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Playing hide-and-peek? A legal perspective on the complex distinction between commercial and editorial content in hybrid advertising formats

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Abstract

Purpose – This paper aims to examine the challenges raised by hybrid advertising strategies for principles of identification and separation, included in various regulatory instruments, and the Audiovisual Media Services Directive (AVMSD) in particular.

Design/methodology/approach – First, this paper describes two examples of hybrid (television) advertising formats, with a potential interconnection between editorial and commercial content, such as advertorials and commercial overlays. This section is followed by an analysis of the origins and key elements of the identification and separation principle. Next, the implementation in legislation of Belgium (Flanders region), The Netherlands and the UK, and decisions of media regulators in those countries are explored to assess how the principles are interpreted in practice. Finally, the authors identify the concrete challenges that these formats raise and frame those against the background of European policy developments.

Findings – The analysis shows that the current interpretation of the identification and separation principles conflicts with the inherently integrated features of hybrid advertising formats, especially commercial overlays. To remedy this, the authors propose strengthening the identification principle, for instance, by developing cross-media labels and framing this within a co-regulatory framework where advertisers and media service providers take up their responsibility to respect fundamental principles and protect less cognitively skilled consumers, such as children.

Originality/value – This paper aims to contribute to the current re-thinking of the legal framework with regard to new commercial communication techniques, convergence and public interest goals. This can be framed against the background of the revision of the AVMSD and the Digital Single Market Strategy.

Keywords Advertising, Self-regulation, Audiovisual Media Services Directive, Co-regulation, Commercial communication, Minors

Paper type Research paper

1. Setting the scene

Trends related to digitisation and convergence lead to the emergence of sophisticated advertising formats. Originally, advertisers spread their commercial messages – addressed to both adults and children – through traditional, mostly national media platforms, such as linear television, radio, print media and outdoor billboards (Tungate, 2007; Glaser, 2013). Nowadays, commercial content is increasingly distributed through a variety of emerging digital platforms, networks and devices, ranging from digital and smart television, over e-readers, game consoles to mobile phones and smartphones, often with both a national and cross-border reach (Cauberghe *et al.*, 2012; Livingstone and Haddon, 2009; Stald *et al.*, 2014). Commercial messages on television evolve from traditional 30-second spots over split-screen advertising, product placement, programme sponsoring and infomercials to digital TV overlays. As smart or connected television concepts gain popularity, clickable banners, pop-ups, advergaming and social media are integrated in the increasingly hybrid services that are offered to viewers.

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Hybrid advertising formats are characterised by a specific feature: the advertising content (i.e. the persuasive and commercial message) is often *embedded* into the non-promotional media content (i.e. entertainment and information) in a more or less *integrated* manner. In other words, in these advertising strategies, also sometimes referred to as “advertainment”, the link between advertising, information and media content is increasingly blurred (Moore, 2004; Calvert, 2008; Cauberghe *et al.*, 2012).

This interconnection between commercial and editorial content may have a significant societal impact. First, consumers are not (fully) able to ignore the commercial message, given its inherent link with the informational element. More importantly, consumers may have greater difficulties in recognising the commercial, i.e. persuasive message, undermining their ability to process this message in a critical manner (Cauberghe *et al.*, 2012; Rozendaal *et al.*, 2011).

The difficulties for consumers to recognise commercial content, seems to be contrary to the specific legal requirement set forth in European and national regulatory instruments, i.e. that “audiovisual commercial communications shall be readily recognisable as such”[1]. Fundamental questions raise as to whether this explicit legal requirement needs to be revisited against the continuously changing advertising and media landscape and how this (whether positive or negative) could be implemented in practice.

This article intends to address both questions. In essence, it will examine the impact of the embedded nature of hybrid advertising strategies on the legal requirement to ensure “recognisable audiovisual commercial communication” (the identification principle), in general, and, for television advertising, the legally required distinction between editorial and commercial content (the separation principle), more in particular.

First, we will outline a couple of examples of hybrid (television) advertising formats, where there might be a potential interconnection between editorial and commercial content. This section will be followed by an analysis of the key elements and the origins of the identification and separation principle. Next, the implementation in national legislation and a number of decisions of media regulators will be explored to assess how the principles are interpreted in practice. Finally, we will identify the concrete challenges that hybrid advertising formats are confronted with and frame those against the background of European developments in this area.

1.1 Hybrid advertising formats

Despite the rise of new media services and types, traditional television is still attracting large audiences and playing a leading role in a converged media landscape. In Belgium, for example, around 97 per cent of the population watches television (Vanhaelewyn *et al.*, 2014). More and more people live in a “multiscreen” household and watch television programmes on a computer, tablet or a smartphone[2]. Viewers increasingly surf the Internet when watching television to look up additional information with regard to the related television programme or visit the programme’s website (Vanhaelewyn *et al.*, 2014). For more than a decade, these evolutions have had a significant influence on investment in advertising across various media channels (Horlings *et al.*, 2005). Advertisers seek to benefit from the possibilities that convergence offers and aim to fulfil consumers’ expectations of a personalised, interactive media experience, with a focus on social networks and entertainment, which is accessible on various devices (Matzneller and Metzendorf, 2014).

In this section, we briefly describe two types of advertising techniques and the related technologies, i.e. infomercials and commercial overlays (including clickable advertising). In Section 4, we will assess to what extent the definitions and criteria we have established in the previous sections apply to these formats. This will enable us to identify concrete legal challenges policymakers are faced with regarding hybrid advertising techniques.

1. An *infomercial* is a message which intends to promote products or services in the format of editorial content. Infomercials are usually of a longer duration than the traditional 30-second spot and often contain highly entertaining editorial content (Dix and Phau, 2008; Cauberghe *et al.*, 2012). The narratives of an infomercial can run over several advertising breaks and build intrigue for viewers. They can be trailed and promoted and of course extended and exploited off-air like a real programme (Murray, 2014).
2. *Commercial overlays* are overlays either placed over or in the editorial content in a programme by television broadcasters or distributors (Scheuer, 2013; Cole, 2014). In essence, they are similar to banners[3] or pop-ups on computer screens. The content of commercial overlays can vary from simply mentioning the brand over the explicit reference to a specific brand website or the details of a particular event. Commercial overlays may include elements of interactive advertising, which allows a bi-directional supply and flow of information between the viewer and the broadcaster/advertiser (European Commission, 2004; Castendyck *et al.*, 2008). This allows a viewer to interactively explore a chosen environment for as long as he or she wishes, by using a mouse or remote control, mainly to obtain further information on either the product or service advertised. As the popularity of connected television is rising[4], advertisers will increasingly benefit from including so-called “clickable advertising” in such overlays, i.e. advertising in a message broadcasted on a connected television[5], which routes the viewer, by clicking on the message, immediately to an on-line environment, such as a website with product-related information or a sales platform to book a holiday[4]. Both the television broadcast and the on-line environment are thus accessible from one and the same device, i.e. the television, controlled by a remote control or even, increasingly, by gesture or voice (Scheuer, 2013).

1.2 Legal requirements: scope

The legal requirements relevant for the identification of and distinction between editorial and commercial content are laid down in a variety of media, e-commerce and consumer-protection-related legal instruments.

Articles 9 and 19 of the Audiovisual Media Services Directive (AVMSD), respectively, require commercial communication in general and television advertising in particular to be “readily recognisable as such”. Specifically for television advertising and teleshopping, Article 19 adds that it should also be “distinguishable from editorial content”. The e-Commerce Directive provides in its Article 6 that commercial communication which are part of, or constitute, an information society service, shall be “clearly identifiable as such”[6]. Further, Article 5 of the Unfair Commercial Practices directive explicitly prohibits, as an unfair commercial practice, 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[7]. Self-regulatory documents, which have traditionally played an important (complementary) role in the advertising sector, also recognise the importance of these principles. Article 9 of the Consolidated Code of the International Chamber of Commerce states that “[m]arketing communications should be clearly distinguishable as such, whatever their form and whatever the medium used. When an advertisement appears in a medium containing news or editorial matter, it should be so presented that it is readily recognisable as an advertisement and the identity of the advertiser should be apparent” (International Chamber of Commerce, 2011). This multitude of legislative instruments and self-regulatory measures leads to a situation where various supervisory authorities or systems are competent for ensuring compliance with the principles regarding identification and distinction between commercial and editorial content. Different levels of conformity may lead to a non-level playing field for different media and/or advertisers.

Although, in general, these regulatory requirements deal with similar concepts and potentially even apply these simultaneously, the present paper only focuses on the provisions set out in Articles 9 and 19 of the AVMSD, reflecting the so-called identification and separation principle, as described in Section 3 below. The roots of these principles, their key components and their legal interpretation will be examined in detail and, where relevant, reference will also be made to the predecessor of the AVMSD, Directive 89/552/EEC known as the “Television without Frontiers” Directive (TWFD).

Additionally, this paper only focuses on the specific legal requirements related to the identification and separation principle. As such, in our analysis, we will only very briefly examine pre-conditions for the application of these requirements, such as the qualification of hybrid commercial messages as audiovisual commercial communication or (television) advertising. However, this is an issue which certainly merits further research in its own right.

2. Commercial communication in the audiovisual media services directive

The AVMSD imposes obligations on providers of audiovisual media services. Such services include services normally provided for remuneration which are under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes to inform, entertain or educate, to the general public by electronic communications networks, as well as audiovisual commercial communication (Article 1 (a) AVMSD). Hence, the scope of the AVMSD is limited to these specific types of services, basically (linear) television broadcasts and (non-linear) on-demand services. This implies that, currently, online services which neither fulfil the requirements of the directive, such as search engines, online games or electronic versions of newspapers,^[8] nor the activities of device manufacturers or distributors are subject to the obligations of the AVMSD.

Two notions are key for our further analysis, i.e. audiovisual commercial communication and television advertising.

The term “audiovisual commercial communication” is a basic concept and newly introduced by the AVMSD (Valcke and Lievens, 2009). According to Article 1(h), “images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity” constitute audiovisual commercial communication. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Overall, audiovisual commercial communication is a generic term, covering a variety of promotional activities, such as not only television advertising, sponsorship, teleshopping and product placement (which are explicitly listed in Article 1(h) AVMSD) but also split screens and various forms of interactive advertising.

Television advertising is defined as “any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking or natural person in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment” (Article 1(i) AVMSD). Specific obligations are imposed on television advertising, including, for instance, restrictions regarding the timing (e.g. interruption of films, television series and news programmes once per scheduled period of at least 30 minutes, Article 20) and quantity (e.g. maximum of 20 per cent of television advertising spots and teleshopping spots within a given clock hour, Article 23) of advertising.

3. The principles of identification and separation

3.1 *The television without frontiers directive and the audiovisual media services directive*

The requirement that commercial communication needs to be “readily recognisable” is to be found in both Articles 9 and 19 AVMSD. The concept finds its origins in the predecessor of the AVMSD, more specifically in Article 10 of the Television without Frontiers Directive

(TWFD), according to which television advertising had to “be readily recognisable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means”.

The concept that advertising should be “readily recognisable”, also known as the “principle of identification”, constituted a core principle of the TWFD, together with the so-called “principle of separation”, i.e. the requirement of separating television advertising from other parts of a television programme. The latter principle can also be traced back to Article 10 TWFD, requiring that television advertising and teleshopping shall be kept “quite separate” from other parts of the programme service. Both principles aimed at reconciling the principle of freedom to produce television advertising with adequate protection for both audiovisual works and the general public, seen as both viewers and consumers (European Commission, 2004). In concreto, compliance with three key principles was envisaged: protecting the consumer, guaranteeing the neutrality of media in view of the economic competition of third parties and ensuring the editorial integrity of television programmes (Castendyck, 2005; Castendyck *et al.*, 2008).

Protecting the consumer against disguised messages seems the most obvious (Kabel, 2003; Castendyck *et al.*, 2008). If it is not clear what constitutes advertising or when the line between editorial and commercial content is blurred, viewers can be misled as to the nature of what they see. The same is valid in relation to competing market players, who want to be judged fairly and on editorial grounds by the media, not because a competitor has paid more to the media enterprise (Castendyck *et al.*, 2008). Further, the mandatory separation and identification of television advertising guarantees the editorial integrity of television programmes (Castendyck *et al.*, 2008). In an environment in which companies want to be perceived positively, undue influencing of editorial and fictional content is not unlikely, which could undermine the function of television as a as a medium of information, education, social and cultural development and entertainment (Council of Europe Committee of Ministers, 1984; Council of Europe, 2002), which should be protected (Castendyck *et al.*, 2008). As phrased by Castendyck, “money should not buy love, and it should also not be able to buy ‘truth’ (i.e. secretly paid expert opinions, disguised as ‘independent science’) or editorial or fictional content” (Castendyck, 2005, p. 857).

The principle of identification is currently included in chapter III, a new chapter introduced in the AVMSD introducing general principles applicable to *all* audiovisual media services, both linear and non-linear. As such, Article 9 links the newly introduced concept of “audiovisual commercial communication” to the identification principle, adding in a second sentence the prohibition of surreptitious audiovisual commercial communication [9]. Various attempts during the legislative process to widen the scope of Article 9, i.e. as to integrate the words “kept quite separable from other parts of the programme service” [10], as well as further specifying it, i.e. adding the words “distinguishable from editorial content” [11], were not upheld. The provisions of Article 9 apply to all types of audiovisual commercial communication used in linear as well as non-linear media services (Castendyck *et al.*, 2008) as detailed below.

The principle of identification is also withheld in the new Article 19 focusing on television advertising and teleshopping. Article 19 however foresees in addition that television advertising and teleshopping shall be distinguishable from editorial content and states that, “without prejudice to the use of new advertising techniques, television advertising and teleshopping shall be kept quite distinct from other parts of the programme by optical and/or acoustic and/or spatial means” [12]. This specification of the means is broader than the wording in Article 10 TWFD: the option to use “spatial” means was added when revising the AVMSD. Interestingly, recital 81 of the AVMD emphasises that the principle of separation should not prevent the use of new advertising techniques, which was also confirmed by the European Commission in its interpretative communication (European Commission, 2004). In relation to split screen advertising, for example, i.e. advertising consisting of the simultaneous or parallel transmission of editorial content and advertising

content[13], the European Commission stated that “the principle of separation between advertising and editorial content should thus not be interpreted as prohibiting split screen advertising. However, such advertising must comply with the provisions on separation between editorial content and advertising laid down in Article 10 of the Directive [TWFD]. This implies that split screen advertising must be readily recognisable as such and kept clearly separate from other parts of the programme by acoustic or optical means aimed at preventing the viewer from mistaking advertising for editorial content. A spatial separation by optical and/or acoustic means is adequate, provided it identifies advertising clearly and enables the viewer to readily recognise it” (European Commission, 2004: para. 47).

3.2 Regulatory implementation at national level

The principles of identification and separation have been implemented in the various Member States by means of national legislative and/or self-regulatory instruments. In our further analysis, we examine in detail the implementation of the mentioned principles in three jurisdictions, Belgium (the Flanders region), The Netherlands and the UK.

In Flanders and The Netherlands, the identification and separation principle has been implemented by means of legislation. In Flanders, the Decree of 27 March 2009 of the Flemish Community on radio and television (*Decreet betreffende radio-omroep en televisie*) translated the provisions of Articles 9 and 19 AVMSD rather literally in Articles 53 and 79[14]. Going beyond what is required by the AVMSD, the Flemish legislator has added a specific provision which states that “commercial communication aimed at children and youngsters must be clearly recognisable as such for them” (Article 71)[14].

In The Netherlands, the Media Act (*Mediawet*) makes a distinction between two types of articles, both relating to advertising and teleshopping. One set of articles integrates the principle of identification[15] and another set clearly implements the principle of separation[16]. The principle of identification and separation is mentioned in relation to both non-commercial[17] and commercial media service providers[18], with a slight distinction in the wording of the principle of separation. For non-commercial media providers, a distinction is required between editorial and commercial content by means of acoustic and visual means[19], whereas the requirement set forth with regard to commercial media service providers explicitly adds “spatial” means[20].

The enforcement of the legal requirements is both in Belgium and The Netherlands in the hands of the respective media regulators: the *Vlaamse Regulator voor de Media* (VRM) in Belgium[21] and the *Commissariaat voor de Media* (CvdM) in The Netherlands[22].

In the UK, the requirement related to identifiable and/or distinct commercial content is integrated in the complex co-regulatory framework which includes elements of statutory legislation and self-regulation. In this framework, Ofcom (Independent Regulator and Competition Authority for the UK communications industries)[23], Committee of Advertising Practice (CAP)[24] and Advertising Standards Authority (ASA)[25] play a significant role (Ofcom, 2004).

With regard to television programming, the Ofcom Broadcasting Code, applicable to all Ofcom licensed broadcasters, provides, in its Section 9, a set of principal and general overarching rules that apply to all commercial references in television programming, i.e. any visual or audio references within programming to a product, service or trade mark (Ofcom, 2013). According to Article 9.2., broadcasters must ensure that editorial content is distinct from advertising. The distinction between editorial and advertising content is thus key and Article 9.2. addresses the risk that this distinction may, or appear to, be undermined by the inclusion of commercial references in television programming.

The Ofcom provisions are supplemented by the rules set forth in the UK Code of Broadcast Advertising (BCAP Code; Committee of Advertising Practice, 2010) and the UK Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing (CAP code; Committee of Advertising Practice, 2014), both established by the self-regulatory CAP. Rule 2.1. of the

BCAP code explicitly states, in relation to television advertising, that advertisements should be “obviously distinguishable” from editorial content, in particular “if they use a situation, performance or style reminiscent of editorial content, to prevent the audience being confused between the two” (rule 2.1. BCAP Code). The rule adds that “the audience should quickly recognise the message as an advertisement”. In relation to the latter, the use of sound effects associated with news bulletins or public service announcements[26] and the use of a title, logo, set or music associated with the a television programme broadcast[27] need special care. The CAP code, applicable on non-broadcast advertising, sales promotion and direct marketing, implements the identification principle in rule 2.1., stating that “marketing communications must be obviously identifiable as such”. Specific attention is paid to infomercials. Marketers and publishers must make clear that these types of communications are marketing communications, by heading them “advertisement feature” (rule 2.4. of the CAP Code).

Ofcom ensures compliance with the Ofcom rules, while ASA independently administers and enforces the (B)CAP Codes across all media.

3.3 Implementation by local media regulators

The principles of separation and identification have been interpreted and applied by the local media regulators. These interpretations provide us with further clarifications on the purpose of the distinction between editorial and commercial content and enable us to derive a number of minimum requirements relating to:

- the purpose of the distinction;
- the method and format of the distinction;
- the related scheduling time;
- circumstantial elements enhancing the absence of a distinction between editorial and commercial content; and
- the imposed sanctions.

In this section, an exploratory analysis of a selection of relevant rulings of the Flemish, Dutch and the UK regulators is provided.

3.3.1 Flanders. Rulings of the VRM related to the identification and separation principles often relate to traditional television advertising. In such cases, using bumpers that are too short (less than 2 s), not mentioning the word “RECLAME” (“ADVERTISING”) on the bumper, visually interweaving bumpers with a subsequent advertising spot, not showing end bumpers or using a countdown clock in the margin of the screen including an announcement of the next programme have all been considered insufficient to comply with the obligation of distinguishing between commercial and editorial content[28]. In March 2015, the VRM issued an opinion on the implementation of the principle related to the distinction between editorial and commercial content ([Vlaamse Regulator voor de Media, 2015](#)). After consulting with the Flemish television broadcasters, a number of concrete guidelines were put forward. Regarding the “start bumper”, two options are identified: either the “start bumper” is shown for a minimum duration of 5 s, or the “start bumper” is shown for a minimum duration of 2 s accompanied by the word “RECLAME” (“ADVERTISING”) in a size which is easily readable for an average viewer. In both cases the bumper must be shown in a “screen-filling” manner, meaning that the screen is completely filled, without using “wipes” within the duration of 5 or 2 s. It is clarified that there is no clear distinction between editorial and commercial content in case the start bumper is incorporated in the editorial content or the advertising spot, or in case the start bumper contains a sponsor message. The “end bumper” must be shown for a minimum duration of 2 s, also in a screen-filling manner, without using wipes. It is not required to mention the word “RECLAME” (“ADVERTISING”), but if the end bumper is incorporated in the editorial

content or the advertising spot, or if it contains a sponsor message, it will not comply with the distinction principle.

A number of rulings, however, do relate to hybrid advertising formats, such as the so-called “editorially camouflaged advertisements”, infomercials or “*publireportages*”. To the extent infomercials are qualified as television advertising, according to the VRM, they need to be broadcasted within the regularly announced advertising blocks, and the appropriate bumpers need to be foreseen[29]. The use of a preceding bumper mentioning “publireportage”[30] or “infomercial”[31] is not sufficient to ensure their readily recognisable and distinctive character. It indeed may confuse the viewer, given the clear promotional intent of the “reportage”. The same is the case when various advertising bumpers are broadcasted, suspending the advertising block[32]. To the extent the word “publireportage” is used to indicate the nature of the spot, this indication needs to be clear and recognisable[33].

Another case concerned a presenter who verbally invited viewers to surf to a website. The URL was visually displayed on the screen, directing the viewer to a website which offers softcore and hardcore erotic content in return for payment[35]. According to the VRM, this should be considered advertising, and, hence, this should be indicated by visual, acoustic or spatial means, which was not the case.

In case of non-compliance, the VRM imposed a warning[34] or a financial penalty[35].

3.3.2 The Netherlands. Although decisions on the distinction between commercial and editorial content by the CvdM is rather scarce, some important guidelines can be retrieved.

In a number of rulings, the CvdM stresses the importance of the distinction between editorial and commercial content by confirming this distinction is one of the most important principles underlying the Dutch Media Act. Viewers may not be confused in relation to the nature (editorial or commercial) of the message they hear or see[36], as confusion could lead to a subconscious commercial influencing of the viewer[37].

With regard to hybrid advertising messages, such as infomercials and advertisements designed as regular programmes (games and competitions aimed at children), the CvdM argues that even though, in some cases, the advertising breaks are clearly separated from other programmes by optical and acoustic means (compliance with the separation principle), commercial messages may not be recognisable as such due to their:

- duration (3, 4 or even 5 minutes);
- scheduling (start at a fixed time with repetitions);
- broadcasting as a series (with varies topics per episode);
- format (the existence of a title, a “thank you notice”);
- presentation by the presenter of other programmes; and
- the invitations to the viewer to watch and participate actively in the programme[38].

This is particularly the case in relation to minors, who can be misled and confused. Also, the fact that the commercial message is part of the regular programme scheduling (TV *Gids*/Guide website) makes the message less recognisable[38]. Finally, the existence of a banner mentioning “advertising” or “infomercial” is not always sufficient to make the message recognisable, in particular when the viewers are minors[38].

In the analysed cases, the CvdM imposed significant financial penalties in case of non-compliance[39] in one instance due to the structural, repetitive character of the breach[36].

3.3.3 United Kingdom. In the United Kingdom, both Ofcom and ASA have issued decisions related to the identification and separation principles[40]. Ofcom has explicitly confirmed in various decisions the purpose of the distinction between editorial and commercial content:

“the purpose of the distinction is to prevent viewers being confused or misled about the status and purpose of the material they are watching and to protect viewers from surreptitious advertising”[41]. It further intends to ensure that a licensee maintains editorial control over its programming and that it is clear to viewers that programming has not been subject to the control of advertisers[42]. Most of Ofcom’s decisions on rule 9.2. (*supra*), however, relate to political messages broadcast during advertising breaks. These decisions are left out of the scope of this analysis.

With regard to the identification principle, ASA has ruled with regard to an advertising feature for beer in the style of a cooking programme, that an advertisement opening with an on-screen notice “This is an Advertisement”[43] which is repeated at one minute intervals throughout its duration make clear that the advertisement was a promotion and not programming[44]. ASA also deemed the content and style of the advertisement sufficiently different than that of the programme during which it was broadcast (“Sunday Brunch”) due to a difference in the use of music and the location of filming[45]. In another decision, which concerned an advertisement for toys, in the style of a game show featuring children, ASA was of the opinion that even if the advertisement only had a duration of 60 s, a notice “Advertisement” should have been superimposed[46]. In that same decision ASA considered that the use of additional wording in the advertisement (such as for example the mentioning of “Terms and conditions apply. Bill payer’s permission required. Minimum age 8”) would not necessarily make clear that the slot was an advertisement rather than editorial[46].

Both Ofcom and ASA have also paid attention to circumstantial factors influencing the identification, such as the role of presenters in documentaries and related programmes. In a decision regarding a complaint in relation to an estate planning show featuring two regular presenters discussing a range of issues and responding to questions from the public, who also featured in an advertisement broadcast in commercial breaks in and around the show, Ofcom stated that “the distinction between editorial and advertising content is unlikely to be maintained in circumstances where people feature as experts in advertisements for a promoted business and also appear in the same capacity in adjacent programming”[47]. In similar cases, ASA also explicitly looked at the broadcasting time of the advertisement and the moment the presenter was revealed. Even though the presenter featuring in the advertisement had a weekly programme, the advertisement was not played in commercial breaks during that programme and the presenter was only revealed at the end of the advertisement, contributing its distinguishable character[48]. Additionally, ASA opined that one of the elements contributing to the quick recognition by the audience of a feature as an advertisement was the comic, fictitious name of the reporter, rendering the advertisement “obviously distinguishable” from editorial content[49].

Sanctions imposed by the UK media regulators varied from statutory sanctions[50] over warnings[38] or prohibitions to broadcast the advertisement in its current form[37].

4. Challenges for hybrid advertising formats

From this preliminary analysis, we attempt to explore how the principles we have derived in the previous sections could be applied to infomercials and commercial overlays, including clickable banners.

First, regulators regularly emphasise that commercial messages need to be broadcast within the regularly announced advertising blocks. Clear bumpers should indicate the start and end of such advertising blocks. This may be problematic for all mentioned advertising formats. Infomercials, containing elements of a programme and acting like a programme, risk to be scheduled outside the regular advertising blocks, as part of the regular programming, potentially misleading the viewers. As for commercial overlays and clickable banners, this principle seems to go against the nature of such techniques, given that the

commercial messages are often placed over editorial content within a television programme independent of advertising breaks.

Second, according to the regulators, certain hybrid commercial messages require a clear notice (visual/acoustic/spatial) at the start of the message, which preferably is intermittently broadcasted throughout the advertisement. In relation to infomercials, it is likely that the wording “infomercial” is used, but this may not be deemed sufficient by certain regulators. Watching television on a convergent device (e.g. a smart or connected TV) might challenge the identification principle even more. While the user is watching a channel of a linear audiovisual media service, a commercial communication distributed in a different way (i.e. not an advertisement designed to interrupt a news broadcast or film but, e.g., on a commercial overlay) might appear on the screen, partially or completely overlapping the television picture in that section of the screen. To be able to identify such a message as commercial communication, it will thus be necessary to indicate this through a clear notice or label.

5. Conclusion

In our opinion, any regulation, whether current or potential, national or local, needs to provide types of provisions that facilitate an average consumer to distinguish between and as such recognise commercial content, i.e. be able to acknowledge in each commercial the persuasive, commercial nature of the message, irrespective of the platform or device this message is distributed through. It is precisely that ability that is put under pressure through the increasing interconnection between editorial and commercial content in hybrid advertising techniques. Consumers, in general, and specific categories of vulnerable consumers – such as minors with immature cognitive skills – in particular (Livingstone, 2009; van Reijmersdal *et al.*, 2010; 2012; Cauberghe *et al.*, 2012), indeed risk being manipulated when it is unclear to them that information or entertainment is a type of advertising that is trying to persuade them to undertake a certain action.

In the European Commission's Feedback paper which gathers the replies to the public consultation launched by the Green Paper “Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values” it is stated that “[t]he principle of identification and distinction between editorial and advertising content has been recognised as remaining/being increasingly important in a time of convergence” (European Commission, 2014, p. 68). Although the challenges that are posed to these principles by immersive advertising techniques are recognised, unfortunately, no further details on how this could or should be implemented are given.

As regards the identification principle, one possible solution could be found in the creation of labels or cues that indicate the commercial nature of a message and enhance transparency about commercial motives. However, the development thereof would need to take into account various elements, such as current and future technology, adoption processes by users or viewers, specific cognitive characteristics and levels of advertising literacy of specific user groups (such as minors) and regular monitoring of efficiency. Positive as well as negative experiences with practices that already exist today (e.g. the product placement “PP” logo that is used in Flanders to indicate the presence of product placement in television programmes but which remains largely unrecognised by viewers) could serve as a source of inspiration in the development of labels that do enhance transparency.

Much more fundamental challenges can be identified with regard to separation principle. In times where advertising revenues for television broadcasters are decreasing and moving to online services, broadcasters are increasingly experimenting with hybrid advertising techniques in an attempt to counter this evolution. This situation will be even more complicated when other players, such as distributors of television services or device manufacturers, are also able to distribute commercial messages on connected or smart

TVs, as an extra layer on top of editorial content. For such techniques, guidelines on spatial or time-wise separation will need to be revised. In addition, for consumers, e.g. parents, who expect a certain (historically developed) level of protection with regard to broadcasting services, it might not be clear that this level of protection might be different when, by clicking on a banner on a connected television, a shift is made to an online environment, which is (possibly) regulated by other instruments with other obligations. This could possibly be remedied by adopting (more) technology-neutral regulation, for instance, by extending the scope of the AVMSD to other players beyond AVMS providers. The Digital Single Market Strategy which was launched by the Commission in May 2015 formally announced the review of the AVMSD, with a specific emphasis on the rules on the protection of minors and advertising rules (European Commission, 2015). In this process, the implications of the use of hybrid advertising formats and the multitude of actors that may play a role with regard to these techniques will undoubtedly be the subject of much debate.

Yet, it could be wondered if a responsible and coherent implementation of the identification principle in the various environments could not suffice. This would require the active involvement of all players that are involved to devise a workable and efficient mechanism that takes into account technological evolutions and the increasing gap between television broadcasting, on-demand and online services and their regulation. Framing this within a co-regulatory framework on a more general level could be an option to consider. The European Commission's Feedback paper also points in the direction of leaving the creation and implementation of principles with regard to commercial communication much more to the actors that are active in that sector on a day-to-day basis. However, if this route is chosen, compliance with fundamental principles of ethical advertising, with attention for vulnerable groups of consumers, and monitoring thereof would need to be guaranteed.

Notes

1. Article 9 of the Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), available at: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32010L0013> (accessed 5 May 2015; hereinafter: AVMSD).
2. 14.8 per cent of the Flemish population watches television on a computer daily, for tablets and smartphones this is 9.2 per cent and 7.2 per cent, respectively: Vanhaelewyn *et al.*, 2014.
3. Banners are images that appear as "advertisements" on a website. The original purpose of banners was to generate traffic to the website of the advertiser. Banners can appear in all kinds of formats and shapes. The overlay is a specific form of a banner that is placed over de requested website and covers the website partially or entirely. The content of the banner can be static or dynamic (with moving images and animations); Cauberghe *et al.*, 2012.
4. Although market penetration (the adoption of connected TV's as the basic household devices) is increasing at a considerable rate, the technology is still being used relatively little: Scheuer, 2013.
5. Connected television is a television which has the ability to connect to the Internet. This type of television is a hybrid device: it does not only receive television signals via traditional broadcast distribution methods (terrestrial, cable or satellite), but can also access the Internet. Scheuer, 2013; Hermanns and Matzneller, 2011.
6. 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), available at: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32000L0031> (accessed 5 May 2015).
7. Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1430833999268&uri=CELEX:32005L0029> (accessed 5 May 2015).
8. The fact that a website of a daily newspaper containing audiovisual material is not an audiovisual media service was confirmed by the EU Court of Justice's Advocate General (AG) in Case

C-347/14 New Media Online in July 2015. The AG emphasised that the EU legislator “did not intend to include internet information portals within its scope” and that multimedia Internet portals do not meet the requirements for being regarded as an audiovisual media service within the meaning of the directive. Cf. Court of Justice of the European Union, Press release No. 75/15, Advocate General’s Opinion in Case C-347/14 New Media Online, available at: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-07/cp150075en.pdf> (accessed 8 July 2015).

9. Surreptitious advertising is defined as a “representation in words or pictures of goods, services, the name, the trade mark 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” (Article 1(j) AVMSD). This type of audiovisual commercial communication is always prohibited.
10. The European Parliament was in favour to widen the scope by not only maintaining the principle of identification but also introducing the principle of separation: “audiovisual commercial communication must be clearly identifiable as such and kept quite separable from other parts of the programme service, in terms of both time and space, by optical and acoustic means”; [European Parliament, 2006: Amendment 111](#).
11. Also, the proposal to specify the principle of identification further by additionally introducing “distinguishable from editorial content” was not upheld ([European Parliament, 2006: Amendment 113](#)).
12. Authors’ emphasis.
13. “For example, one or more advertising spots appear in a window during the transmission of a programme in such a way that two separate images are visible on the screen. Provided the space set aside for advertising is not excessive, this technique enables the viewer to continue to watch the editorial programme during the transmission of an advertising spot”: [European Commission, 2004, para. 41](#)).
14. Article 53 of the Belgian Decree of 27 March 2009 of the Flemish Community on radio and television, *Official Gazette*, 30 April 2009: “Commerciële communicatie en boodschappen van algemeen nut moeten gemakkelijk als zodanig herkenbaar zijn” [“Commercial communication and public service announcements must be easily recognisable as such”]; Article 79 states “§ 1. Televisiereclame, zelfpromotie uitgezonderd, en telewinkelen moeten duidelijk herkenbaar zijn en moeten kunnen worden onderscheiden van redactionele inhoud. Zonder afbreuk te doen aan het gebruik van nieuwe reclametechnieken, moeten reclame en telewinkelen met visuele en/of akoestische en/of ruimtelijke middelen van andere onderdelen van het programma worden gescheiden” [§1. Television advertising, excluding self-promotion, and teleshopping should be clearly identifiable and should be easy to differentiate from editorial content. Without prejudice to the use of new advertising techniques, television advertising and teleshopping shall be kept quite distinct from other parts of the programme by visual and/or acoustic and/or spatial means”].
15. Article 3.5 a and Article 2.88 a of the Mediawet 2008: “Reclame- en telewinkelboodschappen, gesponsord programma-aanbod en productplaatsing zijn als zodanig herkenbaar” [Advertising and teleshopping messages, sponsored programmes and product placement are recognisable as such], retrieved from http://wetten.overheid.nl/BWBR0025028/volledig/geldigheidsdatum_25-07-2011#Hoofdstuk3_Titel32a
16. Articles 2.94 and 3.7 of the Mediawet.
17. For example Article 2.88 a.
18. For example 3.5 a Mediawet.
19. Article 2.94 Mediawet reads “Reclame- en telewinkelboodschappen zijn door akoestische of visuele middelen duidelijk onderscheiden van de overige inhoud van het programma-aanbod” [Advertising and teleshopping messages are clearly distinguished from the other content of the programme by acoustic, visual and spatial means].
20. Article 3.7 Mediawet reads “Reclame- en telewinkelboodschappen zijn door akoestische, visuele of ruimtelijke middelen duidelijk onderscheiden van de overige inhoud van het programma-aanbod” [Advertising and teleshopping messages are clearly distinguished from the other content of the programme by acoustic, visual and spatial means].
21. Available at: www.vlaamseregulatormedia.be/nl
22. Available at: www.cvdn.nl/
23. Available at: www.ofcom.org.uk/
24. Available at: www.cap.org.uk/

25. Available at: <http://asa.org.uk/>
26. Article 2.2. BCAP Code reads "If used in an advertisement, an expression or sound effect associated with news bulletins or public service announcements (for example, 'news flash') needs special care. The audience should quickly recognise the message as an advertisement".
27. Article 2.3. BCAP Code reads: "The use of a title, logo, set or music associated with a programme that is broadcast on that medium needs special care. The audience should quickly recognise the message as an advertisement".
28. *VRM v. SBS Belgium*, 2015/038; *VRM v. Medialaan*, 2015/039.
29. *VRM v. VZW Niet-openbare televisievereniging Brussel*, 2014/136; *VRM v. NV SBS Belgium*, 2014/005; *VRM v. BVBA Actua TV*, 2011/031; *VRM v. VZW Antwerpse Televisie*, 2011/022.
30. *VRM v. NV SBS Belgium*, 2014/005; *VRM v. NV Vlaamse Media Maatschappij*, 2013/106-109; *VRM v. NV Media Ad Infinitum*, 2013/13.
31. *VRM v. NV Medialaan*, 2014/036.
32. *VRM v. NV Media Ad Infinitum*, 2013/13; *VRM v. NV Vlaamse Media Maatschappij*, 2013/106.
33. *VRM v. NV Vlamex*, 2014/028.
34. *VRM v. NV Medialaan*, 2014/036; *VRM v. VZW Niet-openbare televisievereniging Brussel*, 2014/136; *VRM v. NV SBS Belgium*, 2014/005; *VRM v. NV Vlaamse Media Maatschappij*, 2013/106; *VRM v. NV Media Ad Infinitum*, 2013/13; *VRM v. NV Life! TV Broadcasting Company*, 2013/07; *VRM v. BVBA Actua TV*, 2011/031.
35. *VRM v. VZW Antwerpse Televisie*, 2011/022; *VRM v. NV Vlamex*, 2014/028.
36. *CvdM v. TV 10 B.V.*, 5 August 2008.
37. *CvdM v. Stichting Amsterdamse Lokale en regionale Televisie- en radio Omroep (SALTO)*, 12 June 2008.
38. *CvdM v. TV 10 B.V.*, 5 August 2008; *CvdM v. Stichting Amsterdamse Lokale en regionale Televisie- en radio Omroep (SALTO)*, 12 June 2008.
39. *CvdM v. MTV Networks B.V.*, 5 August 2008, in which a significant penalty was imposed due to the repetitive character; the use of the words "Advertising" was not withheld as a mitigating factor; *CvdM v. Stichting Amsterdamse Lokale en regionale Televisie- en radio Omroep (SALTO)*, 12 June 2008.
40. We have, in our analysis, also taken into account rulings relating to radio broadcasting, as these often offered valuable insights for our study.
41. Ofcom, Item for Pakistan Tehreek e Insaaf (ARY News), Broadcast Bulletin 267, 17 November 2014; similar: Ofcom, Wills, Trust & Estate Planning Show (Sangat TV), Broadcast Bulletin 268, 9 January 2014; Ofcom, Item for Save Bangladesh, Broadcast Bulletin 257, 30 June 2014; Ofcom, Community Announcement (Channel i), Broadcast Bulletin 273, 16 February 2015.
42. Ofcom, Doktorunuz Sizinle (Kanal 7 Avrupa), Ofcom Broadcast Bulletin 214, 24 September 2012.
43. ASA, Adjudication on giffgaff Ltd., 28 August 2013.
44. ASA; Adjudication on giffgaff Ltd., 28 August 2013; ASA, Adjudication on Coalition of UK Brewers, in which the on-screen text "This is an Advertisement" was stated at the beginning, middle and towards the end for a duration of 3 and 5 s.
45. ASA, Adjudication on coalition of UK Brewers t/a Let There Be Beer, 27 November 2013. In another case, ASA also decided that the fact that a particular advertisement was in style completely different to news bulletins of that broadcaster ensured compliance with the "distinguishable" requirement under the BCAP Code: ASA, Adjudication on Body Matters Gold Ltd. t/a Real Jewellers, 12 September 2012. On the style aspect of the advertisement which differs from recognisable radio station content featured on the broadcasting stations, see also: ASA, Adjudication on Barclays Bank plc, 13 August 2014.
46. ASA, Adjudication on Disney XD, 30 January 2013.
47. Ofcom, Wills, Trust & Estate Planning Show (Sangat TV), Broadcast Bulletin 268, 9 January 2014; similar Ofcom, Promotion of charity appeals on behalf of Hazrat Sultan Bahu Trust, Broadcast Bulletin 246, 20 January 2014; Ofcom, Doktorunuz Sizinle (Kanal 7 Avrupa), Broadcast Bulletin 214, 24 September 2012.
48. ASA, Adjudication on Chandlers Garage (Brighton) BMW, 14 July 2014.

49. ASA, Adjudication on Body Matters Gold Ltd. t/a Real Jewellers, 12 September 2012.
50. Ofcom, Item for Save Bangladesh (Channel Nine UK), Broadcast Bulletin 257, 30 June 2014; Ofcom, Bangladesh Nationalist Party item (NTV), Broadcast Bulletin 227, 8 April 2013; Ofcom, I Focus (Channel), Broadcast Bulletin 224, 18 February 2013.

References

- Calvert, S. (2008), "Children as consumers: advertising and marketing", *Children and Electronic Media*, Vol. 18 No. 1, pp. 205-234.
- Castendyck, O. (2005), "Werbeintegration im TV-Programm – wann sind Themen placements Schleichwerbung oder Sponsoring?", *Zeitschrift für Urheber – and Medienrecht*, pp. 857-864.
- Castendyck, O., Dommering, E. and Scheuer, A. (Eds) (2008), *European Media Law*, Kluwer Law International, Alphen aan den Rijn.
- Cauberghe, V., De Pelsmacker, P., Hudders, L., Panic, K. and Destoop, K. (2012), "Reclamewijsheid bij kinderen en jongeren – Onderzoeksrapport", available at: <https://cjsm.be/media/onderzoek-en-publicaties/reclamewijsheid-bij-kinderen-en-jongeren> (accessed 5 May 2015).
- Cole, M. (2014), "The current European legal framework: the sets of rules on commercial communication in a converged world", in Nikoltchev, S. (Ed.), *New Forms of Commercial Communications in a Converged Audiovisual Sector*, European Audiovisual Observatory, Strasbourg, pp. 39-51.
- Committee of Advertising Practice (2010), "The UK code of broadcast advertising", available at: www.cap.org.uk/Advertising-Codes/~media/Files/CAP/Codes%20BCAP%20pdf/The%20BCAP%20Code.ashx (accessed 5 May 2015).
- Committee of Advertising Practice (2014), "The UK code of non-broadcast advertising, sales promotion and direct marketing", available at: www.cap.org.uk/Advertising-Codes/~media/Files/CAP/Codes%20CAP%20pdf/The%20CAP%20Code.ashx (accessed 5 May 2015).
- Council of Europe (2002), "Explanatory report to the revised European convention on transfrontier television", available at: <http://conventions.coe.int/Treaty/EN/Reports/Html/132.htm> (accessed 15 May 2015).
- Council of Europe Committee of Ministers (1984), "Recommendation No. R (84) 3 of the committee of ministers to member states on principles on television advertising", available at: [www.coe.int/t/dghl/standardsetting/media/doc/cm/rec\(1984\)003_EN.asp](http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec(1984)003_EN.asp) (accessed 15 May 2015).
- Dix, S. and Phau, I. (2008), "Revisiting the blurring practices between editorials and advertising", Marketing Insights: School of Marketing Working Paper Series, Curtin University of Technology, Perth, available at: http://espace.library.curtin.edu.au/R?func=dbin-jump-full&local_base=gen01-era02&object_id=20996 (accessed 5 May 2015).
- European Commission (2004), "Commission interpretative communication on certain aspects of the provisions on televised advertising in the 'Television without frontiers' Directive", 2004/C 102/02, (April), pp. 2-11.
- European Commission (2014), "Summaries of the replies to the public consultation launched by the Green Paper 'Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values'", available at: <http://ec.europa.eu/digital-agenda/en/news/publication-summaries-green-paper-replies> (accessed 5 May 2015).
- European Commission (2015), "Communication: a digital single market for Europe", available at: http://ec.europa.eu/priorities/digital-single-market/docs/dsm-communication_en.pdf (accessed 7 May 2015).
- European Parliament (2006), "Report on the proposal for a directive of the European Parliament and of the Council 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", available at: www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A6-2006-0399+0+DOC+XML+V0//EN (accessed 5 May 2015).
- Glaser, B. (2013), "How has advertising changed in the last 10 years?", available at: www.allvoices.com/article/15570378 (accessed 5 May 2015).
- Hermanns, O. and Matzneller, P. (2011), "Whose boots are made for walking? Regulation of on-demand audiovisual services", in Nikoltchev, S. (Ed.), *The Regulation of On-demand Services: Chaos or Coherence*, European Audiovisual Observatory, Strasbourg, pp. 7-29.

- Horlings, E., Marsden, C., van Oranje, C. and Botterman, M. (2005), *Contribution to Impact Assessment of the Revision of the Television without Frontiers Directive*, Rand Europe, available at: <http://bookshop.europa.eu/en/contribution-to-impact-assessment-of-the-revision-of-the-television-without-frontiers-directive-pbKK0114469/> (accessed 5 May 2015).
- International Chamber of Commerce (2011), *Consolidated ICC Code: Building Consumer Trust through Best Practice Marketing*, available at: www.iccwbo.org/advocacy-codes-and-rules/document-centre/2011/advertising-and-marketing-communication-practice-%28consolidated-icc-code%29/ (accessed 5 May 2015).
- Kabel, J. (2003), "Swings on the horizontal – the search for consistency in European advertising law", in Nikoltchev, S. (Ed.), *Going Horizontal*, European Audiovisual Observatory, Strasbourg, pp. 2-8.
- Livingstone, S. (2009), "Debating children's susceptibility to persuasion – where does fairness come in? A commentary on the Nairn and Fine versus Ambler debate", *International Journal of Advertising*, Vol. 28 No. 1, pp. 170-174.
- Livingstone, S. and Haddon, L. (2009), "EU kids online: final report", available at: www.lse.ac.uk/media@lse/research/EUKidsOnline/EU%20Kids%20I%20%282006-9%29/EU%20Kids%20Online%20I%20Reports/EUKidsOnlineFinalReport.pdf (accessed 5 May 2015).
- Matzneller, P. and Metzendorf, J. (2014), "Report on the workshop 'new forms of audiovisual commercial communications in a converged audiovisual sector'", in Nikoltchev, S. (Ed.), *New Forms of Commercial Communications in a Converged Audiovisual Sector*, European Audiovisual Observatory, Strasbourg, pp. 7-22.
- Moore, E. (2004), "Children and the changing world of advertising", *Journal of Business Ethics*, Vol. 52 No. 2, pp. 163-164.
- Murray, C. (2014), "Emerging advertising techniques and new funding models for TV broadcasters", in Nikoltchev, S. (Ed.), *New Forms of Commercial Communications in a Converged Audiovisual Sector*, European Audiovisual Observatory, Strasbourg, pp. 23-28.
- Ofcom (2004), "Memorandum of understanding between Office of communications (Ofcom) and The Advertising Standards Authority (Broadcast) Limited (ASA(B)) and The Broadcast Committee of Advertising Practice Limited (BCAP) and The Broadcast Advertising Standards Board of Finance Limited (BASBOF)", available at: http://stakeholders.ofcom.org.uk/binaries/consultations/reg_broad_ad/statement/mou.pdf
- Ofcom (2013), "The Ofcom Broadcasting Code", available at: <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/> (accessed 5 May 2015).
- Rozendaal, E., Lapierre, M., Van Reijmersdal, E. and Buijzen, M. (2011), "Reconsidering advertising literacy as a defense against advertising effects", *Media Psychology*, Vol. 14 No. 4, pp. 338-344.
- Scheuer, A. (2013), "Convergent Devices, Platforms and Services for Audiovisual Media. Challenges set by connected TV for the EU legislative framework", in Nikoltchev, S. (Ed.), *Converged Media: Same Content, Different Laws?*, European Audiovisual Observatory, Strasbourg, pp. 7-22.
- Stald, G., Green, L., Barbovski, M., Haddon, L., Mascheroni, G., Savgari, B., Scifo, B. and Tsaliki, L. (2014), "Online on the mobile: internet use on smartphones and associated risks among youth in Europe", available at: <http://eprints.lse.ac.uk/59960/> (accessed 5 May 2015).
- Tungate, M. (2007), *Adland. A Global History of Advertising*, Kogan Page, London, pp. 9-22.
- Valcke, P. and Lievens, E. (2009), "Rethinking European broadcasting regulation. Unraveling Europe's policy for the digital landscape: critical analysis of the Audiovisual Media Services Directive", in Pauwels, C., Kalimo, H., Donders, K. and Van Rompuy, B. (Eds), *Rethinking European Media and Communications Policy*, VUB Press, Brussels, pp. 127-164.
- van Reijmersdal, E., Jansz, J., Peters, O. and van Noort, G. (2010), "The effects of interactive brand placements in online games on children's cognitive, affective, and conative brand responses", *Computers in Human Behavior*, Vol. 26 No. 6, pp. 1787-1794.
- van Reijmersdal, E., Rozendaal, E. and Buijzen, M. (2012), "Effects of prominence, involvement, and persuasion knowledge on children's cognitive and affective responses to advergames", *Journal of Interactive Marketing*, Vol. 26 No. 1, pp. 33-42.
- Vanhaelewyn, B., Pauwels, G., Maes, M. and De Marez, L. (2014), "Measuring digital media trends in Flanders: Digimeter", available at: www.iminds.be/nl/inzicht-in-digitale-technologie/digimeter (accessed: 5 May 2015).

Vlaamse Regulator voor de Media (2015), *Standpunt VRM: Onderscheid reclame – redactionele inhoud* [*Opinion VRM: Distinction advertising – editorial content*], available at: www.vlaamseregulatormedia.be/nl/nieuws/2015/standpunt-vrm-onderscheid-reclame-redactionele-inhoud (accessed 5 May 2015).

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