Health & Consumer Protection
Directorate-General

Self-Regulation in the EU Advertising Sector:

A report of some discussion among Interested parties

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Foreword

1. It has been my privilege to convene the discussions summarised in this report. The Round Table on Advertising Self-Regulation (SR) has been a fascinating exercise, bringing together the interested parties from across Europe to learn both about and from each other in a structured and sustained dialogue exchange. We achieved, I think, a move from black and white dialogues of the deaf towards a greater shared understanding of the constraints around SR performance in Europe today. For this, I would, above all, wish to express my gratitude to all concerned; not only to the European Advertising Standards Alliance whose courage in constructive self-examination sparked the debate, but to representatives of organisations, some of them traditionally somewhat sceptical of self-regulatory approaches, who have given generously of their time and trust.

2. The report issued here, on the responsibility of the Chair, reflects intense discussions, and much written interaction. The key elements for effective self-regulation set out below are, I am confident, a pretty consensual expression of what is a best-practice model. The narrative around these key elements could always be open to further polishing, but I believe that overall the report reflects an almost unprecedented in-depth exchange between practitioners and stakeholders on the desired components of best-practice SR in one sector.

3. I close this step in the debate around self-regulation with some optimism. The agreed best-practice model is pretty good, if rather challenging, for SR practitioners. In Member States where self-regulation is still an untried concept or a start-up operation, there are real possibilities to adopt the best-practice model as the desired point of arrival, but there is also a real need for all interested parties to recognise that this model could not be built overnight. As the paper also emphasises, no model can be a good fit in every country's historical and cultural context. Full harmonisation is not a likely option here.

4. But there does seem to me to be evidence for the general usefulness of at least two core pre-conditions for credible SR. First, a sustained openness to dialogue with, and participation of, interested non-business players in the SR process; and second, adequate monitoring and accountability of SR performance and outcomes. As practice in these

and other areas continues to improve across the EU, I am confident that SR will be given full weight in society's choices among the menu of regulatory options.

5. My hope is that this report will provide a useful input to ongoing reflection across the EU around self-regulation. This is not so much a debate about self-regulation against hard law, but rather a debate about how law and self-regulation can and should interact in modern Europe.

Robert Madelin

Executive Summary

This report reflects the issues identified during the Round Table on Advertising Self-Regulation between some Commission colleagues, some interested NGOs and representatives of the European Advertising Standards Alliance (EASA).

The goal of this series of discussions was the clearer definition of a Best practice model for self-regulation. There was a general recognition by those involved in this debate that moves towards this best practice model cannot be achieved easily or overnight, and indeed that it is not necessary to propose any uniform way or to define how self regulation should be implemented at national level.

There has been also a consensus around the table that Self-Regulation in advertising can only maximise its potential in a clear legislative framework which allows SR sufficient scope to operate. In this sense, the scope and the degree of statutory systems have a direct influence on the effectiveness of the self-regulatory system.

The clear definition in responsibilities between SROs, government and other authorities promotes transparency, and maximises the impact of SRO activity. There is a clear responsibility of European institutions or Member States in setting clear legal backstops.

The key determinants of effectiveness in the Best Practice Model that this report describes are ummarised in four points below.

1. Effectiveness :

– The SROs should offer the provision of copy advice particularly for media where advertising copy may have so short a shelf-life to negative adjudications. Copy advice should ideally be provided free of charge

– All SROs, from establishment onwards, should establish and publish both performance objectives year by year and records of their performance against those benchmarks. Each SRO should have an explicit objective, to the effect that it should be easy to find through which channel to complain.

– There should be a benchmark for the ease with which any form for the submission of complaints is completed. This objective should be endorsed by its governing board and verified year by year in its customer satisfaction surveys. There should be a standard for the speed with which complaints are handled.

– There should be a systematic duty to publish decisions which is a tool for increasing transparency of the system and increased public confidence

– SROs could recommend to the Advertising industry for its agreement and action, minimum standards for training of new recruited young advertising staff and for the design of internal compliance processes

- Sanctions for non-compliance with codes, for repeat offences and for consistently ignoring codes or adjudications, should be clear and effective. The minimum sanction should be timely withdrawal of advertising copy.

- Withdrawal should apply, in the absence of explicit local SR decisions to the contrary, not only in the jurisdiction of the adjudication but throughout the business concerned; differences in codes and cultural expectations may today mean that different decisions are reached in different markets. The collaboration of the media as a whole on backing the decisions of the SRO is an important element to enforcing the sanctions. The adoption, more generally of "compliance clauses" in advertising contracts should help to make sanctions more effective.

2. Independence :

- Openness, independence and transparency are seen as critical points for the public acceptability of the self-regulation on advertising. The effective contribution of the stakeholders (consumers, parent associations, academics etc) to the elaboration of codes deserves reinforced attention by EASA. Over time, monitoring should include indicators designed to verify that the stakeholders' involvement meets the expectations of the society within which the SRO operate.

- Adjudication bodies should be composed of a substantial proportion of independent persons. Those persons could be selected on the basis of calls for expressions of interest, and appointed by the Board. It could also include possible cooperation with statutory authorities for the appointment of the independent persons of the adjudication bodies. All Adjudication body Members should be subject to rules on the avoidance of conflict of interests and on the declaration of interests. A Jury is fundamental in guaranteeing the independence of the process. Composition, nomination process, independence and integrity of its members are the key determinants for the credibility of the system.

- The business and SR community should remain open to the benefits, as well as the costs of the development of some more clearly 'independent' presence at all levels.

3. Coverage:

- Advertising SR's today in Europe aim to cover not only pure advertising but all other forms of "Commercial" or "marketing communication". The aspiration is a global coverage for all type of marketing or commercial communication**.** It is important to find a generic definition, encompassing all advertising techniques using any medium or distribution channel based on new technology.

- Another issue of concern is the new emerging trends for "buzz marketing" and "word of mouth". SROs should keep under review any trend to significantly increase the proportion of 'adspend' that escapes SR

- On both the European and national level considerable effort has been put into providing basic legal requirements, specifically for direct and interactive marketing. Legislation therefore underpins self-regulation of the individual marketing sector.

– SROs must commit to keeping abreast of emerging techniques, to discussing with all stakeholders any concerns raised by these techniques, and to deciding promptly either to deal with these concerns or to alert the public authorities that they would need to develop an alternative approach. Public authorities cannot assume that SR would be the fall-back for such issues, where legal approaches seem inadequate

4. Funding:

– There was general agreement in the Round Table on the desirability of strong political support for industry voluntary funding. There was no agreement on the feasibility of any additional advertising tax.

The widely shared interest in the debate on SR generally at EU level and in this Round Table, reflects the relative lack of opportunities for sustained and detailed debate in the past. Participants seem to feel that they have learned much concerning the detailed experiences of SR.
This raises the question whether such a process of joint learning and common problem-solving could be sustained within a more established forum, embracing industries other than just advertising.

1 Introduction:

This Draft Report of the ad hoc Round Table on Advertising is developed on the responsibility of DG SANCO.
The Round Table was set up in October 2005 in response to a request by advertisers for guidance and support at the current stage of their endeavours. On the basis of an informal issues paper the Round Table was interested to provide a forum for debate around SR in advertising. The report reflects the debate and contributions from the participants in the Advertising Round Tables of 3 one-day sessions in October 2005, January 2006 and May 2006. It seeks to draw together the issues identified during these debates between some Commission colleagues, some interested NGOs and representatives of the European Advertising Standards Alliance (EASA).

The goal of this series of discussions is the clearer definition of a **Best practice model** for self-regulation. This vision is based on a common acceptance that the model is not achievable today, and that self-regulation short of the model can be useful and effective. This would not aim to be a 'one-size fits all' model, since different national systems have evolved to different states, each with specific legal and social settings. But it would set a common point of reference for efforts underway to develop current practice and approaches which might reject or ignore the common point of reference would, at worst, be ruling themselves out from consideration as an effective alternative to other policy interventions. At best they would have a heavy burden of proof to satisfy if they were to be accepted as effective in addressing public concerns.

There is general recognition by those involved in this debate that moves towards this best practice model cannot be achieved easily or overnight, and indeed that it is not necessary to propose any uniform way or to define how self regulation should be implemented at national level. In some Member States, particularly among the most recent adherents to the EU, SROs have yet to be established. This state of affairs should warn all concerned of the dangers of trying to go too far too fast in defining unattainably challenging objectives. There is, however, an implication that self-regulatory endeavours designed, ultimately, to come up to the standards of such a vision would deserve public support.

1.1 What are we talking about?

Self-regulation (SR) is "a system by which the advertising industry actively polices itself. The three parts of the industry (advertisers, advertising agencies, media) work together to agree standards and to set up a system to ensure that advertisements which fail to meet those standards are quickly corrected or removed" (EASA). For the purpose of the discussions that have led to this paper, self-regulation was not strictly defined. There was general recognition that the real world practice of self-regulation did not follow the current Inter Institutional Agreement on Better Lawmaking of SR and "co-regulation".

SR sometimes includes a participative approach to partnership with stakeholders in at least some key aspects of the setting up and operation of SR. It includes possible co-operation with statutory authorities, whether to make legal backstops effective, to ensure transparent and

independent governance of the self-regulatory process or for other purposes. There are also many cases where self-regulators come to the legislator to have their private norms endorsed by the law.

The distinction between self-regulation and co-regulation is not very obvious. But public authorities are more involved with co-regulation than with self-regulation. There is a large grey area between these two forms of regulation.

These practices fall into a grey area within the incomplete typology created by the Inter-Institutional Agreement and are termed SR by some, and CR by others. In this paper all such practices are called SR.

The Inter-institutional Agreement on better lawmaking (31 December 2003) provides the first definition agreed by the European Parliament, Council and the Commission on self-regulation and co-regulation.

- Self-regulation is defined as the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements).
- Co-regulation is defined as the mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, the social partners, NGOs or associations).

This definition leaves a **grey area** of self-regulation that is not quite as purely autonomous as this wording implies and yet has none of the characteristics required for a system to qualify as CoRegulation.

1.1.1 SR is a legitimate technique

In principle, SR could deliver a wide range of public goods. How far SR does so depends, in practice, primarily on the objectives set for it by a SR charter and by the codes of practice established under it. How far do these explicitly defined SR goals go beyond merely negative prohibitions and actively encourage the positive attainment of social values? For example, the protection of minors could involve both negative prohibitions and more pro-active measures.
Or are the goals of an SRO only to ensure that advertisements and other forms of marketing do not deceive, mislead or offend consumers? Even when a public good goal exists, SR techniques may be effective for attaining some such goals but not for others.

There was much discussion in the round table of the degree to which SROs themselves at present, do, or in future could, have explicit goals related to the delivery of specific public goods, for example in the fields of advertising of alcohol or advertising of nutrition. It is clear that business needs to be more explicit about their commitment to use SR in order to contribute to the achievement of established public policy goals by public authorities. In order to make progress on this issue, there would need to be clarity on the full extent of the goals being pursued, and some clear indicators as to the progress being achieved towards those

goals. In setting these public goals the European Commission has the mandate and the responsibility given by the Treaty obligations in Article 95 on internal market to take ‘as a basis a high level of health and consumer protection’ and Article 152 that all Community policies should ‘ensure a high level of human health protection.

The EASA participants made it clear that advertising self-regulation does not and cannot carry the burden of expectations that other stakeholders may have of the advertising business as a whole. SROs, by effectively enforcing good codes, may contribute to part of the solution of complex societal problems such as ill health caused alcohol abuse or obesity. But the SROs could not solve such issues alone, nor should SROs be judged solely on their role in such issues.

In order to achieve public objectives, the European Union at present sets a high priority on the identification of the most effective, least costly public policy interventions. Better regulation must provide the least costly, most effective, most proportionate and sufficiently legitimate response to public policy interventions at EU level. Better Regulation processes require a review, in unprecedented detail, of the options for intervention, covering hard law, inaction and less formal regulatory approaches. Self-regulation is always an option.

Increasing complexity in society and the pace of social change are the main reasons why regulatory interventions are sometimes ineffective while indirect forms of regulation or other forms of collaborative regulation may, under certain circumstances, be more successful. The role and the structure of the state are in transformation in a changing society. The interdependence between social and political actors is evolving in a complex, dynamic and diverse way. In this context we can imagine different combinations of “responsive regulation” like SR or Co-R **or a hybrid.**

Self-regulation has a role to play but if it is to be more widely accepted as an instrument of public policy, self-regulation must meet certain minimum regulatory criteria.

For example, consumer organisations agreed at the seminar in Lund 2001, what should be the minimum criteria for new forms of regulation:

“We would encourage the Commission to develop ideas on new forms of regulation, which might in some circumstances bring benefits such as improved protection, flexibility, adaptation to changing market conditions and involvement of stakeholders. However any form of regulation must meet certain essential basic criteria including: efficacy, democratic legitimacy, consumer confidence together with coherence and consistency in the context of the single market.
Self-regulation, co-regulation, negotiated solutions and other proposed forms of rule-making must be assessed against these basic criteria.
To meet these essential criteria consumers demand that new form of regulation must be based firmly on law, at least in the form of a framework or general law”[1].

[1] Declaration of Consumer seminar in Lund 2001

SR is a regulatory technique, not a policy

As a technique it can be adapted/ tailored to the need of particular policy. This technique may have certain advantages compared with regulation like adaptability to evolving markets, flexibility and more involvement of stakeholders.

As one tool of public policy among others, SR will have to also to fulfil, like regulation, a certain number of minimal criteria to be used as alternative to regulation. These criteria are efficacy, legitimacy, accountability and consistency with internal market.

In opting for self-regulation the statutory authorities cannot abdicate public responsibilities but on the contrary must make a careful assessment of different options based on sound evidence about the merits and the effectiveness of self-regulation.

While effective SR may avoid the need to have detailed legislation, there are some ad bans in place. If public opinion requires something that SROs failed or refused to deliver, the law could impose a ban. The legitimacy of SR does not, and could not preclude the use of legislative sovereignty to this sort of end.

SR is often proposed (by industry) as an alternative to legislative bans on certain forms of advertising, but that public authorities can offer no a priori guarantee that such bans won't be introduced.

1.1.2 Why is there a Problem?

The SR option is often debated on the basis of what may be less than fully substantiated positive or negative prejudices.

Self-regulation, as practised today, covers a multitude of endeavours of variable quality across the different sectors of business, and the different Member States, of the European Union. Self-regulation's reputation therefore depends on the personal experiences of each observer over time. Prominent actors in policy debates at EU level may have a history of satisfaction or disappointment with self-regulatory approaches. We do not yet have a broad and objective, EU-wide evidence base within which to validate these personal experiences.

There is no single normative, monitoring or enforcement mould for EU self-regulation, even in a single sector such as advertising. It is, for example, clear that some self-regulatory approaches in the EU today include monetary sanctions and suspension or expulsion of members for non-compliance, even if these approaches go well beyond the norm.

At the same time, there is a clear commitment on the part of some, if not all, SR-practising sectors of industry to deliver increasingly high quality self-regulation, and to deliver it more evenly across the enlarged EU.

This is certainly the case for EASA, which has made a public commitment to improve coverage and performance and has reached out to EU Authorities and others for help.

The message heard from EASA is that they cannot deliver their vision alone. If business is to commit the willpower and resources needed to improve self-regulation across the EU 25, there seems to be a need for clear public leadership to the effect that business should be doing this.

What is needed to underpin such leadership?
First, we need a clearer understanding on the key elements of a common vision for SR. The Inter-institutional agreement has not in itself delivered general support for SR techniques.
Secondly, there would need to be clear policies in place to educate and empower citizens so that they can and do make full use of self-regulation.

What would result from such clearer understanding?
Above all, it could then be easier to ensure that effective self-regulation is given appropriate recognition (neither too much nor too little) as public decision-makers weigh and balance the costs and benefits of different options for achieving certain policy goals in "impact assessment".

It is not possible for authorities to make any *a priori* commitment, for example to the effect that if self-regulation operates in a given way then other regulatory approaches within a given sector will be avoided. It is, however, reasonable for SROs to expect that self-regulation generally recognised as serious and effective will be given full weight against other, perhaps slower and more onerous options in the discussion of what regulatory approach works best. In specific cases, moreover, an explicit decision needs to be made at some stage, for example in an impact assessment, that SR was preferred over other approaches to achieve some specific goal. Without any certainty on such occasions, SR could not be expected to gain widening support from economic operators.

1.2 What does this paper do?

The rest of this paper offers one assessment of the key elements for the desirable agreement identified above.
There was a broad agreement that the development of a shared vision of the point of arrival for SR, broadly on the lines set out below, would broaden the sense that SR can be effective, would facilitate discussion of how to develop current practice, and would drive up quality across the EU.

This assessment emerges from a very broad debate about what it might take for sceptical EU stakeholders to become more at ease with self regulation.

The menu is therefore ambitious, and the key elements taken together are probably better than existing SR practices in the majority of the EU Member States. Nevertheless, on most if not all points, it coincides with the essential thrust of recently adopted EASA best practice. Each of the ideas set out here are already applied successfully in more than one Member State, so that none of this paper's suggestions are incompatible with SR as understood by at least some significant part of EU business.
Indeed, if the political will of business, the degree of public support and the available funding were all sufficient to commit to move towards this specification, SR would be even more highly satisfactory for the core owners, as well as more widely trusted by others.

The ambitious ideas set out in this paper should not be taken to imply any critical judgement of where SR is now. On the contrary, EASA has itself taken courageous steps, most recently in committing itself to objectives well beyond current business delivery. Indeed, the willingness of EASA, and all others involved in the debate reported here, to explore what a strategic improvement in SR quality might involve, does create some confidence that SR is capable of a sustained move over time towards a level of heightened effectiveness.

2 A supportive legal and judicial context.

Key elements

- *The clear definition of responsibilities between SROs, government and other authorities promotes transparency, and maximises the impact of SRO activity.*
- *Self-regulation in advertising can only maximise its potential in a clear legislative framework which allows SR sufficient scope to operate.*
- *The scope and the degree of statutory systems have a direct influence on the effectiveness of the self-regulatory system.*
- *There is a clear responsibility of European institutions or Member States in setting clear legal backstops.*

It has been a consensus around the round table that SR in advertising can only be effective operating in a clear legislative framework. Self-regulation can work well in relation to business that is member of a code provided that:

- The code regulates the issue adequately
- Members of the code comply with the code
- There are effective sanctions for those members who do not comply with the code.

The SR system should be well designed and with clear distinction about jurisdiction, competences and responsibilities between SROs and public authorities. The system must be able to operate effectively and to deliver real results for all the stakeholders.

If the SR sanctions do not work, an ultimate legal mechanism is needed in order to force members to comply. A similar mechanism is also needed for those traders who are not members of a code. In this section, we use the term “legal backstop” to refer to such mechanisms.

2.1 Legal backstop at EU level: Misleading Advertising and Unfair Commercial Practices

At EU level, the Unfair Commercial Practices Directive protects consumers from the misuse of codes which may distort their decisions to buy and provides for ‘a legal backstop’. It will

be applicable in all Member States by 12 December 2007. Meanwhile, there is a second legal backstop in the Misleading Advertising Directive[2],
the new Unfair Commercial Practices Directive (UCP)[3]. For rogue traders, the Consumer Protection Co-operation Regulation[4] has been adopted. It allows cooperation between national enforcement authorities, which is relevant where self-regulatory monitoring mechanisms do not have the legal foundation required to stop rogue traders.

Codes can still have a useful role to play in enabling firms to comply with UCP. UCP includes definitions and specific provisions regarding Codes of Conduct:

A code of conduct is “an agreement or set of rules not imposed by law, regulation or administrative provision of a Member State which defines the behaviour of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors” (UCP Article 2(f)).

It is considered to be a misleading commercial practice if a trader, who has committed himself to a code of conduct does not comply with it, provided that:
1) the commitment is firm and capable of being verified and that
2) the trader indicates in his behaviour (in his commercial practice) that he is bound by the code. (UCP Article 6 (2)).

Several commercial practices regarding the misuse of codes have been blacklisted in UCP. Hence, the following practices will be banned as unfair in all circumstances (UCP Annex I, points 1-4):

- “Claiming to be a signatory to a code of conduct when the trader is not.”
- “Displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation.”

- “Claiming that a code of conduct has an endorsement form a public or other body which it does not have.”
- “Claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorised by a public or private body when he/it has not or making such a claim without complying with the terms of the approval, endorsement or authorisation.”

Control by codes of conduct and enforcement

UCP clarifies the role that code owners can play on enforcement. According to Article 10 UCP does not exclude the control, which Member States may encourage, of unfair commercial practices by code owners and recourse to such bodies. The control exercised by

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[2] Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising.

[3] 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 and 2002/65 of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive).

[4] Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (’the Regulation on consumer protection cooperation’), OJ L 364, 9.12.2004, p. 1.

code owners to eliminate unfair commercial practices may avoid the need for recourse to administrative or judicial action and should therefore be encouraged. However, the proceedings before self-regulatory bodies are in addition to the court or administrative proceedings. Member States cannot replace the means of judicial or administrative recourse with control by code owners. It is the duty of the Member States to ensure adequate and effective enforcement. Thus, the division of responsibilities between Member States (authorities and courts) and the SROs has been clearly defined.

2.2 Models of Self-regulation across the EU

For historical reasons, SR has been shaped in different models and diverse ways due to the national legal traditions and cultures and to the need of reflect them in national legislation or codes. Advertising SR has taken different forms across the EU and the approaches differ widely.
There are wide national differences across the EU as regards the use of self- and co-regulation and statutory regulation. A number of countries use and promote self- -regulation; others allow a limited role for SROs and in others the co-regulatory structure dominates the system.

Two main factors have been identified by these discussions to determine the current shape of self-regulation in advertising:

- The **scope of national legislation** has a direct impact on the self-regulatory system. The national legal context determines the characteristics of how the SROs operates in every Member state. In some countries such as in Denmark, Finland and Sweden public enforcement by Ombudsman prevails. In Germany and Austria, the statutory regulation is so comprehensive that the opportunities for self-regulation are very limited. Whereas, France, Ireland, Spain, Belgium, the Netherlands and the UK, are countries where self-regulation plays a more significant role.

- **The tradition of using legal instruments** differs from one country to another. Some countries are more familiar with using soft law instruments and then consequently are more open to use self-regulation as a complement to classic regulation. The need to reflect cultural norms is particularly specific for the regulation of advertisement content. Historically these different realities have been implemented at national level and therefore the self-regulatory systems have also been developed nationally, rather than at EU level.

EASA have identified three main models of advertising self-regulation operating in Europe. These systems are categorised by their differing relationships with the law.

2.2.1 Self-regulation, within a strong legislative framework

Within this model, there are two identified sub-types:

The first of these, exemplified by Ireland, the Netherlands, Spain and the UK, is where legislation allows extensive scope for self-regulation. SROs in these countries have a high profile and wide responsibilities. In Ireland and the UK there have been initiatives to tighten up the regulatory mechanism on alcohol and food advertising to children to reinforce the levels of protection on these issues.

The second sub-type of this model is a situation where advertising is subject to extensive legislative regulation, but where self-regulation has nevertheless established an effective system by fulfilling a complementary role to legislation. The French SR system, one of the oldest in Europe, is a good example in this sub-type.

In the case of **Netherlands** the system is characterized by clear and comprehensive links between the law and the advertising self-regulatory system, resulting in clearly defined responsibilities and the development of a comprehensive set of self-regulatory rules. Under the Dutch SR system, although membership of the Advertising Code Foundation is voluntary, the law requires both public and private broadcasters to be affiliated to the Dutch Advertising Code if they intend to carry advertising. Dutch law subjects the broadcast media to the self-regulatory advertising code. If the SRO upholds a complaint, broadcasters are legally required to withdraw the advertisement.

By contrast, in **Spain** the significant overlap of jurisdiction between national legislation, regional legislation, national and regional statutory authorities, the powers of the judiciary and the role of the SRO, has resulted in a lack of clarity and even occasional conflicts between the self-regulatory system and the judiciary. Autocontrol has experienced difficulties, particularly with the competition and anti-trust authorities, and has also had its adjudications relating to advertisers not in membership of Autocontrol struck down by Spanish courts.

2.2.2 Self-regulation restricted by law

The second model of self-regulation in Europe is one where, due to the presence and detail of national legislation, limited scope is available for self-regulation to operate. Again, within this category there are two distinct models. The first is found in countries such as **Germany and Austria**, where advertising falls under the auspices of unfair competition law, characterised by very strict and detailed legislative controls on advertisement content.
The second sub-type in this category is found in the Nordic countries (**Denmark, Finland, and Sweden**) where responsibility for consumer protection and the regulation of marketing is vested in the Market Court, the Consumer Ombudsman and other statutory bodies

The **German** situation is one where a tight and detailed legal framework has significantly limited the scope for self-regulation in advertising. The **Austrian** system is similar in this respect. Germany has an extensive legal framework relating to advertising and detailed provisions are in place for its regulation and supervision. The peculiar feature here is that statutory authorities are responsible for applying self-regulatory rules. The State Media Authorities are responsible for the regulation of broadcast advertising. Although they are independent from the state governments, the State Media Authorities may be regarded as statutory regulators, because they are constituted by law and legally bound to supervise broadcasting and media services.
In Germany the SRO, DW[5] is limited to issues of taste and decency while WBZ [6] is responsible for the enforcement, through the courts, of unfair competition law. This highly unusual model of co-regulation makes an industry-funded body, rather than a statutory regulator, responsible for the enforcement of legislation.

[5] *Deutscher Werberat*
[6] *Zentrale zur Bekämpfung unlauteren Wettbewerbs* (Centre for Combating Unfair Competition

2.2.3 Emerging self-regulatory systems

The final model of self-regulation in Europe is the one found in the ‘new’ member states of Central and Eastern Europe. These states – Poland, Czech Republic, Hungary, the Slovak Republic, and Slovenia - have no established tradition of advertising self-regulation. The SROs in these countries are still in the process of defining their relationship with statutory regulation, as well as with consumers, and require ongoing guidance and support

3 Defining an effective SR model:

The EASA Charter covers ten SR principles. EASA Best Practice (April 2004) describes the application of these principles in greater detail. In discussing EASA practice, the Round Table has identified key determinants of effectiveness. These are summarised in the four points below. They are all consistent with EASA guidelines, but reflect the very best practice in implementing those guidelines. These are not goals that could be achieved everywhere immediately. In addition, the last point describes what structure might be developed at EU level to maintain and organise the discussion so far, if that were deemed desirable.

The basics components for a Best Practice SR model on advertising

- Effectiveness :
  - *Provision of copy advice*
  - *Complaint handling*
  - *Sanctions*
  - *Consumer awareness*
- Independence:
  - *Involvement of interested parties in Code drafting*
  - *Involvement of independent persons in the complaints adjudication process*
- Coverage
- Funding

3.1 Effectiveness

3.1.1 Provision of copy advice:

Key elements

- *The SROs should offer the provision of copy advice particularly for media where advertising copy may have so short a shelf-life to negative adjudications.*
- *Copy advice should ideally be provided free of charge*

During the round table two concepts have been clarified: *copy advice* and *pre-clearance*: Although both take place before publication, they are not the same procedure.

In the case of copy advice, there is normally no element of obligation, either when seeking the advice in the first place or in following it once it has been obtained.

Copy advice is defined as confidential, non-binding pre-publication advice about a specific advertising proposal, provided by an SRO to an advertiser, agency or media. The forms which copy advice takes may vary, but it has two essential characteristics:

- it is non-binding;
- it concerns a specific advertising proposal (i.e. an advertisement or a campaign).

Copy advice is not to be confused with other kinds of advice which an SRO may provide, e.g. general advice about the meaning or interpretation of code rules, or an opinion (whether compulsory or provided on request) which is binding on the advertiser, agency or media organisation and consequently falls under the general heading of 'pre-clearance'.

Pre-clearance, on the other hand, is the compulsory examination of an advertisement, before it is broadcast or published, to ensure that it complies with legal, statutory or self-regulatory rules.

Pre-clearance is normally found in circumstances where advertising is subject to statutory or co-regulation. It is the exception rather than the rule in European countries: pre-clearance is currently required in the UK for broadcast advertising and tobacco advertising, in France and Ireland for television advertising and in Italy for the advertising of non-prescription medicines.

Pre-clearance often involves an element of copy advice, in terms of the changes necessary to allow a non-compliant advertisement to be broadcast or published. However, its final purpose is not the same as copy advice, because pre-clearance constitutes prior restraint whereas copy advice does not.

Like copy advice, pre-clearance greatly reduces the risk of complaint, but if a complaint is received, the preliminary decision to grant clearance will be reviewed by the adjudication committee and if necessary, overruled.

Current situation across the EU 25 for copy advice

There is an EASA commitment to achieve copy advice in EU 25.

Copy advice in place:

Austria, Belgium, Czech Republic, Finland, France (under certain conditions), Germany (WBZ – misleadingness, unfair competition…), Greece, Hungary, Ireland, Italy, Portugal, Slovak Republic, Slovenia, Spain, , UK.

Copy advice in development:

Lithuania (SRO in development),

Copy advice not in place:

, Cyprus (SRO in development), Estonia (SRO in development), Germany (DW – taste and decency), Latvia (SRO in development), Luxembourg, Netherlands, Sweden,

The French system places great emphasis on the preventive aspect of advertising regulation. Apart from the UK, (and Ireland for alcohol issues), it is the only one which systematically pre-clears television advertisements: agencies and/or advertisers must submit the advertisement to the SRO before transmission. Unlike the UK, where it remains a statutory requirement, in France pre-clearance is compulsory for television advertising by decision of the industry itself.

The principle purpose of copy advice is to prevent problems before they happen; this benefits not only the advertiser, agency and media immediately concerned, but also the wider advertising industry, by avoiding complaints and being seen to promote social responsibility.

It was a general view in the round table that SROs **should offer the provision of copy advice particularly for media where advertising copy may** have so short a shelf-life that there is no time to correct it in response to negative adjudications. Copy advice should ideally be provided free of charge. We recognise that there is a dilemma here: free provision should increase demand for the service but the fees are in some countries an essential source of funds to offer the service.

3.1.2 Complaint handling

Key elements

- *All SROs, from establishment onwards, should establish and publish both performance objectives year by year and records of their performance against those benchmarks.*
- *Each SRO should have an explicit objective, to the effect that it should be easy to find through which channel to complain.*
- *There should be a benchmark for the ease with which any form for the submission of complaints is completed. This objective should be endorsed by its governing board and verified year by year in its customer satisfaction surveys*
- *There should be a standard for the speed with which complaints are handled.*
- *There should be a systematic duty to publish decisions which is a tool for increasing transparency of the system and increased public confidence*
- *SROs could recommend to the Advertising industry for its agreement and action, minimum standards for training of new recruited young advertising staff and for the design of internal compliance processes*

All SROs, from establishment onwards, should establish and publish both performance objectives year by year and records of their performance against those benchmarks.

This should be part of a programme of monitoring process to evaluate levels of compliance. Making public the key performance indicators will reassure public opinion that the system is working effectively. Independent evaluations carried from time to time

out by external institutions to measure SROs against objectives can also reinforce the public opinion perception.

The Advertising Standards Authority (ASA), has established key performance indicators, including the average speed in resolving complaints. For 2005 the target for resolving complaints about non-broadcast advertisements was established at 25 days (in 2004 in the UK the average was 27 days). The result was an average of 23 days. ASA handled around 26.000 complaints about 12,000 adverts in 2005 which represents 16% more than in the previous year. From July 2006, ASA will publish on their website, statistics on the number of complaints and the average time taken to deal with different classes of complaints.

Other SROs like *Autocontrol* (Spain) have not yet established monitoring systems. Still others, such as SRC (Netherlands) have just started monitoring. This is a dynamic area. The dialogue between consumers and industry should be improved to implement monitoring programmes in order to promote transparency and accountability of the process.

- **Explicit objectives and complaints channels**

Each SRO should set itself the explicit objective, that it should be easy to find through which channel to complain (hotline, letter, internet, referral by consumer or other citizen organisations). This objective should be endorsed by its governing board. The SRO should check, year by year in customer satisfaction surveys how far users do in fact find the system easy to use.

It should be possible to have clear indications for consumers on how and where to complain in a very simple way. It should be as simple as a free telephone number and a service on-line. At present every SRO offers the possibility for consumers to file a complaint either by telephone or e-mail. The vast majority of SROs have also developed online complaint forms, and some such as the ASA in the UK allow complaints to be received by SMS.

In most of the EU10, SROs that are operational have a website available for consumer information. One of the first explicit objectives of these should be to inform public opinion on how to complain. There should be cooperation here with European Consumer Centres in such countries to develop awareness of the SROs new service.

"The *SROs should ensure that their complaints submission procedures are straightforward and accessible. There should be clear guidelines on how consumers and competitors can submit complaints. Delivery methods should be identified, such as post, fax, email, online complaints form, or SMS. In order to be as accessible as possible, SROs should take account of current technological developments when deciding on the methods allowed for submitting complaints. It is therefore recommended, given the current extensive use of the Internet, that SROs should have an on-line complaint form*"[7]

[7] EASA Recommendations of Best Practice on Complaints handling.

- **Benchmarks for the ease of complaints submission**

There should be a benchmark for the ease with which any form for the submission of complaints is completed.
Public perception and acceptance will depend to a very large extent on how efficiently an SRO is seen to deal with complaints. Therefore the complaints need to be handled promptly.

"There should be clear guidelines on how consumers and competitors can submit complaints. Delivery methods should be identified, such as post, fax, email, online complaints form, or SMS. In order to be as accessible as possible, SROs should take account of current technological developments when deciding on the methods allowed for submitting complaints"[8].

Benchmarks for the speed of complaints handling.

There should be a standard for the speed with which complaints are handled.
One of self-regulation's principal advantages over the judicial process is, precisely, its speed.

In some SROs like *Autocontrol* (Spain) they already have set up standards to handling complaints with very strict deadlines: The complaint is forwarded to the advertiser which has five working days for making comments. After this time limit the case is referred to the Jury. The decision of the Jury is published on line.

"While situations can differ from SRO to SRO (size of SRO, size of advertising market, etc), SROs should set clearly defined time limits for all stages of the complaints handling process:
It is recommended, however, that as a benchmark, complaints should be investigated and adjudicated upon within 2 months of receipt of the complaint. In the case of cross-border complaints, the benchmark should be 3 months [9]*".*

- **Publication of decisions**

The aim of publication is to be transparent in order to strengthen the credibility of the system. Media coverage also raises awareness of the self-regulatory system.

The publication of decisions is a tool for increasing transparency of the system and for the high level of public confidence. In this regard they are important decisions like jury appointments, complaints and name of advertisers as well as standards and codes of SROs. Specifically, the results of adjudications should be available to all stakeholders: the advertising industry, media, citizens and the authorities.

EASA has recently established a recommendation of Best Practice on Publication of Decisions.

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[8] EASA Recommendations of Best Practice on Complaints handling.
[9] EASA Recommendations of Best Practice on Complaints handling

SROs could recommend to the Advertising industry for its agreement and action, minimum standards for training of new recruited young advertising staff and for the design of internal compliance processes

3.1.3 Sanctions:

Key elements
- *Sanctions for non-compliance with codes, for repeat offences and for consistently ignoring codes or adjudications, should be clear and effective.* - *The minimum sanction should be timely withdrawal of advertising copy.* - *Withdrawal should apply ,in the absence of explicit local SR decisions to the contrary, not only in the jurisdiction of the adjudication but throughout the business concerned; differences in codes and cultural expectations may today mean that different decisions are reached in different markets.* - *The collaboration of the media as a whole on backing the decisions of the SRO is an important element to enforcing the sanctions. The adoption, more generally of "compliance clauses" in advertising contracts should help to make sanctions more effective.*

Effective self-regulation needs to act appropriately to prevent repeat offences following an adjudication, either by the same advertiser or by competitors. An advertiser whose campaign has been found to breach the code should be required to give an assurance that the ad will be amended or withdrawn. SROs must be proactive in applying key adjudications to all players in the relevant market, alerting advertisers, agencies and media to the implications of decisions. SROs should operate a range of procedures and sanctions to secure compliance, suited to the gravity, scale and complexity of the situation. These might start with an Ad Alert warning to media not to carry further advertising without referring to the SRO.

Advertisers who will not comply should be called in for a compliance meeting and, if necessary, referred to statutory enforcement bodies. In some circumstances, it may be appropriate to require an advertiser to seek and follow Copy Advice before advertising again. This sanction might be imposed for a set period of time – six months or a year, for example.

In general sanctions for non-compliance with codes, for repeat offences and for consistently ignoring codes or adjudications, should be clear and effective. SROs should measure their deterrent effect over time.
The minimum sanction should be timely withdrawal of advertising copy, not only in the jurisdiction of the adjudication but throughout the business concerned**.** Financial penalties are not ruled out, although available evidence suggests that the business costs to companies of a withdrawal are real (reputation, share price). These market penalties can be a more effective source of good behaviour than the imposition of specific financial penalties.

In some cases the sanction may also require the mandatory copy advice or pre-clearance for along period of time. This plus the "name and shame" effect from publishing with full details

of the decisions of the sanction can greatly damage the reputation of a company and has proved to be a powerful instrument.

One illustrative example is the *"Tetley Tea campaign"* which claimed that the product's antioxidants could help keep people healthy. ASA's Council ruled that the specific claim was in breach and should be withdrawn. The withdrawal reportedly cost 15million £ and Tetley's contract with its advertising agency terminated soon thereafter.

An example of a Cross-border complaint involving a rogue trader involves *Construct Data Verlag*. The complaints were received by EASA, from mostly European companies but also Israeli and American ones, and concerned a direct mailing from Austria featuring a business guide. The mailing invited the recipient to confirm the information the guide already had gathered about the recipient. However, by signing the form, the recipient automatically requested an advertisement in the guide, without being sufficiently informed of this.

The recipients found the advertisement to be misleading. EASA transferred the complaint to the Austrian SRO, OWR, under the cross-border procedure. OWR noted that the advertiser has persistently disregarded decision against its advertising by the OWR, and therefore transferred the case to the appropriate authorities. Construct Data Verlag has been taken to court by the Austrian Association for Protection against Unfair Competition in January 2006.

In the case of a repeat offence or a serious violation of the Code, in most countries (including the Netherlands, France and the UK) the media member of the SRO is instructed to cease publication of the advertisement in question. In addition, in the UK for example, preferential postal rates accorded to bulk mail contracts will be withdrawn from repeat direct mail offenders. The UK poster advertising sector has also put a system of two years mandatory preclearance in place for advertisers who repeatedly breach the Code, a sanction that is handled by the UK SRO (The Advertising Standards Authority).

"When non-state organisations are also responsible for the enforcement of the codes, the existence of effective sanctions is crucial. However, in addition to the effectiveness of enforcement the pace of decision making is an important factor as well. UK-advertising regulation seems to be a positive example for this"[10].

The UK is also a country which makes use of a compliance clause, which is a clause that can be included in advertising contracts committing both parties to acceptance of the self-regulatory code and to observance of the rulings of the SRO.

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[10] Hans-Bredow Study on Co-Regulation Measures in the Media Sector

Example of the UK compliance clause

1.1 Both parties shall comply with the British Codes of Advertising and Sales Promotion, the Independent Television Commission ("ITC") Code of Advertising Standards and Practice, the ITC Sponsorship Code, the Radio Authority Code and other relevant codes of advertising laid down whether on a statutory or a self-regulatory basis. Both parties shall abide by the rulings of the Advertising Standards Authority, the Committee of Advertising Practice, ITC and the Radio Authority.
1.2 In order to satisfy the requirements of any applicable self-regulatory codes or statutory requirements, the Client and the Agency will co-operate with each other in ensuring that suitable objective factual product and other information is available as required.
1.3 The Client shall inform the Agency without delay if the Client considers that any Advertising submitted to the Client by the Agency for approval is false or misleading or in any way contrary to law or to any applicable code. '

EASA's network of SROs exchange intelligence about advertising campaigns. Since 1991 close to 2000 complaints have been handled by EASA members through the EASA's Cross-Border complaints system. In 2005, over 110 complaints were closed by EASA, primarily relating to misleading advertisements by direct mail. In case of a serious problem, a Euro Ad Alert may also be appropriate. Some adjudications will simply be different however, due to the differences in local sensitivities are different. For example, the ASA UK upheld complaints involving Sophie Dahl posters for YSL's Opium fragrance, whereas France's BVP did not. On the other hand, the BVP upheld complaints involving Sloggi underwear 'string' posters, whereas the ASA did not.

3.1.4 Consumer awareness:

Complainants should be involved systematically in follow-up satisfaction surveys. Citizens as a whole should be surveyed on a regular basis as to their awareness of SROs, their satisfaction with performance and issues of concern to them. Such processes should be conducted in accord with survey best practice and may be out-sourced in order to increase trust in the results

The Advertising Standards Authority for Ireland (ASAI) has conducted a survey to measure public awareness of the ASAI over time. The last results indicate that in 2005 nearly half of adults (46%) when prompted are familiar with the organisation. Three quarters of them claimed ASAI is performing in a good or excellent manner.

It is important that self-regulatory processes demonstrate a high-level of transparency in order to establish and maintain a high level of public confidence that will increase also consumer awareness.

3.2 Independence.

Key elements
- *Openness, independence and transparency are seen as critical points for the public acceptability of the self-regulation on advertising.* - *The effective contribution of the stakeholders (consumers, parent associations, academics etc) to the elaboration of codes deserves reinforced attention by EASA.* - *Over time, monitoring should include indicators designed to verify that the stakeholders' involvement meets the expectations of the society within which the SRO operate.* - *Adjudication bodies should be composed of a substantial proportion of independent persons. Those persons could be selected on the basis of calls for expressions of interest, and appointed by the Board.* - *It could also include possible cooperation with statutory authorities for the appointment of the independent persons of the adjudication bodies. All Adjudication body Members should be subject to rules on the avoidance of conflict of interests and on the declaration of interests.* - *A Jury is fundamental in guaranteeing the independence of the process. Composition, nomination process, independence and integrity of its members are the key determinants for the credibility of the system.* - *The business and SR community should remain open to the benefits, as well as the costs of the development of some more clearly 'independent' presence at all levels.*

3.2.1 Involvement of Stakeholders in Code drafting

Each SRO should have an explicit view as to who are its stakeholders. At a start-up phase, this can be achieved by offering a role to an EU-wide standard set of potential stakeholders: for example, relevant government ministries and agencies, academia, relevant business sectors, ethical authorities, consumer, family, youth and other relevant citizen organisations. Such a list could be expanded to meet local needs. Over time, customer surveys should include questions designed to verify that the current definition of the stakeholders meets the expectations of the society within which the SRO operates.

The Common principle of EASA established that "SROs *should ensure that in the development of codes the relevant views of all stakeholders are taken into account"*.
The effective participation of the stakeholders deserves reinforced attention.

EASA provided several best practice examples which demonstrate different national approaches. In the UK Code revision involves formal public consultation and responses are not limited to a pre-identified list of stakeholder. Since January 2005 in France, BVP has associated consumers to be consulted in the drafting process of the codes via the *Comité de*

Concertation, a committee bringing together advertising professionals and registered consumers organisations.

3.2.2 Involvement of independent persons in the adjudication process

Adjudication bodies should be composed of a substantial proportion of independent persons. Those persons should be selected on the basis of public advertisement, and appointed by the Board. They should be subject to rules on the avoidance of conflict of interests and on the declaration of interests.

This is a challenging proposition, and may currently be regarded as unacceptable as of today in some jurisdictions. But discussions show that this also constitutes an important element in building trust, so that in instances where this is not in place, an SRO would have to perform particularly well on every other issue, if it were to achieve credibility.

Perceived lack of openness, independence and transparency are seen as critical points for the public acceptability of the self-regulation on advertising.

On the question of independence, a fundamental role is played by the jury,its independence and integrity of its members are the key determinants.

On this issue, the principles applicable to out-of-court bodies involved in the *consensual resolution of consumer disputes*[11], are relevant. They stress the need for procedures to meet minimum criteria guaranteeing the impartiality of the body, the efficiency of the procedure and the publication and transparency of proceedings.

In Italy, IAP has a Jury composed of eminent lawyers, academics and experts in consumer affairs and in advertising. It is independent of the advertising industry.

In Spain, *Autocontro*l has also established a Jury composed by academic, experts and lawyers. The jury is appointed in 75% by the Board of Directors and 25% of them selected by the national authorities *(Instituto Nacional del Consumo)*

In Ireland, ASAI's Complaints Committee is composed of 15 members.[Members with background on the advertising industry must be superior to 50%. Moreover 4 members are appointed by the Director of Consumer Affairs.
In other countries like France no Jury system is in place.

3.2.3 Broader Independent participation in SR

There is at present no enthusiasm from Industry , NGO's, or Government officials to be involved as independent parties, in an executive capacity, right at the top level of governing structures of SROs.
From NGO's point of view the perception that advertising exists to serve the interest of the Advertising industry rather than the public is also a key barrier to acceptance.

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[11] JO .n ° L109 of 19.04.2001 p.56

There is evidence, from outside the advertising SR field[12] that an independent even if 'non-executive' presence can increase trust. This makes the Commission's own vision of 'participation' a key element of modern administration.

It is the view of DG SANCO officials involved that SROs should not reject out of hand the benefits, as well as the costs, of the development of some more clearly 'independent', if only non –executive, presence at all levels. But this is an issue which could not be said to be a part of current Best practice emerging from the conversations reported here.

3.3 Coverage

Key elements
- *Advertising SR's today in Europe aim to cover not only pure advertising but all other forms of "Commercial" or "marketing communication". The aspiration is a global coverage for all type of marketing or commercial communication* - *It is important to find a generic definition, encompassing all advertising techniques using any medium or distribution channel based on new technology.* - *Another issue of concern is the new emerging trends for "buzz marketing" and "word of mouth".* - *SROs should keep under review any trend to significantly increase the proportion of 'adspend' that escapes SR* - *On both the European and national level considerable effort has been put into providing basic legal requirements, specifically for direct and interactive marketing. Legislation therefore underpins self-regulation of the individual marketing sector.* - *SROs must commit to keeping abreast of emerging techniques, to discussing with all stakeholders any concerns raised by these techniques, and to deciding promptly either to deal with these concerns or to alert the public authorities that they would need to develop an alternative approach. Public authorities cannot assume that SR would be the fall-back for such issues, where legal approaches seem inadequate.*

Advertising SR's today in Europe aimed to cover not only pure advertising but all other forms of "Commercial" or "marketing communication". But there are typically some aspects excluded from SR in any country, for example: aspects such as labelling, in-store promotions sponsorship, and sales promotions, which are typically understood to be outside SR. Maybe because they are regulated by another law, or code.

Given that the common aim of EASA operators is to achieve very broad coverage, there is general agreement that, SR Systems like any regulatory framework - should be designed in

[12] Presentation of Accountability. S. Zadek. see VolII.

such a way that they can easily expand both their scope (sectoral coverage and participation) and content (rules) in response to new challenges.

At present the central challenge is the development of advertising business and **new media** technologies. New media are dynamic and constantly evolving. It has therefore been important to find a generic definition, encompassing all advertising techniques using any medium or distribution channel based on new technology.

The current thinking when revising the ICC Consolidated Code of Advertising and Marketing Communication Practice in the chapter on new media is to define new media as "any media providing electronic, interactive communications, such as the internet, online services, electronic and communication networks, including the telephone." The term "marketing communication", includes other techniques as well as advertising and can be interpreted broadly to entail various forms of communication.

SROs state that they keep under review any trend to significantly increase the proportion of 'adspend' that thereby escapes SR

In its interim paper *Advertising Standards and the New Media,* EASA sets out its current approach on three main issues:

Scope:

- EASA aims for advertising self-regulation to apply without exception to the new media
- The elaboration of national rules in this area is being made in countries with the direct participation of the industry actors involved
- Due to different national contexts, not all media are currently fully engaged at national level in the self-regulatory systems for advertising

Advertising Content:

- The ICC guidelines on advertising using the electronic media are the globally accepted minimum set of rules in this area and have been further adapted via an EASA Guidance note and national provisions
- Key areas related to data collection and privacy, communications costs and transparency, respect of public groups and use of new media have been addressed in the ICC guidelines on advertising using the electronic media and are now becoming generally accepted principles for advertising. The ICC guidelines make clear that particular care should be taken with respect to children.
- EASA intends to improve industry awareness of advertising standards particularly in relation to new media practitioners who may not yet have the SR acquis.

Enforcement:

- Advertising standards are enforced at three separate levels before the legal backstop: Company, Sector and SRO
- The legal backstop is essential with regard to rogue operators
- Because of the international nature of some new technologies, EASA favours greater international advertising self-regulation and regulatory cooperation to pursue for example rogue traders (e.g. OECD, FTC in the US, etc)
- Advertising SROs will need to engage in an open dialogue with the new actors, which will require investments in new technologies capable of adequately responding to new issues arising in this area.

3.3.1 Individual Media and Individual Marketing

It was also pointed out at the Advertising Roundtable that there exists an additional well-established body of self-regulation which falls outside the mandate of many SROs, which is operated by marketing associations at national and European level. We will look at this below under the title "Individual Media, Individual Marketing".

Most new media is used to achieve a one-to-one or dialogue with the consumer. It is difficult to divide "new media" from other direct and interactive marketing communications systems. Not only is there so much integration between the systems in practice (marketing campaigns which use a multi-channel approach), but also many issues remain common, especially the data protection aspects. There are older, well-established marketing disciplines that aim to achieve an individual approach – post, telephone, etc.

On both the European and national levels considerable effort has been put into providing basic legal requirements, specifically for direct and interactive marketing (and also for sales promotion, and some other marketing or sales disciplines such as sponsorship, directsales/doorstep, selling,etc.).

There are some very specific EU Directives which apply to direct and interactive marketing in addition to the Directives on advertising and unfair commercial practices. These include the Distance Selling and Distance Selling of Financial Services Directives; the e-Commerce Directive; Consumer Directive, Paper & Packaging Directive, and the Data Protection Directives.

Legislation therefore underpins self-regulation of the sector.

As with many other areas where regulatory bodies exist, a combination of self-regulation and co-regulation is likely to be created. In particular, the data protection aspects of direct and interactive marketing have elements which vary from "traditional" self-regulation. In these cases it is not self-regulation but co-regulation between the national authority and the sector. In some cases this is even required by law (e.g. the Dutch data protection law requires the sectors to negotiate codes with the data protection authority).

These co-regulatory and self-regulatory codes also involve technical systems to "clean" lists of consumers who do not wish to receive an unsolicited direct or interactive approach. Such

database systems are called ‘Preference Services’ or ‘Robinson Lists’(lists of opting out for consumers) and are present in the majority of the EU countries.

In a few countries strict data protection law means they are not necessary.

There are also professional codes and guidelines usually for professional standards for training, or produced by national associations based on national laws and amplified to help practitioners. Examples would be codes on contact/call centres (teleservices) or list brokers; codes and best practice on environmental best practices (use of recyclable products, etc.).Other codes are being adopted on the use of SMS texts, mobile marketing, email marketing, business-to-business, the use of on-line marketing (e.g. to prevent aggressive pop-ups, spyware, etc.

For e-commerce there are also such initiatives as trustmarks, white or black lists for email marketers, complaints resolution and alternative dispute resolution services. Recently there has been an increasing debate on the use of standards to create “best practice”, or codes which are somewhere between self and co-regulation, depending on who is pushing the standardisation process. Direct and interactive marketing regulation is a mixture of legislation, self-regulation, co-regulation, technical rules; in which the SROs play a role as guardians of the general codes of best behaviour/best practice, but in which other players, e.g. the DPAs, are the regulators of the sector. It is important to ensure that these systems co-exist and to avoid confusion.

3.3.2 Other forms of new marketing

There was some concern among some participants in the Advertising Round table that either SR or some other form of intervention should be considered in order to deal with advertising (e.g. television, magazines, posters or cinemas), but also with the considerable area of commercial communication like for example, sponsorship of sporting events, celebrity endorsements, merchandising linked to cartoon characters, tie-ins to TV and movie releases etc.

The new forms of marketing not covered by EASA or other SROs causing concern both to society and SROs like the emerging and growing trend for 'buzz marketing' and 'word of mouth' marketing. According to Advertising Age, 85 % of the top 1000 marketers use some form of this approach and it is one of the highest growth element of the marketing sector. Between 100 and 150 million US dollars are spent annually on this type of marketing.

There seems to be a difference between spreading crafted advertising messages through consumer networks - either through media, ambient or online (i.e. buzz/viral) and the accelerating, amplifying and measuring natural word of mouth recommendations (i.e. Word of Mouth).

An example of WoM is P&G that has a special division created 4 years ago called Tremor which has recruited a panel of 250,000 teenagers from 13 to 19 who are asked to talk with friends about new products or concepts P&G sends them. About 75% of members are female. Panelists are not paid cash but get product samples or other materials.

There has been a lot of criticism recently about the issues of transparency and ethics of this type of marketing. US NGO 'Commercial Alert' has a sent a letter of complaint to the Federal Trade Commission asking for an investigation to determine if buzz marketers are violating federal law on prohibiting deceptive advertising

The Word Of Mouth Marketing Association, http://www.womma.com/ have just created a code of ethics (February 2005) but there seems to be no links to the advertising self regulation codes. The Viral & buzz Marketing Association (http//wwwVBMA.net) has over 50 members now from all over the globe including a substantial number of European companies. It has a mission statement with a number of beliefs but seems to have no code of ethics

Some of the participants found also important that the code should cover events, celebrity spokespeople and sponsorship. There also should be specific reference to the practice of Public Relations which is a part of commercial communications but a separate discipline to advertising

At an industry conference in 2005, a question was asked whether viral marketers are taking advantage of children by not revealing the financial issues behind the promotion. BzzAgent and Tremor (leading marketing players) stated that when teenagers are involved, parents are approached and explained how their children are involved in these efforts.

This would be worth discussing, especially how parental consent is sought and how the new marketing practices are measured, monitored and controlled.

Several of these new marketing techniques could be covered by the UCP Directive, e.g. asking teenagers to promote certain products amongst their friends, even if they are not paid in cash but by products samples or other materials (the examples of WoM mentioned above). The Unfair Commercial Practices Directive contains a general clause banning unfair commercial practices and is not limited to certain media or certain marketing methods, but applies generally. The notion of “commercial practices” is wide and covers “any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers.

As new media is constantly evolving, industry and SROs must commit to keeping abreast of key emerging techniques, to discussing with all stakeholders any concerns raised by these techniques, and to deciding promptly either to deal with these concerns or to alert the public authorities that they would need to develop an alternative approach. Public authorities cannot simply assume that SR would be the fall-back for any such issues where legal approaches seem inadequate.

3.4 Funding

There was general agreement in the Round Table on the desirability of strong political support for industry voluntary funding. There was no agreement on the feasibility of any additional advertising tax.

There are currently two general funding models for self-regulation in place across Europe a) based on membership contributions/subscriptions and b) based on a levy of advertising or media spend.

Where it is possible, all agreed that to introduce the levy-based system of funding seems to be the most effective and should be preferred for those countries now launching SR. Levies should be designed to meet essential SRO costs. Current experience suggests that a small fraction of a percentage point (0.1 – 0.2 percent) of advertising turnover would be more than adequate.

Public money (from local as much as EU sources) could be used to supplement industry efforts in, for example, Cohesion Fund recipient Member States. This would be desirable in the start-up phase of SR. EASA is currently mapping SR funding needs across the EU. This should certainly not be seen as ongoing core funding, but instead, either as a start up subsidy or for capacity building or training.

3.4.1 SRO Funding models

The Membership model

In the majority of European countries, except for the UK, Ireland and the Netherlands, self-regulatory systems have been funded by membership contributions. These originate from membership which in about 70% of the countries derives from trade associations representing the advertising industry (e.g. advertisers, agencies and media associations) and sectoral associations (e.g. spirits federation). In the remainder of the countries membership consists of both associations and individual companies or, in some cases, particularly in Central and Eastern Europe, just individual companies. The level of contribution is typically calculated according to the importance of a sector in the advertising domain and advertising spend.

Strengths: The membership model can be relatively easy to set up at the start up phase of an SRO. Membership provides some degree of ownership for those participating (companies/associations) and certainty on the exact amount contributed on an annual basis i.e. it will not vary according to the amount of advertising spend in a year.

Weaknesses: The membership model only applies to members and leaves self-regulation open to the volatility of markets and public affairs budgets (supporting this association over that one). When large sectors drop out remaining a member may look like a disadvantage. In start-up situations, self-regulatory systems in Central and Eastern European countries have typically relied on a core of multinational advertisers for their funding.

The disadvantage of such an approach in addition to the above is that a) it can be difficult to extend membership to local advertisers thus leaving the system open to being branded a ‘foreign imposition’ and not our system, and b) funding originating from only limited number of companies can leave the system open to criticisms in relation to its independence.

The Levy model

The levy system is currently under consideration in a number of European countries e.g. Spain, Portugal, Poland, and Belgium. It is in operation in the UK and Ireland and is becoming operational in the Netherlands. The levy is an amount of money calculated in proportion to the individual advertising project which is added to the invoice in order to pay for the self-regulatory system. It is levied on the bill and passed on to the advertiser to pay.

Strengths: The strengths of the levy system are its neutrality, inclusiveness and universality. It ensures that all operators participate in the system and fairly spreads the burden of funding according to the level of ad media spend. The levy can be adjusted by common approval without having to undertake lengthy discussions concerning membership rates.

Weaknesses: The levy can be perceived as a tax and where there is a tax on advertising this becomes more problematic in terms of its acceptance. Some companies may feel that they have to pay more in certain markets.

The cases of UK, Ireland and Netherlands

The levy system is working well in the UK and in Ireland, with progress more recently also in the Netherlands.

UK levy system

In the UK, independent bodies have been set up to collect the 0.1% levy on advertisers that funds the Advertising Standards Authority (ASA). There is one body for non-broadcast advertising - the Advertising Standards Board of Finance (Asbof) – and one for broadcast advertising – the Broadcast Advertising Standards Board of Finance (Basbof). Asbof and Basbof are entirely independent and in charge of the whole process of calculating, collecting and conveying the funds to the ASA.

The ASA's budget for the year 2006 as a result of the levy is just over £8.0 million.

Consumers are not charged to complain. The only cost to consumers to send a complaint is the price of a stamp, or the time spent online or the SMS cost.

The system of funding for ASA responds well to the EASA best practice model and conducts both copy advice, industry and consumer awareness schemes and promotions. It operates within a regulatory framework which is both beneficial to the development of effective best practice self-regulation and does not dissuade industry investment in the latter.

Irish system for all media

The surcharge or levy scheme finances the administration of the ASAI with a voluntary contribution of 0.2% of gross media rates and ranks as a normal advertising expense for tax purposes. The surcharge applies to advertising covered by the ASAI Codes of Advertising Standards and Sales Promotion Practice.

The 0.2% is reviewed each year by the Board of ASAI but it has not been necessary to raise it.

In addition, certain members, mainly media members, pay an annual subscription. These subscriptions were envisaged, to a certain extent, as a compensation for the fact that the levy is not collected from direct advertising - that is advertising which does not go through an advertising agency. However, in practice the subscriptions are fixed by agreement with the Board of ASAI and are revised upwards once a year.

About 90% of the money collected is spent on the ASAI's annual budget.

ASAI responds well to the EASA best practice model and conducts both copy advice, industry and consumer awareness schemes and promotions.

New Dutch scheme for all media

Up to 2004, the Dutch system was funded by membership contributions from industry associations. By 2004 it was decided to move to a levy system which initially would work in parallel with the membership scheme until the levy scheme was properly in place.

The Dutch levy proposed consists of a levy consisting of 250 euro per million euro advertising turnover .Advertising turnover figures are delivered by an independent authority.The Dutch SRO (SRC) is currently involved in the invoicing and collection of the levy on the basis of 0.025% on gross advertising media spend.

The Dutch scheme in 2005 is currently a combination of both levy and membership schemes, and will remain so during the transition phase.

SRC's annual budget in 2005 was 550 000 euros

The round table discussed the scenario to apply the levy system throughout the EU countries.

EASA considers that in principle, the levy system could be used in a number of individual European countries in order to reinforce the effectiveness of self-regulatory systems but it would be inappropriate for EASA to impose the system across Europe, for the following reasons:

- Self-regulatory systems are fundamentally national in nature: they have developed independently in each Member State, they are embedded into national legal frameworks, and are 'sovereign', i.e. not governed by a European body (EASA promotes coordination and best practice and deals with cross-border complaints, but does not govern national self-regulatory systems).
- EASA and its members are committed to adequate and sustained funding for SROs, but it is the prerogative of national stakeholders (including the media and agencies, as well as advertisers) to decide on an appropriate system. Indeed, many highly successful and recognised self-regulatory systems (e.g. France, Spain) operate through membership-based funding systems.

- Advertising budgets are national in nature in the vast majority of cases: even large multinational companies usually have national advertising budgets.

- Advertising markets differ significantly in size, structure and maturity across the EU, so that the same level of funding is not required in each Member State. While the weaker systems are currently being strengthened in the context of implementing the EASA Charter, any attempt to impose a levy across the board is likely to discourage rather than encourage this process.

An EU-wide forum?

Ensuring that advertising self-regulation wins and retains public confidence is a goal to be pursued at national and local level, through a continuous process. It depends on consumer research, public events and dialogue with interested parties. The question arises how best to link these local processes to each other and to the EU level.

The widely shared interest in the debate on SR generally at EU level and in this Round Table, reflects the relative lack of opportunities for sustained and detailed debate in the past. Participants seem to feel that they have learned much concerning the detailed experiences of SR. This raises the question whether such a process of joint learning and common problem-solving could be sustained within a more established forum, embracing industries other than just advertising.

Such a more sustained process could be an option to support the improvement of SR rather than a new component of SR itself, and would bear fruit irrespective of the degree to which SR is used as compared to other regulatory tools in the coming period in the EU. It could cover all SR (this would be an issue for deeper study) or focus maybe as a pilot phase, on SR in certain sectors.

Such a forum should involve all stakeholders. It would be convened by the Commission (all interested services) and involve perhaps also other EU institutional players such as the European Parliament.

The group could meet at working-level and periodically at higher level. The purpose would be to provide sustained public engagement to stimulate the search by business for effective self-regulation and would provide a feedback mechanism to ensure that over time the high-level charter commitments of EASA remain relevant to the needs of EU society. The group could analyse and compare national SRO performance data on consumer awareness and satisfaction data by country. It should also examine other data, about trends in advertising and trends in issues of concern around advertising, such as currently obesity or alcohol. The Round Table reached a conclusion no this point.

Annex

The basics components for a Best Practice SR model on advertising

- Effectiveness :
  - *Provision of copy advice*
  - *Complaint handling*
  - *Sanctions*
  - *Consumer awareness*
- Independence:
  - *Involvement of interested parties in Code drafting*
  - *Involvement of independent persons in the complaints adjudication process*
- Coverage
- Funding

- Effectiveness :

  ♦ *Provision of copy advice*

– The SROs should offer the provision of copy advice particularly for media where advertising copy may have so short a shelf-life to negative adjudications.

– Copy advice should ideally be provided free of charge

  ♦ *Complaint handling*

– All SROs, from establishment onwards, should establish and publish both performance objectives year by year and records of their performance against those benchmarks.

– Each SRO should have an explicit objective, to the effect that it should be easy to find through which channel to complain.

– There should be a benchmark for the ease with which any form for the submission of complaints is completed. This objective should be endorsed by its governing board and verified year by year in its customer satisfaction surveys

– There should be a standard for the speed with which complaints are handled.

– There should be a systematic duty to publish decisions which is a tool for increasing transparency of the system and increased public confidence

– SROs could recommend to the Advertising industry for its agreement and action, minimum standards for training of new recruited young advertising staff and for the design of internal compliance processes

♦ *Sanctions*

– Sanctions for non-compliance with codes, for repeat offences and for consistently ignoring codes or adjudications, should be clear and effective.

– The minimum sanction should be timely withdrawal of advertising copy.

– Withdrawal should apply ,in the absence of explicit local SR decisions to the contrary, not only in the jurisdiction of the adjudication but throughout the business concerned; differences in codes and cultural expectations may today mean that different decisions are reached in different markets.

– The collaboration of the media as a whole on backing the decisions of the SRO is an important element to enforcing the sanctions. The adoption, more generally of "compliance clauses" in advertising contracts should help to make sanctions more effective.

- Independence:

♦ *Involvement of interested parties in Code drafting*

- Perceived lack of openness, independence and transparency are seen as critical points for the public acceptability of the self-regulation on advertising.
- The effective contribution of the stakeholders (consumers, parent associations, academics etc) to the elaboration of codes deserves reinforced attention by EASA.
- Over time, monitoring should include indicators designed to verify that the stakeholders' involvement meets the expectations of the society within which the SRO operate.

♦ *Involvement of independent persons in the complaints adjudication process*

- Adjudication bodies should be composed of a substantial proportion of independent persons. Those persons could be selected on the basis of calls for expressions of interest, and appointed by the Board.
- It could also include possible cooperation with statutory authorities for the appointment of the independent persons of the adjudication bodies. All Adjudication body Members should be subject to rules on the avoidance of conflict of interests and on the declaration of interests.
- A Jury is fundamental in guaranteeing the independence of the process. Composition, nomination process, independence and integrity of its members are the key determinants for the credibility of the system.
- The business and SR community should remain open to the benefits, as well as the costs of the development of some more clearly 'independent' presence at all levels.

- Coverage:

– Advertising SR's today in Europe aimed to cover not only pure advertising but all other forms of "Commercial" or "marketing communication". The aspiration is a global coverage for all type of marketing or commercial communication

– It is important to find a generic definition, encompassing all advertising techniques using any medium or distribution channel based on new technology.

– Another issue of concern is the new emerging trends for "buzz marketing" and "word of mouth".

– SROs should keep under review any trend to significantly increase the proportion of 'adspend' that escapes SR

– On both the European and national level considerable effort has been put into providing basic legal requirements, specifically for direct and interactive marketing. Legislation therefore underpins self-regulation of the individual marketing sector.

– SROs must commit to keeping abreast of emerging techniques, to discussing with all stakeholders any concerns raised by these techniques, and to deciding promptly either to deal with these concerns or to alert the public authorities that they would need to develop an alternative approach. Public authorities cannot assume that SR would be the fall-back for such issues, where legal approaches seem inadequate

- Funding:

– There was general agreement in the Round Table on the desirability of strong political support for industry voluntary funding. There was no agreement on the feasibility of any additional advertising tax.