

**30th EPRA meeting
Dresden, 15 October 2009
Working group II:
Self and Cross-promotion: Clarifying Concepts – At last?
Information Paper by the EPRA Secretariat**

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Introduction:

This introductory document aims at providing brief background information on the issue of self and cross-promotion, which has generally been identified as including some “contentious” or unresolved aspects which were not fully clarified by the AVMS Directive or have given rise to diverging interpretations at Member States’ level. The question of self and cross-promotion was one of the five different issues included in the introductory document on commercial communications presented at the 29th EPRA meeting in Tallinn¹. However, owing to constraints of time, it was not discussed in the course of the plenary debates. The following document thus reproduces the section on self and cross-promotion of the Tallinn paper, and is complemented by a case-study on the specific issue of sponsored trailers which makes use of a recent information request circulated by the Broadcasting Council of Latvia.

1. Self and cross-promotion

Self-promotion is mentioned in the respective definitions of audiovisual commercial communication and television advertising².

Recital (39) of the Directive 97/36/EC explicitly refers to self-promotion:

“Whereas it is necessary to make clear that self-promotional activities are a particular form of advertising in which the broadcaster promotes its own products, services, programmes or channels; whereas, in particular, trailers consisting of extracts from programmes should be treated as programmes; whereas self-promotion is a new and relatively unknown phenomenon and provisions concerning it may therefore be particularly subject to review in future examinations of this Directive;”

While the proportion of television advertising spots and teleshopping within a given clock hour shall not exceed 20% (Art. 18 (1)), this does not apply to “*announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived from those programmes, sponsorship announcements and product placements*” (Art. 18 (2)).

The legal situation under the TVWF and AVMS is rather complex and somewhat confusing. Further to the definitions of audiovisual commercial communication and television advertising, and read in connection with Rec. 39, self-promotion is a form of television advertising. As a consequence, this seems to imply that self-promotion spots should be submitted to the

¹ Commercial Communication from TVWF to AVMS Remaining Problems and New Issues: Introductory document for the Plenary Session, EPRA/2009/02, available under: http://www.epra.org/content/english/members/working_papers/Tallinn/Commercial_Communication_EPRA_2009_02_final.pdf

² (h) ‘audiovisual commercial communication’ means 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. Such images accompany or are included in a programme in return for payment or for similar consideration **or for self-promotional purposes**. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement; ‘television advertising’ means 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;

advertising quantitative limits. Art. 18 (2) however, refers to announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived from those programmes and expressly exonerates them from advertising limitations. Rec. 39 further indicates that a particular form of self-promotion, i.e. trailers should not be considered as advertising but as a programme.

The juxtaposition of all these provisions appears to indicate the existence of different forms of self-promotion, some of which are to be considered as advertising and subject to advertising minutage limits, some of which are to be considered as advertising but not subject to advertising minutage limitations (non promotional announcements) and some of which are not to be counted as advertising but as programmes (trailers).

These uncertainties have resulted in a great variety of interpretations at Member State's level. The issue of self-promotion has recently been debated in several countries, such as Latvia, Lithuania or Portugal.

For the sake of clarity, three questions need to be examined separately: in which cases self promotion is to be **considered** as advertising (e.g. as opposed to editorial content or neutral non-promotional references to programmes), in which cases self-promotion is **NOT** to be considered as advertising and in which cases self-promotion is to be **calculated** as advertising. This distinction is not purely theoretical: even if some forms of self-promotion may be exempt from quantitative advertising restrictions further to Art. 18 (2), they may still be subject to qualitative requirements applicable to advertising.

However, the responses to the survey proved difficult to interpret in this regard because many regulators do not distinguish between different forms of self-promotion and only refer to programme trailers or announcements in connection with broadcasters' programmes.

The Dutch CvdM, however, while qualifying most self-promotion forms as advertising, identifies two forms of self-promotion as **editorial content**: programme trailers and items in programmes consisting of games and quizzes with the aim of making a programme more interactive for viewers (provided that there are no promotional references for goods and services).

In Switzerland, self-promotion is considered to be TV advertising, whereas programme trailers and promotion for programme accompanying materials are not considered as self-promotion.

It is interesting to note that a few respondents, such as Sweden, consider that self-promotion is not to be considered as advertising. In Greece, self-promotion should not exceed 3 min/hour.

One further issue in this context concerns **cross promotion**, e.g. the promotion on one channel of programmes from other channels generally belonging to the same audiovisual consortium. It has sometimes been argued³ that cross promotion could only be considered as TV advertising if the promoted services are television subscription services (pay TV). However, the (few) respondents which have addressed the issue of cross promotion in their answer do not make any distinction between pay TV or free to air TV.

In France, the CSA allows private channels to have cross-promotion practices, as long as they have a **purely informative and no promotional character**. To be considered as purely informative, the trailer may mention the title of the broadcast, the name of the broadcaster, the date and time when it is shown and an excerpt of the programme. This announcement should not be overly laudatory otherwise it could be considered as advertising.

In Italy and the Netherlands the key-element seems to be the editorial responsibility. In Italy, the AGCOM considers that: "All announcements referring to programmes broadcast on different platforms, or to directly derived related products, **under the editorial responsibility** of a broadcaster or a content provider, are considered self-promotion, regardless of the channel by which the announcements are broadcast"⁴).

This leads us to the question as to whether regulators consider cross promotion as such based either on the content of the promotion or on the organisation/editorial responsibility of a broadcaster, or both.

³ For instance in the Contact Committee or during a WG at the EPRA Riga meeting.

⁴ See Decision 211/08/CSP

This also leads us to the question: in which cases is cross promotion calculated in the advertising time?

In the Netherlands, the CvdM also uses the criterion of editorial link. Promotional references to goods and services of a company to which a service broadcaster is only economically - not editorially - linked are subject to the advertising quantitative limitations. As an example, promotional references to a TV guide or website which is not directly editorially linked to the programme or the broadcaster would be considered as advertising and subject to the hourly limitations. The same would apply to games and quizzes in which a prize (delivered by a third party) is portrayed in a recognisable and promotional way.

The Spanish CAC considers that self-promotion is to be calculated within the quantitative quota when it contains the broadcaster's merchandising with commercial purposes, e.g. when a broadcaster's programme website is self-promoted and this website contains for instance tunes, images etc. to be downloaded for payment. In Germany, self-promotions relating to the channel on which the promotion is broadcast are not considered to be advertising, whereas self-promotions relating to TV channels linked to one broadcaster are an issue of debate. Many regulators seem to consider that self-promotions can never be counted as advertising.

The last question is whether cross promotion that is NOT calculated in the advertising time could be subject to the qualitative requirements applicable to advertising?

Self-promotion:

- **In which cases self promotion is to be considered as advertising?**
- **In which cases self-promotion is NOT to be considered as advertising?**
- **In which cases self-promotion is to be calculated as advertising**

- **What are the practical criteria used by regulators to distinguish between different forms of self-promotions, some to be calculated in the advertising time and some excluded for the calculation, further to Art. 18 (2)? Is it based on a case-by-case approach?**

- **How to assess the promotional or non promotional character of announcements?**

Cross promotion:

- **Do regulators consider cross promotion as such based on the content of the promotion or on the organisation/editorial responsibility of a broadcaster, or both?**
- **In which cases is cross promotion calculated in the advertising time?**
- **Is cross promotion that is NOT calculated in the advertising time subject to the qualitative requirements applicable to advertising?**
- **How to delimit and assess cross promotion?**

2. Case-study on sponsored trailers

In April 2009, the Broadcasting Council of Latvia submitted a request to the EPRA network on the specific issue of sponsored trailers. The main issue at stake in Latvia was that broadcasters and the Broadcasting Council interpreted the application of the rules in a different way, hence the need for a common position. The Broadcasting Council received responses from 23 regulators⁵.

⁵ BE (VRM), CH, CY, DE, ES (CAC), EE, GB, GR, HU, IL (x2), IT, LT MD, MK, NL, NO, PL, PT, RO, SE, SI, SK and TR.

2.1. When announcing the sponsor of a programme or broadcast, is it also permitted to mention the name of the product produced by the sponsoring company?

The majority of the respondents to the request (such as Slovenia, Cyprus, Belgium (Flanders), Germany, Greece, Estonia, Hungary, Lithuania, Macedonia, the UK) considered that it is permitted to mention **the name of the product** produced by the sponsoring company, as long as it does not encourage the purchase of the product.

As an example in Germany, the Joint Directives of the State Media Authorities for Advertising, for the Implementation of the Separation of Advertising and Programme and for Sponsoring in Television/Radio" (Advertising Directives) from 21st February 2000 state that:

"(3) Sponsored programmes shall not exhort to the sale, purchase or rental or lease of products or services of the sponsor or a third party, above all by explicit special references."

"(4) The announcement of the sponsor shall only occupy the time necessary to clearly perceive the announcement of outside financing by the sponsor. The sponsorship announcement must produce an obvious reference to the sponsored broadcast and, except for an image-forming slogan, may not contain any additional advertising messages about the sponsor, products or trade marks."

In the UK, *"providing that references to a sponsor's products and services are not unduly prominent and do not encourage purchase or rental, a sponsorship credit may provide a brief description of the sponsor's products/services on the basis that it can help identify the sponsor"*.

In some countries, specific restrictions exist. As an example, in Slovakia, it is permitted to mention one product but there **must still be the name of the company or natural person** in the sponsorship announcement. In the amendment of the Broadcasting Act which is due to the AVMS Directive, the Council for Broadcasting and Retransmission proposed to liberalise this duty so the broadcasters, or in reality the sponsor, can choose if they want to mention the product or the name. Similarly, in Poland, the sponsor, not the product, should be treated as the producer. It is therefore permissible to show the image of one product or service of the sponsor, while mentioning his name. In Cyprus, The Radio and Television Stations Law of 1998 does not prohibit the mentioning of the name of the product. However, slogans that are used in sponsor announcements may be broadcasted in writing only. In Romania, further to Art.106 (2), in programmes with a duration of less than 30 minutes, the name, trademark and logo of the sponsor or the name or image of a representative product shall be broadcast for a maximum broadcasting time of 30 seconds.

In Italy, it is forbidden to mention **specific services or products** through the sponsorship of a programme. While it is acceptable to have a sponsorship credit such as *"This film is offered by BMW"*, it would be prohibited to have a sponsorship announcement stating that *"This film is offered by BMW Z4 Coupé"*.

There are however exceptions as in the Netherlands, where, in general it is NOT allowed to mention or show the product of the sponsor in a sponsor announcement (sponsor reference or sponsor credit). The only exception would be when it is necessary to distinguish the sponsor for the viewer. For instance: Ajax is in our country not only a famous football club but also a cleanser brand as well as a brand of fire extinguishers. So in this and other exceptional cases in order to avoid confusion for the viewer about who is sponsor you may include the name of the product in the sponsor reference.

In Catalonia, *"explicit reference may be made to the products and services of the sponsor or those of a third party with the exclusive purpose of identifying the sponsor and clarifying the link between the programme and the sponsoring company. "*

In Norway, it is only permitted to mention the **legal entity** that has contributed to the programme. The sponsor's product or product-trademarks may not be mentioned or shown. However, trademarks used by the sponsor to refer to its person as such, are allowed. In some cases, the product-trademark and sponsor's trademark referring to his person will be the same (e.g. the legal entity Coca-Cola Norway Ltd. uses logos/trademarks also found on their products). This is not prohibited.

In Sweden, this practice is not allowed either. It is however allowed to let a product from a specific company sponsor a program, but in that case the company and the product may not appear at the same time.

2.1 Is it the practice in your country to include a reference to the sponsor in programme trailers (self-promotion) for sponsored programmes or broadcasts?

For example: "this film is offered by Fructis shampoo".

A reference to the sponsor in programmes trailers for sponsored programmes or broadcasts seems to be a **common practice** in most countries (such as Spain (CAC – Catalonia), Cyprus, the Flemish Community of Belgium, Hungary, Macedonia, Moldova, Netherlands, Portugal, Slovakia, Switzerland or the UK). In such instances, the sponsor announcement is not counted in the advertising time. In the UK, "*where a programme trail contains a reference to the sponsor of the programme, the sponsor reference must remain brief and secondary*".

In Poland, according to the regulation of the National Broadcasting Council of 6 July 2000: "*A sponsor credit may be included in the trailer of a programme item. The trailer of a programme item may be transmitted exclusively before the first transmission of this programme item by the broadcaster, not more than 15 times during a television programme service and not more than 25 times during a radio programme service*". But: "*§ 2. 1. A single identification of the sponsor may not exceed 8 seconds in the case of one sponsor, 15 seconds in the case of two sponsors and 25 seconds in other cases*". It is however not possible to say: "this film is offered by ... shampoo". We can say instead "this film is offered by the producer (name) of ... shampoo". Such announcements are not counted in the total amount of advertising.

However, in Sweden, this is not something that the Broadcasting Council has observed in channels under its jurisdiction. The question has thus never been tried in Sweden.

In Norway, Israel⁶ and Greece, references to sponsor in programme trailers are **not allowed**. This particular question is regulated in Norway by section 3-10 of the Broadcasting Regulation which states that:

"Where a programme is sponsored, information to this effect shall be given prior to and/or after the programme. Sponsors may not be identified in programmes or in programme trailers. In case of breaks in programmes, the sponsor may be identified at the start and end of each part of the programme".

In Slovenia, it is required by law that the sponsor be announced at the beginning and the end of a sponsored programme. In practice this is mostly done by showing advertisements of sponsors at the beginning (as the last spot in an advertising break) and the end of a programme (as the first spot in an advertising break) with a "sponsor" sign superimposed onto the advertisement. In self-promotion spots such as like movie trailers and similar, sponsors do not have to be announced, but mostly are, and in a similar way as mentioned before - with an advertisement and "sponsor" sign superimposed onto it, right after the self-promotion spot. Announcements of this kind, no matter whether they are shown at the beginning and the end

⁶ In Israel, this practice is not allowed for multichannel television and the channels regulated by the 2nd Authority for Radio and Television. It is however allowed for some special-interest channels which are allowed to broadcast commercials.

of a programme, or along with a self-promotion spot, **do count in the total amount of advertising**, if the sponsored programme is of a **commercial nature**. Sponsor announcements for '**non-commercial**' programmes, such as cultural and humanitarian events do not count in the total amount of advertising if they are shown free-of-charge.

With regard to the specific issue of the calculation in the advertising time, the Swiss OFCOM, states that programme trailers are NOT considered to be advertising or self-promotion. Such announcements are therefore not counted in the total amount of advertising. In Italy, such sponsorship is also not counted in hourly limits - unless advertising has been inserted in a sponsoring credit, in which case the quota time of advertising should obviously be calculated. The same principle applies in Moldova.

Along the same reasoning, the Dutch Commissariaat voor de Media declares that "Pure programme announcements, so called trailers, should be regarded as **editorial content** and hence a programme. As a consequence of this these trailers can be sponsored and may contain a sponsor reference. This interpretation can be concluded from recitals 39 of the TWF Directive 1997. As a consequence of qualifying these announcements as a type of program we draw the conclusion these trailers can also be sponsored and may carry a billboard of a sponsor. We will only consider a trailer as a program as long as it does not consist of **promotional references to other products or services**. On the other hand we have to realize that a trailer will never be purely informative and neutral since it has the aim to encourage the audience to watch the program referred to. This is not an obstacle to consider a trailer as a program as long as promotional references are restricted to the program referred to and do not contain promotion for any other products of services".

Sponsored Trailers:

- **What is the nature of trailers (advertising, self-promotion, and programme)?**
- **Are sponsored trailers to be calculated in the advertising time?**
- **How to assess the promotional or non promotional character of sponsored trailers?**
- **Do the same or different rules apply for the sponsoring of trailers as for sponsoring (other) programmes?**
- **Do sponsoring rules also apply when the programme, and not explicitly the trailer, is sponsored?**