public Service Broadcasting to Public Service Media*, Nordicom Goteborg 2007, p. 21.

10) Directive 2005/29/EC of 11 May 2005 concerning the unfair business-to-consumer commercial practices, OJEC L 149 of 11 June 2005, p.22. For more on this Directive, see Stephen Weatherill & Ulf Portland, Oregon: Hart Publishing

2007. The date of implementation was December 2007. Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29*, Oxford and Portland, Oregon: Hart Publishing 2007.

11) See Section 1 of the German Law on Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb - UWG*) on the basis of which, conforming to standard Jurisprudence, the UWG serves a threefold objective: the protection of consumers, competitors and the general public... See for that jurisprudence and further Frauke Henning Bodewig, *Unfair Competition Law. European Union and Member States*, Kluwer Law International 2006, p. 127.

12) Directive 84/450/EEC of 10 September 1984 concerning misleading advertising, OJEC L 250 of 9 September 1984, p. 17.

13) Directive 97/55/EC of 6 October 1997 concerning misleading and comparative advertising, OJEC L 290 of 23 October 1997, p. 10.

14) See Recitals (3) and (4) of the UCP Directive.

15) Directive 2006/114 of 12 December 2006 concerning misleading advertising and comparative advertising (codified version), OJEC L 376 of 27 December 2006, p. 21.

16) Emphasis added by the author.

17) ECJ 16 July 1998, C-210/96 (Gut Springenheide GmbH, R. Tusky en Oberkreisdirektor des Kreises Steinfurt – Amt für Lebensmittelüberwachung).

18) C-373/90 of 16 January 1992 (Criminal proceedings against X.).

19) Emphasis added by the author.

20) Emphasis added by the author.

21) Recital 60: "Surreptitious audiovisual commercial communication is a practice prohibited by this Directive because of its negative effect on consumers. (...)".

22) Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"), OJEC L 178 of 17 July 2000, p. 1.

23) ECJ 18 October 2007, C-195/06 (KommAustria v. ORF).

24) Source: <http://curia.europa.eu/juris/cgi-bin/gettext.pl?lang=de&num=79968976C19010245&doc=T&ouvert=T&seance=ARRET>