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Establishing Self-Regulatory Advertisement Standards Mechanisms: The Case for an Advertising Standards Authority for Malta



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¹ Lord McGregor of Durris, Chairman, Advertising Standards Authority, 1989. Advertising Standards Authority (UK), Annual Report 1997, London, ASA, p. 20.

² Advertising Standards Authority (UK), Annual Report 2006, London, ASA, p. 17.

³ Chapter 490 of the Laws of Malta.

⁴ Article 3 of the Administrative Justice Act.

⁵ In the Address by His Excellency Dr. Edward Fenech Adami, President of Malta, on the Occasion of the Opening of the Eleventh Parliament, 10th May 2008, it is stated that in so far as good governance is concerned, the Government is proposing legislation 'for the empowerment of the Ombudsman in coordinating all administrative complaints in the public

'I approach the work of the Advertising Standards Authority in its early maturity in the light of two convictions: first that an independent press is one of the indispensable bases of democracy and, second, that the larger the lay element in the administration of justice, the sounder will be the national foundations of law and order. At first sight, these beliefs may not seem immediately relevant to the concerns of an Authority that exists to deal with complaints from the public about the contents of advertisements; to maintain and promote proper standards in advertising; and to be responsible for the British Code of Advertising Practice. Nevertheless,

it is not hard to show that they do bear directly upon the conditions of today. Without advertising, there could not be a free press independent of Government.'¹

'It isn't the change in advertising that has been remarkable over recent decades, but where and how that advertising appears. Technology, ingenuity and the power of creativity mean that almost any surface, service, device or screen is now an advertising medium.'²

1. Introduction

Whilst the Administrative Justice Act, 2007³ has streamlined

administrative tribunals in order to ensure, *inter alia*, that they all respect the principles of good administrative behaviour,⁴ the President of Malta has declared in the opening speech of Parliament that it is Government's intention to enact legislation to standardise extant ombudsmen.⁵ In so far as advertising regulation is concerned, improvements need also to be made to the governmental structures which enforce advertising legislation. However, this should not be a one way process: the advertising industry also has to give its share in advertising regulation and has a positive pivotal role to play. Indeed, advertising regulation in Malta is

service (recte sector) as a whole.

⁶The Broadcasting Authority controls advertising on the broadcasting media through article 19 and the Third Schedule to the Broadcasting Act which contains a Code For Advertisements, Teleshopping and Sponsorships as well as through various Requirements as to Advertisements, Methods of Advertising and Directions which it issues from time to time. For a list of these Requirements and interpretative circulars, vide Dr. Kevin Aquilina and Mario Axiak, *Maltese Broadcasting Legislation: Salient Legislation, Broadcasting Authority, Broadcasting Studies Series Volume 1*, Hamrun, 2007.

⁷Investment services advertising is regulated by the Investment Services Act, Chapter 370 of the Laws of Malta; advertising is also referred to in the Banking Act, Chapter 371 of the Laws of Malta; in article 13(f) of the Financial Markets Act, Chapter 345 of the Laws of Malta; and in articles 2 and 48 of the Insurance Business Act, Chapter 403 of the Laws of Malta.

⁸Article 10 of the Equality For Men and Women Act, Chapter 456 of the Laws of Malta, prohibits any person from publishing or displaying or causing to be published or displayed any advertisement, or otherwise to advertise a vacancy for employment which discriminates between job seekers or to request from job seekers information concerning their private life or family plans except in such cases where employers prove that the work in connection with the situation advertised can only be performed by a person of a specific sex. Nor is it lawful for persons to publish or display or cause to be published or displayed any advertisement which promotes discrimination or which otherwise discriminates.

⁹Relevant provisions include articles 2, 7, 9, 48, 49, 50, 53, 72, 73, 90, 94 of the Consumer Affairs Act, Chapter 378 of the Laws of Malta.

¹⁰Relevant legislation comprises articles 2, 31 and 106(g) of the

still missing the industry's contribution at ensuring that advertising standards are well kept by the advertising industry. Although there do exist self-regulatory mechanisms in Malta regulating both the media and advertising sectors, they tend to be sectoral and subject-specific. What is needed is a holistic approach to advertising standards whereby one governmental regulatory authority is established which essentially delegates its enforcement powers to a serious and effective self-regulatory mechanism. It is the contention of this paper that this can be achieved by the establishment of a self-regulatory Advertising Standards Authority - as is the case in other jurisdictions abroad - which will work hand in hand with extant advertising regulators or, better, with the proposed new regulatory authority dealing, inter alia, with advertising standards.

2. Extant Self-Regulatory Mechanisms

In Malta there are several governmental bodies which regulate the media in general and advertising in particular. Nonetheless, the same cannot be said for self-regulatory mechanisms which regulate both the media and the advertising sector. Extant self-regulatory mechanisms comprise the Institute of Journalists' Press Ethics Commission, advertising self-regulation in the financial services sector; the Code of Practice for Internet Service Providers drawn up by the Internet Service Providers Sub-section of the Malta Chamber of Commerce and the Code of Conduct For Electronic Content Provision by Electronic Communications Undertakings in

Malta. Moreover, within the Maltese media and advertising landscapes there exist no co-regulatory structures.

Further, in so far as advertising standards are concerned, there is no extant self-regulatory advertising standards authority in Malta. Indeed, the International Advertising Association Malta Chapter cannot be considered to be a self-regulatory regime as it is more of a pressure group for advertisers rather than a self-regulatory mechanism.

3. Public Entities Regulating Advertisements

Apart from the Broadcasting Authority which controls advertising in the broadcasting media irrespective of the services and product advertised therein, there are other sectoral public entities involved in the regulation of advertising.⁶ Sectoral entities involved in the regulation of broadcasting advertising comprise the following:

- Malta Financial Services Authority⁷
- National Commission for the Promotion of Equality between Men and Women⁸
- Director of Consumer Affairs⁹
- Medicines Authority¹⁰ and its Advertising Committee¹¹
- Medical Council¹²
- Pharmacy Council¹³
- Council for Nurses and Midwives¹⁴
- Council for the Professions Complementary to Medicine¹⁵
- Minister responsible for public health¹⁶
- Malta Lotteries Authority - means of distance communication¹⁷
- Malta Environment and Planning Authority¹⁸

- Commission for the Administration of Justice¹⁹

4. Relevant Legislation Regulating Advertisements

On the other hand, there exist other laws which regulate advertising in addition to that mentioned in part 3 above and which are administered by diverse government bodies. Notable instances include the Tobacco (Smoking Control) Act,²⁰ the Control of Tattooing Act,²¹ the Public Collection Act²² and subsidiary legislation made under the European Convention Act.²³

5. Regulatory Considerations: Structures and Typology of Offences

From a regulatory point of view it is more than evident that there are too many governmental bodies involved in some way or other in the regulation of advertisements. At times it is not clear to the public which is the competent authority which regulates a particular sector of advertising and at other times there appears to be an overlap between regulators. Not only so but if action is taken by one regulator, say the Broadcasting Authority, the contravention of the applicable advertising law gives rise to an administrative offence whilst if it is the Executive Police who institute proceedings for a breach of an advertising law then the violation of the law gives rise to a criminal offence. Thus, in so far as the regulatory aspect is concerned it makes a lot of sense to have one governmental body dealing with advertising, even if it has to coordinate with other specialised bodies, and that there should be one

Medicines Act, Chapter 456 of the Laws of Malta, the Control of Advertising of Medicinal Regulations (Subsidiary Legislation 458.14), Medicinal Products (Advertising) Regulations (Subsidiary Legislation 458.32)

¹¹ Established by regulation 15 of Medicinal Products (Advertising) Regulations (Subsidiary Legislation 458.32).

¹² The Medical Council has drawn up a Code of Ethics entitled 'General Notice for the Guidance of Practitioners' available at http://www.sahha.gov.mt/showdoc.aspx?id=87&filesource=48&file=Medical_Council_Code_of_Ethics.pdf. Paragraphs 7 and 8 lay out rules on 'Advertising and Canvassing' for the medical and dental professions.

¹³ The 'Circular on Advertising' adopted by the Pharmacy Council is available at http://www.sahha.gov.mt/showdoc.aspx?id=89&filesource=48&file=Circular_on_advertising.pdf.

¹⁴ Vide the 'Maltese Code of Ethics for Nurses and Midwives', under the heading 'Responsibilities towards Society' at http://www.sahha.gov.mt/showdoc.aspx?id=83&filesource=48&file=nm_codeofethics.pdf.

¹⁵ Vide 'A Code of Professional and Ethical Conduct for the Professions Complementary to Medicine' available at http://www.sahha.gov.mt/showdoc.aspx?id=84&filesource=48&file=codeofethics_pcm.pdf.

¹⁶ The Minister responsible for public health may make regulations regulating advertisements relating to the labeling and marketing of drugs and chemical products, psychotropic drugs, (articles 40(c), 40A(1)(c) of the Medical and Kindred Professions Act, Chapter 31 of the Laws of Malta. Another relevant provision is article 90A on advertisements of treatments.

¹⁷ Confer in particular articles 2(1), 11(f), 71 and 76 of the Lotteries and Other Games Act, Chapter 438 of the Laws of Malta.

¹⁸ In terms of article 49 of the Development

uniform and standardised system of applicable penalties. I opine that in the cases of advertising regulation there should be a regulatory body which should be empowered to issue cease and desist orders, that any breach of such orders should give rise to administrative (not criminal) offences and that no recourse should be had to the criminal law in such cases except, if need be, in very exceptional cases where there is a breach of the Criminal Code (or some other criminal provision in any other law) together with a violation of an advertising law. Indeed, the Criminal Law should be reserved for heinous offences and contraventions of advertising laws should be dealt with as administrative offences by a regulatory structure. In order not to duplicate existing structures and not to create new ones – which come at a cost both to the State and to the citizen who has to fill the State's coffers through taxation to pay for such structures - it is also being proposed to establish a Communications Authority which would essentially be the product of a merger between the Broadcasting Authority, the Malta Communications Authority, those units within the Consumer and Competition Division which deal with advertising and the Press Registrar. This new convergent Authority should also be entrusted with advertising regulation with the important caveat that it should act through self-regulatory regimes such as the Advertising Standards Authority which this paper is proposing to create. By promoting co-regulation, the new Authority can shed most of its enforcement powers upon the advertising industry – be it responsibility for

advertising in the press, broadcasting media, billboards, internet, etc. – thereby trimming down the manpower of the convergent regulatory body but at the same time ensuring that advertising law is still abided by through a serious and effective self-regulatory mechanism. This would ensure that the convergent authority, though a super authority, is curtailed in size, kept to the basic minimum and is kept as mean and lean as possible. The latest European Union Audiovisual Media Services Directive encourages the setting up of co-regulatory and self-regulatory mechanisms to enhance the regulation of broadcasting content on television.

6. The European Union Audiovisual Media Services Directive

The European Union Audiovisual Media Services Directive (AVMS) was approved on 11 December 2007.²⁴ It has to be transposed by Member States not later than 19 December 2009. What is interesting in this 2007 amending directive is that it encourages the creation of self-regulatory regimes. The Directive contains two references to self-regulation: in Recital 36 of the Preamble and in Article 3(7). Although the Preamble has no binding force as contrasted with Article 3(7) of the Directive, the Preamble is relevant as it sheds light on the correct interpretation of Article 3(7).

Recital 36 reads as follows: In its Communication to the European Parliament and the Council on Better Regulation for Growth and Jobs in the European Union, the Commission stressed that



a careful analysis of the appropriate regulatory approach is necessary, in particular, in order to establish whether legislation is preferable for the relevant sector and problem, or whether alternatives such as co-regulation or self-regulation should be considered. Furthermore, experience has shown that both co- and self-regulation instruments, implemented in accordance with the different legal traditions of the Member States, can play an important role in delivering a high level of consumer protection. Measures aimed at achieving public interest objectives in the emerging audiovisual media services sector are more effective if they are taken with

Planning Act, Chapter 356 of the Laws of Malta, the Malta Environment and Planning Authority may issue advertisements regulation orders. An 'advertisement' is defined as 'any word, letter, model, sign, placard, board, notice, device or representation, whether illuminated or not, in the nature of and employed wholly or in part for the purposes of advertisement, announcement or direction, including any boarding or similar structure used or adapted for use for the display of advertisements'. Billboards, as seen from this definition, require a MEPA development permission to be erected.

¹⁹ The Commission for the Administration of Justice has made the Code of Ethics for Members of the Judiciary; the Code of Ethics and Conduct for Advocates; and the Code of Ethics and Conduct for Legal Procurators. The Chamber of Advocates has also its own Guidelines on Advertising for the Legal Profession.

²⁰ Chapter 315 of the Laws of Malta.

²¹ Chapter 270 of the Laws of Malta.

²² Chapter 279 of the Laws of Malta.

²³ Advertising, Sponsorship and Teleshopping (Protection of Consumers' Interest) (Television Broadcasting Injunction) Order, 2005.

²⁴ Directive 2007/65/EC amending Directive 89/552/EEC of 3 October 1989. The 2007 Directive is published in the Official Journal of 18 December 2007 (No L 332, p. 27).

²⁵ Advertising Standards Authority (UK), Annual Report 1997, London, ASA, p. 34.

²⁶ Section 6(2) and (3) of the UK Communications Act, 2003 (c. 21).

²⁷ Advertising Standards Authority (UK), Annual Report 2004, London, ASA, p. 3.

²⁸ Advertising Standards Authority (UK), Annual Report 1999, London, ASA, p. 16-17.

the active support of the service providers themselves.

Thus self-regulation constitutes a type of voluntary initiative which enables economic operators, social partners, non-governmental organisations or associations to adopt common guidelines amongst themselves and for themselves. Member States should, in accordance with their different legal traditions, recognise the role which effective self-regulation can play as a complement to the legislative and judicial and/or administrative mechanisms in place and its useful contribution to the achievement of the objectives of this Directive. However, while self-regulation might be a complementary method of implementing certain provisions of this Directive, it should not constitute a substitute for the obligations of the national legislator.

Co-regulation gives, in its minimal form, a legal link between self-regulation and the national legislator in accordance with the legal traditions of the Member States. Co-regulation should allow for the possibility of State intervention in the event of its objectives not being met. Without prejudice to Member States' formal obligations regarding transposition, this Directive encourages the use of co-regulation and self-regulation. This should neither oblige Member States to set up co- and/or self-regulatory regimes nor disrupt or jeopardise current co-or self-regulatory initiatives which are already in place within Member States and which are working effectively.

Article 3(7) of the Directive provides as follows:



Member States shall encourage co- and/or self-regulatory regimes at national level in the fields coordinated by this Directive to the extent permitted by their legal systems. These regimes shall be such that they are broadly accepted by the main stakeholders in the Member States concerned and provide for effective enforcement.

7. The U.K. Advertising Standards Authority

Although the EU has come out with the ideas of self- and co-regulation, in the United Kingdom there has been a self-regulatory mechanism established since 1962 by the name of the Advertising Standards Authority (ASA) which is seen as a model for self-regulation and a co-regulatory mechanism established since 2004. For such a structure to continue to be valid, it must command the trust and confidence of the Government of the day. For this to be achieved, the ASA and the industry have to work hand in hand. Undoubtedly, a self-regulatory

system that works well benefits consumers and competition alike. The ASA ensures that whoever commissions, prepares, places and publishes advertisements observes the British Code of Advertising, Sales Promotion and Direct Marketing. The Code requires that advertisements, sales promotion and direct marketing should be:

- legal, decent, honest and truthful
- prepared with a sense of responsibility to consumers and to society
- in line with the principles of fair competition generally accepted in business.²⁵

Interestingly enough, until 2004, the ASA did not cover broadcast advertisements but restricted itself only to non-broadcast advertisements. Non-broadcast advertising includes newspapers, magazines, posters, direct mail and promotions, cinema adverts and the new media (internet, mobile phones, etc.). However, since 2004, the ASA took over responsibility for regulating broadcast advertising, under contract ▶

²⁹ Advertising Standards Authority (U.K.), Annual Report 2000, London, ASA, p. 3-4.

³⁰ Ibid., p. 3.

³¹ Ibid.

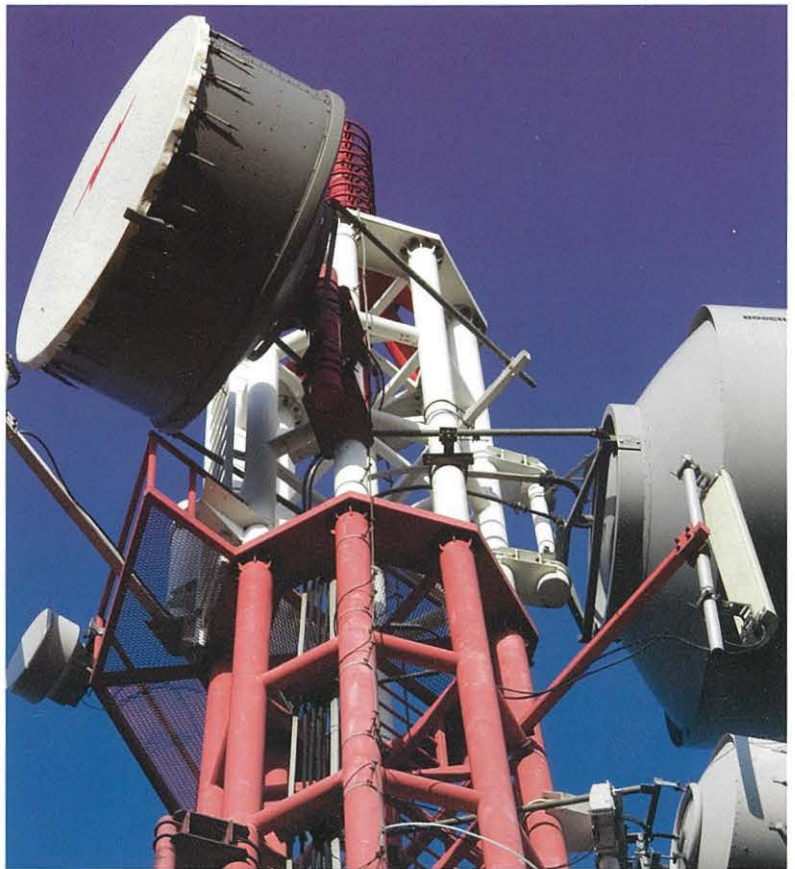
³² Section 60.38 of The British Code of Advertising, Sales Promotion and Direct Marketing, The Committee of Advertising Practice, 2005, p. 39.

³³ For further information on the European Advertising Standards Alliance, visit its website at <http://www.easa-alliance.org/>. EASA members resolve cross-border complaints on the basis of mutual recognition and the country of origin principle.

³⁴ Advertising Standards Authority (U.K.), Annual Report 2006, London, ASA, p. 2.

from the communications regulator, the Office of Communications (Ofcom). Indeed, the U.K. Communications Act 2003 requires Ofcom generally to promote and facilitate the development and use of effective self-regulation. This is a harbinger of article 3(7) of the AVMS Directive referred to above. It allows Ofcom to contract out its functions, where appropriate, using the Deregulation and Contracting Out Act 1994.²⁶ Since 1st November 2004, the ASA regulates advertising across all media thereby becoming the one-stop-shop for advertising complaints regardless of media.²⁷ The media types it covers in addition to the broadcasting media comprise the following: posters, direct mail, postal mail, national press, magazines, internet, regional press, leaflets, brochures, points of sale, electronic, catalogue, directory, packaging, circular, facsimile, insert, cinema, transport, text messages (such as SMS and MMS), voicemails, e-mails, computer games, ambient and video.

As media continue to integrate and converge into each other – thereby rendering obfuscated the distinction between broadcast and non-broadcast advertising – the more compelling has it become from a consumer's, publisher's, advertiser's and broadcaster's standpoint to have one serious and effective self-regulatory mechanism to regulate all forms of adverts, broadcast or non-broadcast, irrespective of the medium concerned. Ofcom's decision to contract out the regulation of broadcast advertising to the ASA has created a co-regulatory partnership which did not exist before 1st November 2004 in regulating



non-broadcast advertising content. Since 1st November 2004, the ASA now has responsibility to enforce also broadcast advertising Codes namely, the Television Advertising Standards Code, the Radio Advertising Standards Code and the Advertising Standards Code for Text Services.

The ASA is empowered to apply a range of sanctions through its Committee of Advertising Practice to ensure that adverts comply with the above-mentioned Code. It carries out spot-checks, post-investigative compliance checks and a list of repeat offenders has been drawn up. In the latter case, frequent transgressors are asked to attend meetings at the ASA to agree a course of action to improve their compliance with the Code.

Customer satisfaction surveys are also carried out.²⁸

The ASA attempts to strike a balance by safeguarding commercial freedom of speech whilst ensuring that consumers are not misled or offended, or competitors unfairly disadvantaged. The Authority ensures that misleading advertising is removed or amended. Publishers, media owners and others in the business will deny space to the small minority of advertisers who break the rules. In the U.K. self-regulation has worked as it is in the advertisers' own interest to maintain public confidence in advertising.²⁹

The mechanism operates without calling on public funds and at no cost to the complainant. Although self-regulation is criticised on the

basis that it is a contradiction in terms and that if the advertising industry is left to police itself the result will be self-indulgence rather than self-restraint, as Lord, QC, ASA Chairman put it, this is not the case as the self-regulation experience in the U.K. has worked well.³⁰ Indeed, as the ASA Chairman eloquently put it, 'self-regulation is flexible and can adapt quickly to new situations – new media, new advertising formats, new products, new markets. In fact effective self-regulation may be the only credible means of maintaining standards on the internet or in cross-border trade.'³¹

The ASA is independent both from Government and from commercial interests. Its decisions are subject to appeal to an Independent Reviewer or to judicial review. Appeals to the Independent Reviewer are accepted if they meet one of two criteria: that they provide additional, relevant evidence which was available at the time the advertisement appeared, or can demonstrate the existence of a substantial flaw in the adjudication or in the process by which that adjudication was made.³²

8. The Case for an Advertising Standards Authority for Malta

The advertising industry should take up the initiative to establish a self-regulatory mechanism on the lines of the U.K. Advertising Standards Authority. Such Authority should deal with both broadcast and non-broadcast advertising and should cover all types of media. Moreover, when the Maltese industry draws up its own Code of Advertising and Sales Promotion and enforces both such Code and the Broadcasting Authority's

Requirements on advertising, then the regulator will not have to move in to fill in the lacunae which exist today in so far as holistic advertising regulation is concerned. Nor would the regulator need to budge in to enforce these Codes and Broadcasting Requirements except in those cases where the ASA would not be in a position to enforce them thereby requesting the regulator's intervention to apply legal sanctions in terms of law. Of course, there should be a law which recognizes the relevance of a serious and effective self-regulatory mechanisms such as the ASA and that where consensus and persuasion are not achieved by these established means for resolving conflicts and recourse to such mechanisms to resolve complaints has been exhausted, the regulator would have to be called in where coercion seems to be the only language where advertisers will respond positively to the law's calling.

The experience gained by the U.K. Advertising Standards Authority and the other 25 counterpart bodies within the European Advertising Standards Alliance³³ should be tapped upon and made use of in establishing a Maltese version of the U.K. Advertising Standards Authority which, although not taking the place of law enforcement authorities, will work with the advertising industry to help resolve complaints, provide effective measures for protecting consumers and introduce a culture of self-regulation in the advertising sector which is so much missing in the Maltese Islands. As Lord Borrie QC, ASA Chairman, put it in the ASA's Annual Report for 2006, 'Self-regulation offers a free, fast and practical approach to redressing consumer complaints. It secures

advertisers' freedom to advertise responsibly and maintains the integrity of their marketing.'³⁴

9. Concluding Remarks

In sum, this paper essentially recommends the establishment of one governmental body to regulate the communications sector – which ought to include media advertising within its remit – and the encouragement on the part of the Government for the local advertising industry to create its own self-regulatory advertising mechanism. Both the regulator and the self-regulator should work hand in hand with, initially, it being the self-regulator which ought to devise and enforce its own Code of Advertising Practice and broadcast advertising requirements. It should only be at a later stage, when the self-regulatory mechanism does not achieve its aim in those limited cases that the regulator should come in and apply the full rigor of the law to that advertiser who is not complying with the self-regulatory mechanism. Moreover, all laws regulating advertising should be amended to provide for one sanction for non-compliance therewith – an administrative (as opposed to a penal) sanction. Self-regulation should then be developed into co-regulation whereby the regulator can delegate its enforcement function to the self-regulator thereby creating a system of co-regulation. With the regulator and self-regulator working hand in hand, the ensuing co-regulatory regime will ensure that the media industry will comply with all its obligations at law and that its adherence to and respect for the law becomes paramount. ■