




REPORT

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**THE PLAYING FIELD IN
AUDIOVISUAL ADVERTISING**
WHAT DOES IT LOOK LIKE AND
WHO IS PLAYING?



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Executive summary

The aim of this report is to contribute to policy debates by providing evidence on the dynamics of markets for audiovisual advertising in which both audiovisual media services (AVMSs) and video sharing platforms (VSPs) are operating. It addresses the following questions:

- To what extent are audiovisual media services and VSPs competing in the same markets as comparable services?
- What conditions are shaping the levelness of the field on which they are competing?


The investigation covered Belgium, France, Italy and the UK. Using a detailed literature review, 26 key informant interviews, and a comparative legal analysis, the research found evidence that:

- Though TV advertising and online video advertising on VSPs and other services do not serve exactly the same function for advertisers, AVMSs and VSPs are certainly competing for the same budgets and building relationships with the same advertisers in largely the same way, with media agencies playing an important mediating role.
- The playing field is not even. The main reasons that the playing field on which AVMSs and VSPs are competing for advertising budgets is not level are related to imbalances in the human and financial resources they can invest in building relationships and in their ownership of and ability to use data.

Interchangeability

The distribution of advertising budgets resembles concocting a recipe from a number of different ingredients all of which have different features. Agencies do not see it as competition between offline and online, but about finding the right mix of numerous options to reach certain objectives, and they engage in extensive research and complex modelling to do this. Nevertheless, budgets are not expanding currently and there is increased pressure to achieve efficiency and short-term effects, reported against key performance indicators (KPIs).

Agencies and advertisers still view TV as crucial for advertising, especially for brand building and awareness, and often TV advertising is the flagship around which the rest of the campaign is designed. TV is trusted because its regulatory framework ensures it is a 'brand safe' environment and a good viewing experience, and because the audited measurement systems provide transparency in terms of where advertiser money is going and what it is getting.



For agencies and advertisers, online video advertising is attractive for its efficiency in reaching target audiences, often with significant cost saving and in extreme detail, and for the ability to receive rapid feedback on the response to ads placed. They also value online options for small or experimental campaigns. Despite remaining suspicious of much of the data that is produced and concerned about brand safety, they often need to reach the audiences no longer watching TV and they get excited about the optimisation possibilities available.

There are differences in the qualitative rules around advertising and agency respondents reported being able to do things online that they cannot do on TV. Some of these rules have been equalised with the 2018 update to the EU's Audiovisual Media Services Directive (AVMSD). Rules on misleading and comparative advertising are largely harmonised at the EU level and apply to all services, so this area of law was mostly the same in all four jurisdictions studied. A ban on political advertising on AVMSs was also common to all four, with no equivalent for VSPs. Efforts to address political advertising online are nascent, mainly focused on ensuring disclosure, and tied to efforts to combat disinformation. There is also a difference in product placement rules. The 2018 AVMSD includes user generated content (UGC) in the definition of product placement and allows it for the most part, but the exceptions, such as children's and consumer programmes, in which it is prohibited for AVMS providers do not apply to VSPs.

RECOMMENDATIONS

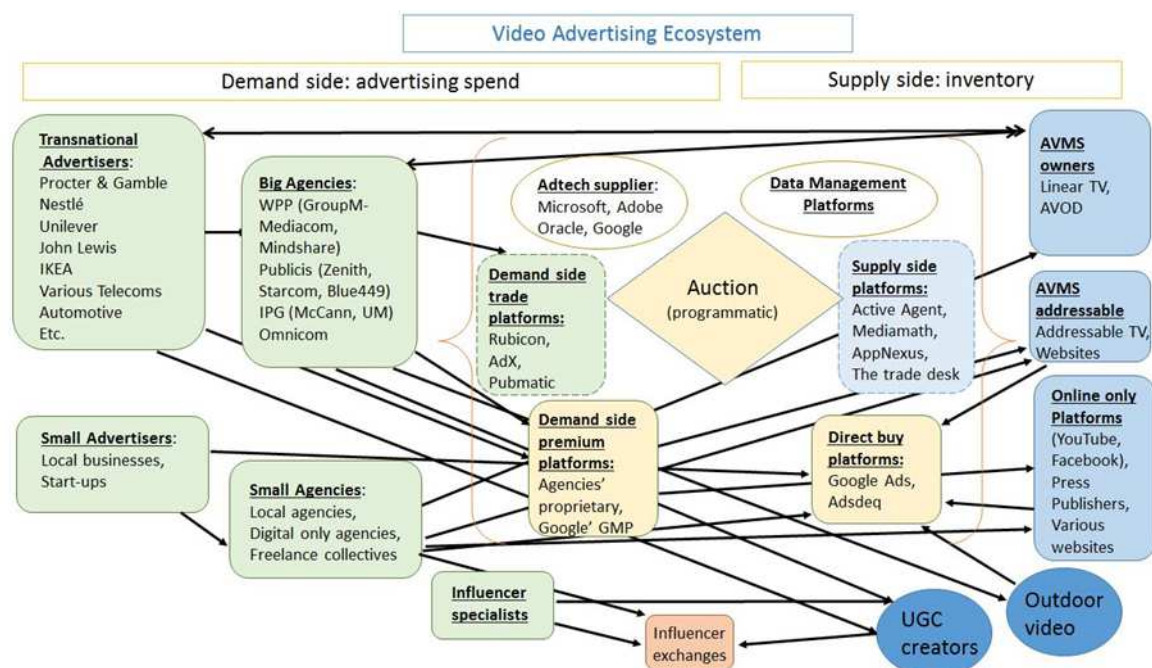
As they implement the AVMSD, **Member states** should devise co-regulatory mechanisms that will be effective in enforcing content and advertising standards on VSPs and adhere to the Directive's intention of levelling the playing field. **The Commission's** guidance as to what qualifies as a VSP and criteria for co-regulatory mechanisms should be designed to maximally even out conditions among advertising-dependent services.

Though there is no need to regulate UGC producers such as vloggers and influencers, **national regulators** should provide disclosure guidelines similar to those for content on AVMSs, and the **European Regulators Group (ERGA)** should investigate whether there is a need for the AVMSD's product placement exceptions to be extended to VSPs.

Industry bodies with support from **national regulators** should work towards standardisation of measurement within and across channels, including both agreement on a 'common currency' measurement for video and innovative ways in which the need to service KPIs can be addressed by all players.

Relationships

AVMS providers and VSPs take similar approaches to building relationships with agencies and advertisers. Both nurture long-term relationships with agencies, with personal relationships still being crucial. They also engage directly with larger advertisers to understand their aims and make them aware of the options they provide, particularly when rolling out new ones, such as the 6 second un-skippable ads online or addressable TV options.



Source: The authors based on literature review and interview accounts.

Whereas the most popular VSPs are global companies able to use that status advantageously for tax purposes and draw on extensive financial and human resources, AVMS providers are often prohibited by national-level rules aimed at protecting media pluralism from collaborating or even combining resources within the same group in ways that might allow them work towards addressing these imbalances. Some AVMS providers are engaged in transnational collaborations.

Rebates and discounts based on scale and duration are common practice in how prices are set both for online and offline inventory, except when they are determined by auction in the programmatic systems. These and other contract conditions are subject to negotiations that, for AVMS providers in some jurisdictions, are constrained by trading frameworks.

RECOMMENDATIONS

Member states should revisit media plurality measures, including cross-ownership rules, with a view to enabling AVMS providers to co-operate in some areas, in which greater scale or scope may be crucial to allowing them to compete against global VOD and VSP services, without reducing the pluralism of views and content available to citizens.

Member states should adopt transparency requirements similar to the French Sapin law in fair trading policy and **EU policy makers** should consider harmonising EU-level rules.


The European Commission should closely monitor the implementation of national-level taxes on the B2B revenues of platforms, such as Italy's 3% "web tax," to assess the effects on the wider ecosystem and other businesses, and consider roll out across the Union.

Data Ownership and Use

VSPs can leverage the consent that they gather from their vast user base for targeting purposes and for the kind of tracking of an individual's post-exposure journey needed to provide ROI results and make attribution claims. On the other hand, AVMS providers have only recently been requiring registration for users to access their AVOD and this is still giving them a rather limited type and amount of data on their users. The extent to which addressable TV gives AVMS providers useful data depends on the arrangements with the company providing the set top boxes to households.

There is also an imbalance in access to online campaign-related data. The agreements that agencies and advertisers have with demand side platforms give them ownership of such data for their own campaigns. However the AVMS providers, or other publishers on the supply side, do not get such data for the campaigns run on their sites or around their content. A parallel might be if BARB, Auditel or Mediametri data was only available to agencies and advertisers. Our evidence indicates that data is an essential element of competition, and inventory holders such as AVMS providers and VSPs must be able to address the need for advertisers to demonstrate performance.

Agencies and advertisers have concerns about dominance in the exploitation of data in this ecosystem that merit investigation. Respondents from various categories noted that GDPR appears to have further concentrated power in the hands of global platforms operating in the



programmatic systems. Several mentioned the challenges of trying to compare across “walled gardens” of data maintained by those providing online advertising inventory and the lack of choice about what platforms they can use.

RECOMMENDATION

Competition authorities and **data protection authorities** should work together to assess possible concentration in the programmatic advertising system and in the wider market for video advertising.

01

AIMS AND SCOPE OF THE STUDY


1. Aims and scope of the study

The aim of this report is to contribute to policy debates by providing evidence as to the extent to which audiovisual media services (AVMSs) and video sharing platforms (VSPs) are comparable services in the market for advertising. A fundamental principle in regulation within the EU's Digital Single Market is that there should be "a level playing field for comparable digital services," with the understanding that what are considered comparable services will vary depending on the public policy context.¹ In October 2018, the European Parliament adopted a new version of the AVMSD that assumes the AVMSs and VSPs "compete for the same audiences and revenues as audiovisual media services."² Announcing its adoption, MEP Sabine Verheyen said: "we have established a fair, level playing field." Though it might not have been stated directly in the proposal or the final adopted version that these services are "comparable services", a term which would have implications under competition rules, there was clearly an intention to revise the rules to enable AVMSs and VSPs to compete more fairly.

However, the story is far from over in defining the playing field for audiovisual advertising and the services for who it is a major revenue stream. Audiovisual media services have welcomed the increased obligations on VSPs in relation to advertising but complain they do not go far enough to level the playing field. The new AVMSD will still need to be implemented over the next two years, with important steps, such as the shape of co-regulatory regimes with VSPs left to be determined by member states. Other legislation that could have significant consequences for advertising markets, namely the ePrivacy Regulation, is under development. At the same time, the market itself is changing rapidly and basic competition regulation needs to keep up. This report is intended to inform these processes.

¹ COM(2016) 288 Online Platforms and the Digital Single Market Opportunities and Challenges for Europe
<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016DC0288&from=EN>

² P8_TA-PROV(2018)0364 Provision of audiovisual media services***I European Parliament legislative resolution of 2 October 2018 on the proposal for a directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities (COM(2016)0287 – C8-0193/2016 – 2016/0151(COD)) Preamble Recital 4.



The two research questions this report addresses are:

- To what extent are audiovisual media services and VSPs competing in the same markets as comparable services?
- What conditions are shaping the levelness of the field on which they are competing?

The evidence presented here is based on three avenues of research, a detailed literature review, key informant interviews, and a comparative legal analysis. The literature review covered mainly marketing and business literature.³ VSPs are rarely separated out from the rest of the online platforms in literature on advertising and advertising markets; however, we have attempted to highlight online video advertising in the review as much as possible. To focus the main part of our investigation, we examined four cases: Belgium, France, Italy and the United Kingdom. These cases were chosen to provide a mix in terms of market size and levels of advancement in terms of digital services and online advertising. Some of those interviewed were in global or regional roles rather than nationally based. We conducted 26 interviews, which included 34 people as some interviews were conducted with more than one person. The respondents included people from large and small media agencies, global advertisers, AVMS providers, VSPs, and an ad exchange, as well as independent industry observers. The respondents have all been carefully anonymised in this report. The legal analysis offers comparison where there were different regimes in place and discusses the common legal framework on issues where there is harmonisation.

The following chapter describes the ecosystem and the main “players” on the playing field: the media agencies in their media planning function, the AVMSs, online platforms (including VSPs), and programmatic advertising. This is followed by a series of six chapters that draw mainly on the interviews covering key topics related to sub-research questions established at the outset of the project. Chapter 9 presents the legal framework and in the final chapter, we offer conclusions and policy recommendations.

³ It was not within the scope of this project to examine the computer science literature or economic literature that dealt with the technical side of programmatic advertising or the econometric modelling used in media planning.

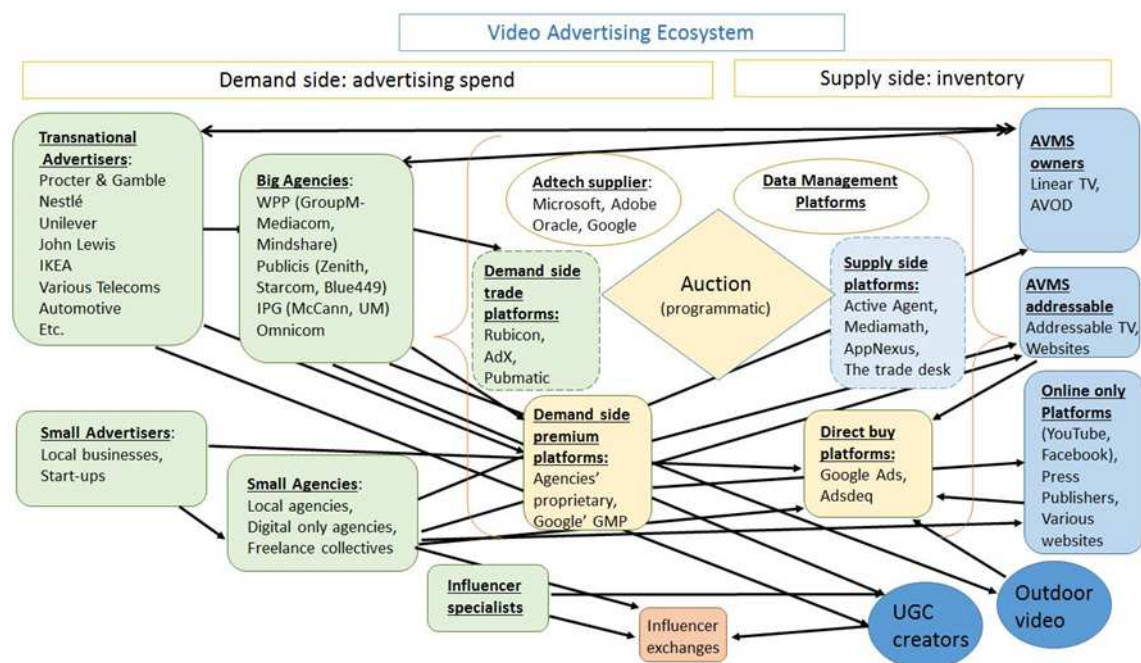
02

THE ECOSYSTEM

2. The ecosystem

The ecosystem in which video advertising is located has grown increasingly complex in the last two decades. A field that used to be dominated by direct relationships among a few actors is now an intricate landscape in which players are frequently changing. There is now a variety of relationships between those offering advertising inventory, who we will refer to as inventory holders, and those looking to invest advertising budgets. Some of these are still direct, while others involve a number of layers of intermediaries. In figure 1 below we have attempted to illustrate the current ecosystem based on the review of available literature and the accounts of interview respondents.


Figure 1 – Illustration of video advertising ecosystem



Source: The authors based on literature review and interview accounts.

As one can see in Figure 1, the demand side is characterised often by intermediaries such as media agencies which act on behalf of advertisers, whilst the supply side (the inventory) is characterised by two channels, AVMSs and online only.⁴ Video advertising online is not only

⁴ In this report, we use the term 'channels' in the manner it is used in the advertising industry to refer to the different types of media through which commercial communications can be carried.



carried on VSPs, but also by other advertising-funded media, including the traditional publishers' websites. Here, they are not disaggregated because their inventory is traded in the same manner, either through direct buying, or via the same programmatic systems. The inventory of AVMS providers is divided into addressable and non-addressable, but only the addressable part of their inventory is traded programmatically.⁵ We include two other channels for video advertising because they were mentioned as part of the mix of channels considered in media plans by our interviewees. Outdoor video refers to billboards and other 'out of home' forms that carry video advertising displays in rail and bus stations or shopping centres, and is outside the scope of this report. User generated content (UGC) creators are shown separately because of the direct relationships they have with the demand side as influencers. Online influencer marketing is a relatively new phenomenon that is discussed in more detail in section 3. The advertising around their content that is traded programmatically is usually supplied by the VSPs on which their content is hosted.⁶ In order to set the scene for the empirical findings that follow we will briefly introduce the function of the media agencies, the characteristics of the two channels, and programmatic systems.

2.1. Media planning

The main function of media agencies is to develop, on behalf of advertisers, media strategies elaborated through often very detailed media plans. Media planning is a sub-field of advertising,⁷ which comprises a series of decisions regarding the best means of delivering advertisements to prospective purchasers of a brand.⁸ It has been described as the process whereby a decision maker chooses where, when, and how often to advertise with a limited budget.⁹ Sometimes, the process of selecting the media channel is also referred to as 'media


⁵ It was still not consistent practice to make addressable TV inventory available for programmatic trading across the cases studied, but according to interview accounts, some AVMS providers such as Sky in the UK and both TF1 and M6 in France are doing so.

⁶ This division is of course not completely clear cut as some creators or media owners whose content is hosted on VSPs sell some of the advertising around their content themselves giving a percentage to the VSP, but the idea here was to pull out the influencer marketing.

⁷ Yorgo Pasadeos, 'A 30-year assessment of the media planning literature' (1997) 19 (1) *Journal of Current Issues & Research in Advertising* 23.

⁸ See also Sections 2.2 and 2.3 below.

⁹ See for example: Jack Sissors and Roger Baron, *Advertising Media Planning* (Mc-Graw Hill 2010).



selection'¹⁰ or 'media strategy'.¹¹ Our interviewees mainly described that level of decision-making as being handled by "strategy teams" or "comms teams" responsible for the overall strategy, which was then fleshed out by the planners. In general, media planning involves the selection and use of media, allowing the marketers to communicate the message optimally to as many target markets as needed at minimum cost.¹² Hence, it is the job of a media planner to use media to convey the advertising message to the target customer in the best possible way.¹³ Accordingly, media planners define target audiences and make decisions regarding the appropriate type of media and formats, including the very specific conditions of the eventual purchase.¹⁴ The media planner, most importantly for the scope of this review, proposes which media campaigns should run and how much money should be spent in each medium.¹⁵ According to the literature, a number of different factors enter into these decisions. Potential reach and frequency have always been core considerations, and their continued importance was evident in our interviews.

Reach is a measurement of audience accumulation, which tells planners how many different prospects might see the ad at least once over any period of time the planner finds relevant.¹⁶ It may be expressed as the number of prospects or as a percentage of the target audience, but in either case, it represents a non-duplicated audience.¹⁷ The term frequency refers to the number of ad exposures each consumer receives in a particular time period.¹⁸ It has been argued that at the heart of media planning is the fact that there is never enough money to achieve high reach and high frequency for a long period of time.¹⁹ However, high frequency may not always be the objective. Some researchers suggest that a consumer has to be exposed to an advertising

¹⁰ See for example: Glen Nowak, Glen Cameron and Dean Krugman, 'How local advertisers choose and use advertising media: An assessment of media decision making by non-national advertisers' [1993] *Journal of Advertising Research* 39.

¹¹ Andy Tilley, 'The Strategic Importance of Media', in Leslie Butterfield (ed), *Excellence in Advertising* (Butterworth-Heinemann 1999) 193.

¹² Russel Abratt et al., 'Client-agency perspectives of information needs for media planning' (1999) 39 (6) *Journal of Advertising Research* 37.

¹³ Helen Katz, *The media handbook: A complete guide to advertising media selection, planning, research, and buying* (Routledge 2010).

¹⁴ Peter Danaher, 'Media planning' in Gerhard Tellis et al. (eds), *The Sage Handbook of Advertising* (SAGE 2007) 299.


¹⁵ Sissors and Baron (n 9) 3.

¹⁶ *Ibid*, 110.

¹⁷ W. Ronald Lane et al., *Kleppner's Advertising Procedure* (Pearson 2011) 230.

¹⁸ Gerard Broussard, 'How Advertising Frequency Can Work To Build Online Advertising Effectiveness' (2000) 42(4) *International Journal of Market Research* 439, 440.

¹⁹ See for example: Marius Bulearca and Suzana Bulearca, 'Is Media Planning the Driver or the End-Product of Promotional Strategy?' [2009] *Global Business and Management Research: An International Journal* 105, 11.



message at least three times (within a purchasing cycle) in order for the message to be effective,²⁰ whereas others have argued that there is little point to any beyond the first exposure.²¹ The position supported by our interview data is that reach and frequency targets can vary significantly depending on several factors, namely, the advertiser's objectives, the competitive context and target audience characteristics.²²

Thus, media planning involves detailed background research on the nature of the market and the consumer.²³ According to the literature, media planning can also take into account the following:

- Media availability²⁴
- Visual content²⁵
- Time to process the message²⁶
- Brand awareness and brand attitude strategies²⁷
- Brand engagement²⁸
- Effective reach²⁹

Media planners traditionally compare the relative costs of the delivery audience of each media service on the basis of its cost per thousand members (CPM) of the target audience,³⁰ which online is matched with cost per thousand impressions, or times an ad appears on a page viewed. The media planner's task is very challenging today because it must typically include knowledge of integrated and social media, mobile, and the traditional media options in their standard and convergent forms.³¹ Faced with this growing number of options, media planners now lend their

²⁰ Chris Fill et. al., *Advertising – Strategy, Creativity and Media* (Pearson 2013) 293.

²¹ For an overview see Chris Hackley and Runpaka Amy Hackley, *Advertising and Promotion* (SAGE 2015) 159.

²² Ibid.

²³ Fill et al. (n 20) 276.

²⁴ See for example: Hugh Cannon, 'Addressing New Media with Conventional Media Planning' (2001) 1 (2) *Journal of Interactive Advertising* 28.

²⁵ Ibid.

²⁶ Ibid.


²⁷ See in particular: Robert Huang and Emine Sarigöllü, 'How brand awareness relates to market outcome, brand equity, and the marketing mix' [2012] *Journal of Business Research* 92.

²⁸ See in particular: Hilde A. M. Voorveld et al., 'How advertising in offline media drives reach of and engagement with brands on Facebook' [2018] *International Journal of Advertising* 1.

²⁹ See Gerhard Tellis, 'Advertising Effectiveness', in Wolfgang Donsbach (ed), *The International Encyclopaedia of Communication* (Wiley & Sons 2008) 1.

³⁰ Sean Brierly, *The Advertising Handbook* (Routledge 2002) 115.

³¹ For an investigation into the effectiveness of using online media, see Bobby Calder et al., 'An Experimental Study of the Relationship between Online Engagement and Advertising Effectiveness' [2009] *Journal of Interactive Marketing*



expertise earlier in the strategic stages of a campaign than before the expansion of internet.

2.2. Audiovisual media services

An audiovisual media service is defined in EU law as a service “under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks.”³² This can include online only video on demand (VOD) services and, since the 2015 *New Media Online* case of the Court of Justice of the EU (CJEU),³³ dedicated video sections of the online presentations of press publishers. However, this investigation is interested in those operated by broadcasters, which includes linear television broadcasting (TV), advertising supported video on demand (AVOD), and companion online content,³⁴ and in broadcasters that rely on advertising for at least part of their funding.

TV advertising remains the most visible and, according to the literature, most prestigious form of advertising.³⁵ The revenues that can be generated from commercial communication around television content, which can include a variety of inventory such as multiple categories of advertising spots, product placement, and sponsorship,³⁶ depend on the type of content and its capacity to attract audience.³⁷ Although with the spread of connected TVs, addressable and interactive advertising for television is developing in most European markets,³⁸ it remains very difficult to track a consumer’s reaction to most broadcast advertising. As a result, advertisers pay on the basis of consumers’ anticipated exposure to the ad rather than their actions as a

321.

³² Art.1(1)(a) of the Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (Text with EEA relevance) *OJ L 95, 15.4.2010, p. 1–24* (‘AVMSD’).

³³ *CJEU, C-347/14 New Media Online GmbH v Bundeskommunikationssenat and Der Bundeskanzler*, (2015) ECLI:EU:C:2015:709


³⁴ Broadcasters also operate websites that are often companions to the content on their broadcast services and may also have other services in their portfolios.

³⁵ Also supported by our interviews, for more see section 4.1 below As pointed out by one of our interviewees, all the ‘.com’ realise the power of television ads as they themselves advertise heavily on traditional media such as on television. E.g. Trivago, Bookings, Amazon.

³⁶ A more thorough list of TV inventory is given in section 3.

³⁷ Mario La Torre, *The Economics of the Audiovisual Industry: Financing TV, Film and Web* (Palgrave 2014) 46.

³⁸ See below for further detail on addressable advertising.



result of seeing the ads.³⁹ Nevertheless, television remains the media channel with the highest daily viewing time amongst the general population in the EU,⁴⁰ and thus is seen as particularly valuable for reaching large audiences in real time. Another supposed benefit of this media channel is its ability to attract consumers with their editorial or programming and to develop strong loyalties among audiences.⁴¹

However, recent studies have shown that viewing habits have changed significantly, with younger audiences in particular watching more online than offline content in some markets.⁴² This development is likely to have an impact on advertising budget allocation, primarily because viewing time is taken into consideration by advertisers when deciding how to place their commercial communication and what they are willing to pay for it.⁴³ A decreased audience for any given medium due to competition for audience attention from online platforms and the greater number of linear channels will have a negative impact on its appeal and revenues.

There is a body of literature on the cost of television advertising that distinguishes between the exposure costs and the production costs. There seems to be a consensus that media planners find that TV lets them reach mass markets very cost efficiently when considering the CPM.⁴⁴ However, a media plan may also have to consider the often significant expenses for director's fees, creative labour fees (including fees for talent) and editing/completion costs, in addition to the actual costs of placement.⁴⁵ Sponsorship and product placement deals are usually very high investment options that have a long lead time and are often long running arrangements. Thus, despite the efficiency of TV in reaching large audiences, some scholars have historically seen it as an expensive medium in which to invest,⁴⁶ and it has been argued that these high costs often

³⁹ James Ratliff and Daniel Rubinfeld, 'Online Advertising: Defining Relevant Markets' (2010) 6 (3) *Journal of Competition Law and Economics* 679.

⁴⁰ European Audiovisual Observatory, 'Yearbook 2017/2018 – Key Trends' (*Council of Europe*, 2018) p 48 <<https://rm.coe.int/yearbook-keytrends-2017-2018-en/16807b567e>>.

⁴¹ Sissors and Baron (n 9) 10.

⁴² See for example: Ofcom, 'Media Nations: UK' (18 July 2018)


https://www.ofcom.org.uk/_data/assets/pdf_file/0014/116006/media-nations-2018-uk.pdf.

⁴³ Mario La Torre, *The Economics of the Audiovisual Industry: Financing TV, Film and Web* (Palgrave 2014) 46.

⁴⁴ See for example: Chris Hackley and Runpaka Amy Hackley, *Advertising and Promotion* (SAGE 2015) 170-172.

⁴⁵ Fill et al. (n 20) 233.

⁴⁶ George Belch and Michael Belch, *Advertising and Promotion: An Integrated Marketing Communications Perspective* (McGraw-Hill 2011) 354.



price small- and medium-size advertisers out of the market.⁴⁷

However, television advertising is moving beyond traditional commercial breaks and redefining how advertising and programme content work together.⁴⁸ With the growing alternatives to the 30-second spot, there has been demand for television sales houses to offer new television advertising formats.⁴⁹ Digital, niche services and other options have opened up the channel more to smaller advertisers. Television has always enabled the advertiser to deliver the advertising message on a specific date and time, but recently the control of timing is increasingly built into the devices for receiving the signal.⁵⁰ Time-shifted viewing presents a challenge to broadcasters because it often enables the viewer to skip through advertisements. However, the targeting capabilities of these set-top boxes (STBs) and digital video recorders (DVRs) have opened up new opportunities. Procuring impressions at the STB-level and matching it to data gathered by the network operator or other sources about the household allows television to be 'addressable'. Though it does not match the granular micro-targeting of individuals that can be done online, through addressable TV advertisers can now lower per-exposure costs and/or reach viewers most likely to be responsive to the advertising.⁵¹ This development results in lower advertising costs and raises incremental profits considerably relative to show-level targeting, which is amplified when advertisers can buy in real time as opposed to up front.⁵² Addressable TV advertising is seen to be opening up the medium to those who do not normally advertise on TV due to budget constraints or because there is no efficient way to reach their niche audience.⁵³ Addressable TV is not yet available extensively in Europe, but had been launched in all four of the countries examined in this study.

⁴⁷ Ibid.

⁴⁸ María Arrazola et al., 'Do new forms of television advertising occasion better recall than traditional advertising spots?' (2013) 32 (2) *International Journal of Advertising* 281, 282.

⁴⁹ Ibid.

⁵⁰ Martyn Davis and David Zerdin, *The effective use of Advertising Media: A Practical Handbook* (Random House 1995) 110.

⁵¹ See in particular: Yiting Deng and Carl Mela, 'TV Viewing and Advertising Targeting' (2018) 55 (1) *Journal of Marketing Research* 99.

⁵² Ibid, 99, 117.

⁵³ Iris Jennes and Jo Pierson, 'Audience Measurement and Digitalisation: Digital TV and Internet' [2011] *Proceedings of the 9th European Conference on Interactive TV and Video* 97, 98.

2.3. Online (including VSPs)

In the literature, it is difficult to separate out video advertising or VSPs because online advertising is most often discussed in general, or with distinctions made between search, display, and social media. The distinguishing feature of internet advertising is its ability to convey information to a targeted audience,⁵⁴ and this targeted audience is comprised of individuals who have been identified as fitting into the target group based on data gathered about them. *Wenjuan Ma et al.* argue that the power of online advertising stems from the advertiser's ability to exploit direct, two-way, and, often, real-time connections to internet users that enables it to use the vast computational powers of online service providers aggregate and use data from individual users.⁵⁵ This data is collected with the aid of cookies, which are small bits of code placed on internet users' computers, that make it possible to track users' online activities. This is often combined with information internet users voluntarily supply when they sign up for online services or respond to online surveys to create profiles reflective of their interests.⁵⁶

For online video advertising on platforms such as YouTube, in-stream ads can be shown prior to the video being viewed (pre-roll), during the video (mid-roll), or at the end of the video (post-roll). These are considered to have different values and are often priced differently; however, the research on their effectiveness is inconclusive. Based on a laboratory experiment, *Li and Lo* argue that mid-roll ads lead to better brand name recognition than pre-roll and post-roll ads because of attention spill over, though not if it is unrelated to the video content.⁵⁷ In contrast, they found post-roll ads can improve brand name recognition in an incongruent context.⁵⁸ Another feature of online video advertising is that spots are often skippable. *Campbell et al.* examined 'skipping behaviour' by employing a large industry data set of pre-roll ads representing multiple countries and product categories. It was concluded that less complex affective ad characteristics increase the skipping of pre-roll ads by failing to engage cognitive


⁵⁴ Dirk Bergemann and Alessandro Bonatti, 'Targeting in advertising markets: implications for offline versus online media' (2011) 42 (3) *Journal of Economics* 417, 418.

⁵⁵ Wenjuan Ma et al., 'Online Advertising' in Robin Mansell et al. (eds), *The International Encyclopedia of Digital Communication and Society* (John Wiley & Sons 2015) 3.

⁵⁶ *Ibid.*

⁵⁷ Hao Li and Hui-Yi Lo, 'Do You Recognize Its Brand? The Effectiveness of Online In-Stream Video Advertisements' (2014) 44 (3) *Journal of Advertising* 208.

⁵⁸ *Ibid.*



resources and therefore leaving cognitive resources available to experience irritation.⁵⁹ They argued that in a pre-roll context, attention-getting ad characteristics are not only superfluous but actually increase the likelihood consumers recognise pre-roll content as advertising and skip.⁶⁰ Therefore, there are clear parallels in online video advertising to the art of designing and placing ads in television, and also similarly, the relationship of the ad to the content and its placement with an ad break are key qualitative considerations in planning.

A qualitative consideration unique to online video advertising is ad viewability. This refers to the extent to which the ad appears on the screen, a quality that is particularly important if the ad is appearing in a 'feed' context where the viewer might be scrolling. The extent to which a video is viewable on the screen and for how long factors into whether or not it counts as an impression. It is also taken into account when advertisers and agencies are considering how effective that impression might be, often along with whether it plays with the sound on or off. The adoption of ad viewability technology may be able to track this for advertisers,⁶¹ but there is not sufficient research in the academic literature to draw conclusions as to whether or how much these matter in terms of effectiveness. Measurement organisations may be overestimating the positive effects of internet ad campaigns because at present there is no valid empirical basis on which to estimate audiences reliably.⁶² The responses measured can range from going to a brand's website to completing an online purchase, both of which can be tracked and fall into the category of return on investment (ROI) data that is often used to demonstrate effectiveness.

2.4. Programmatic systems


According to the literature, there are two different, and increasingly competing, approaches to buying and selling advertising media: the mass approach and the computational advertising approach. The mass approach is characterised as media companies selling mass audiences

⁵⁹ Colin Campbell et al., 'Understanding Why Consumers Don't Skip Pre-Roll Video Ads' (2017) 46 (3) Journal of Advertising 411.

⁶⁰ Ibid.

⁶¹ David Bounie et al., 'Do You See What I See? Ad Viewability and the Economics of Online Advertising' (2017) SSRNS Working Paper https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2854265

⁶² See for example: Paul Lavrackas, 'An evaluation of methods used to assess the effectiveness of advertising on the internet' (*Interactive Advertising Bureau*, 2010) http://www.researchexcellence.com/files/pdf/2015-02/id121_iab_evaluation_internet_ad_11_15_10.pdf



through a sales force to advertisers who inform their decisions with probability samples.⁶³ The computational advertising approach is marked by purchasing individual exposures informed by whatever data may be available about the device, cookie, household, etc.⁶⁴ Often, the media sale takes place on an ad exchange in real time through an automated auction, the message may be personalised, and often the behavioural responses to the exposure can be tracked (e.g. clicks, conversions).⁶⁵

The term ‘programmatic advertising’ refers to the advertising business that develops buying and selling processes via software-based automation.⁶⁶ Programmatic buying and programmatic trading are thus used as synonyms. Although as shown in Figure 1, there is a portion of advertising not sold via auction, but through otherwise automated means, most often people use the term programmatic advertising to refer to the real-time auctions. Algorithms make decisions at the customer- (or household- or device-) level, informed by customer databases, and directly observe outcomes such as conversion.⁶⁷ Advertisers can still deliver to mass audiences, but they are now doing so by making individual choices as to whom to address advertising, when to deliver it, and what commercial message will lead to the best outcomes, all in near real time.⁶⁸ According to the literature, programmatic advertising today is growing into the method of choice for trade, from high end premium to low-cost reach.⁶⁹

The key players and key steps for programmatic advertising are summarised in the following figure extracted from the UK House of Lords Report on UK advertising in the Digital Age based on an evidence submission by Google to its inquiry:

⁶³ See in particular: Edward C Malthouse et al., ‘Understanding programmatic TV advertising’ [2018] *International Journal of Advertising* 1.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ Inmaculada Martínez-Martínez, Juan-Miguel Aguado and Yannick Boeykens, ‘Ethical Implications of Digital Advertising Automation: The Case of Programmatic Advertising in Spain’ (2017) 26 (2) *International Journal of Information and Communication* 201, 203.

⁶⁷ Claudia Perlich et al, ‘Machine learning for targeted display advertising: Transfer learning in action’ [2014] *Machine Learning* 103.

⁶⁸ *Ibid.*

⁶⁹ See for example: Oliver Gertz and Deirdre McGlashan, ‘Consumer-Centric Programmatic Advertising’ in Oliver Bush (ed), *Programmatic Advertising* (Springer 2016) 64.

Figure 2 – The functioning of programmatic advertising

Box 2: How programmatic advertising works

<p>Key players:</p> <p>Ad exchange: an ad exchange is a digital marketplace that enables advertisers and media owners to buy and sell advertising space through real-time auctions.</p> <p>Supply Side Platform (SSP): SSPs help publishers access advertisers on different ad exchanges to get the best yield for their advertising space.</p> <p>Demand Side Platform (DSP): a DSP is a technology that enables advertisers to plug into different ad exchanges and access advertising space.</p> <p>Key steps of ‘real-time bidding’ programmatic advertising:</p> <ol style="list-style-type: none">1. Publishers make their inventory available to the ad exchanges via an SSP.2. Advertisers decide roughly which audiences they want to target with their ads (this could be based on their existing audience data such as existing website visitors, act-alike audiences of existing customers, or demographics).3. An individual visits a webpage. As the webpage loads, information about the individual and the content of the page is gathered and reported back to the ad exchange.4. Algorithms process the information to make inferences about the individual’s characteristics such as age, income and interests. The information may derive from ‘cookies’, software downloaded on to the individual’s device during previous web activity, or from an online service provider with whom the individual holds an account. GPS technology may also provide information about the individual’s geographical location.5. If the characteristics match targeting defined by the advertiser, the advertiser is entered into an auction with other advertisers who are also bidding for the individual.6. Whichever advertiser has the highest bid wins the right to show advertising to the individual during the visit to the webpage.7. Publishers get paid for the advertising they show on their sites. <p>Steps 3 to 6 happen in milliseconds.</p>

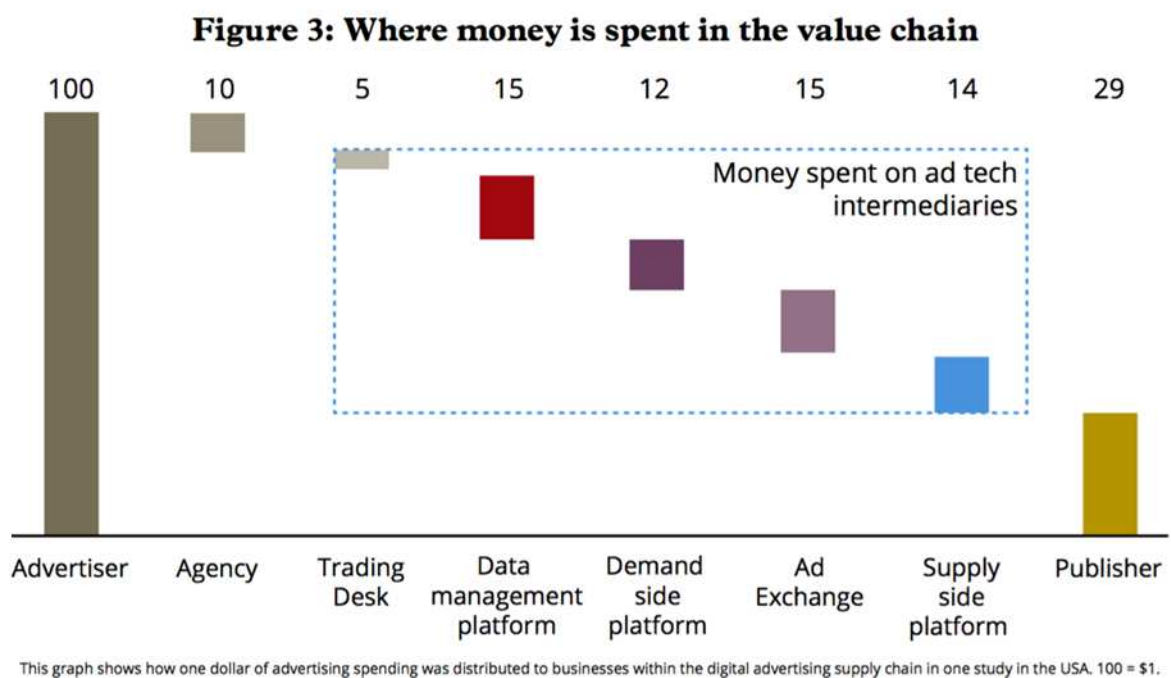
Source: Select Committee on Communications, *UK advertising in a digital age* (HL 2017–19, 116) 13.

Figure 2 illustrates a somewhat simplified version of the programmatic real-time auction process. In recent years, with the rapid development of the industry, growing revenue and the introduction of programmatic advertising, an increasing number of companies are engaging with the business by providing new tools and platforms.⁷⁰ Contributions in the academic literature have identified the increased number of players involved in advertising as one of the main reasons for perceptions of a lack of transparency in programmatic advertising,⁷¹ and a

⁷⁰ Shuai Yuan et al., ‘Internet Advertising: An Interplay among Advertisers, Online Publishers, Ad Exchanges and Web Users’ (2012) available at https://www.researchgate.net/publication/225284618_Internet_Advertising_An_Interplay_among_Advertisers_Online_PublishersAd_Exchanges_and_Web_Users

⁷¹ Erin Schauster and Marlene Neill, ‘Have the Ethics Changed? An Examination of Ethics in Advertising and Public Relations Agencies’ (2017) 32 (1) *Journal of Media Ethics* 45, 51.

somewhat loss of control of the advertiser.⁷² These concerns about transparency and loss of control centre on where advertising money is going and where ads are being placed. Some of the evidence submitted to the House of Lords Inquiry suggests that the scale of digital advertising increased this lack of transparency as there are, supposedly, ‘too many middle men involved for it to be transparent’,⁷³ while other stakeholders argued that this is not a problem that has come about because of digital, but one that has always existed in media.⁷⁴ The Inquiry’s report determined that the majority of the money that is spent on an ad does not go to the publisher, but is extracted through commissions or revenue shares by various actors along the way as illustrated in Figure 3 from the report.



Source: Select Committee on Communications, *UK advertising in a digital age* (HL 2017–19, 116) 15.


Concerns about ad misplacement largely centre on brand safety. In some extreme situations, ads are displayed next to content that leads to scandals and damaged brand reputation.⁷⁵ It has been suggested that advertisers should implement systems to monitor the usage of their brand

⁷² Minette Drumwright and Patrick Murphy, ‘The Current State of Advertising Ethics: Industry and Academic Perspectives’ (2009) 38 (1) *Journal of Advertising* 83, 87.

⁷³ Select Committee on Communications, *UK advertising in a digital age* (HL 2017–19, 116) 14 (hereafter ‘HOL report’).

⁷⁴ *Ibid.*

⁷⁵ A well-publicised case included US giants Walmart and Verizon temporarily pulling their ads from YouTube in 2017 after they had appeared next to videos of extremist speech, and in 2018 candy giant Mars doing so after its ad played next to a drill rap video exalting violence.



names and trademarks on unauthorised sites.⁷⁶ In our interviews with agencies, advertisers and platforms, it was apparent that such systems were already being implemented. Existing brand protection services for corporates should also consider the negative implications for mainstream advertisements appearing alongside ‘scam’ advertisements, as well as advertisers appearing to endorse the illegal distribution of infringing content. Inter alia, this is achieved by directly dealing with publishers, by using only private exchanges, and by the ‘more or less extensive’ use of whitelists and blacklists.⁷⁷

Another risk with programmatic advertising is the proliferation of fake traffic and ad fraud.⁷⁸ A common issue here is the so-called ‘click fraud’. ‘Click fraud’ describes the ‘wilful act of clicking on a sponsored advertisement in order to falsely increase the number of clicks.’⁷⁹ This is done either to generate illegitimate revenues or to manipulate a competitor’s advertising behaviour by consuming its pay-per-click budget.⁸⁰ This was reflected in the comments of some of our agency interviewees who do like to use “clicks” as a measure of ROI. It has been argued that programmatic advertising still faces other significant hurdles, such as a lack of best practices beyond remarketing and premium inventory, the problem of cross-device adaptability and a lack of subject experts.⁸¹

2.5. The players

This section has illustrated the ecosystem for video advertising and the main players: introduced the media agencies, AVMSs and online services, and the programmatic advertising system. It reviewed the current knowledge about their roles and characteristics. The literature, including industry reports and other sources, is limited in its account of the relationships among these players. There is a particular lack of literature dedicated to online video advertising in particular and the newer options such as addressable TV and influencers have yet to be fully investigated.

⁷⁶ Yanwu Yang et al, ‘Computational advertising: A paradigm shift for advertising and marketing?’ (2017) 32 (3) IEEE Intelligent Systems 3.

⁷⁷ HOL report (n 78) 16.

⁷⁸ Gian Fulgoni and Andrew Lipsman, ‘Measuring Television In the Programmatic Age – Why Television Measurement Methods Are Shifting toward Digital’ (2017) Journal of Advertising Research 10.

⁷⁹ Vishal Midha, ‘The Glitch in On-line Advertising: A Study of Click Fraud in Pay-Per-Click Advertising Programs’ (2008) 13 (2) International Journal of Electronic Commerce, 91, 93.

⁸⁰ Ibid.

⁸¹ Jürgen Zeitz and Steffen Zorn, ‘Perspectives in Programmatic Advertising’ in Oliver Bush (ed), *Programmatic Advertising* (Springer 2016) 37.



The next sections of the report attempt to fill some of these gaps using the data from in depth, semi-structured interviews we conducted with individuals from these players and other actors in the ecosystem.

03

RELATIONSHIPS WITH ADVERTISERS

3. Relationships with advertisers

The relationships that AVMS providers and VSPs have with advertisers are very similar, but with differences in the resources they can devote to building relationships and in the level of transparency.


Relationships that AVMS providers and VSPs have with advertisers are growing increasingly complex. There is also an extensive amount of technology involved in managing these relationships on all sides, not just that used for the execution of real-time auction trading. As was illustrated in Figure 1 above, there are essentially three different pathways through which buying takes place:

- **Direct buys:** These can be arrangements with media owners for various kinds of spots, sponsorship, product placement, branded content, or they can be 'reserve buys' for premium online inventory. The extent to which tech is involved varies greatly across markets and inventory holders.
- **Premium programmatic buy:** These are arrangement through platforms that enable buying certain premium inventory in advance across a number of inventory holders. Large agencies may have their own proprietary systems and Google's Marketing Platform (GMP) is commonly used.
- **Real-time Programmatic Auction:** This is an arrangement in which inventory, mainly online, is available for open auction in real time and is bought through programmatic means.

Both AVMS providers and VSPs operate with all three types of buying relationships.

3.1. AVMS - advertiser

AVMS providers are represented in these buying relationships by their sales houses, which cover their core linear TV offerings, AVOD and any online inventory they have, and which might also be representing other media. The buying relationships between AVMS providers and advertisers fall mainly in the first two categories and are almost exclusively mediated by agencies. They are party to the large trading frameworks for TV that involve long-term commitments and large scale buying. AVMS providers' representatives in Belgium, Italy, and the UK all attested to the




importance of their relationships with media agencies, which were said to be the conduit for 80% (Italy) to 90% (Belgium) of their revenues. These relationships are long-term and deep, with, according to one AVMS respondent, negotiations that happen every year or even every two or three years depending on how the deals are structured. The relationships also exist at various levels. Agency leadership teams have close relationships with the heads of major AVMS providers and channel specialists who work with them, according to one agency respondent, on “structuring, negotiating, buying, putting together the actual media idea that will happen,” as well as perhaps at the planning team.

In the UK and France, AVMS providers and agencies are locked into a share-based trading system, and in Belgium the agencies are also vested in a similar system. As one Belgian agency respondent explained:

“In Belgium also we try to protect the negotiations and the different trading tactics. We try to keep them pretty the same year after years...It is my job also, my role, to make them [brands] conscious about the fact that short-term decisions aren't good, especially not for Belgium, which is a land of long-term commitments, long-term relationship, et cetera, in which commitments on television and online video are very, very important.” Agency respondent

These relationships are changing, however. Two AVMS respondents reported having to do a lot of educating as the relatively young and ‘digital native’ teams within agencies were not aware of the options and evidence behind television advertising. This is being done within their individual relationships with agencies and via collective investment in national-level and transnational associations to promote the medium. It was also reported by another that, more often, budgets are being kept hidden until the last minute rather than dealt out on the long term, as advertisers want more flexibility.

In parallel with their relationships with agencies, AVMS providers all confirmed that they have direct relationships with larger advertisers as well, and this is a complement to their relationships with the agencies rather than a by-passing of them. As one AVMS respondent explained, “it is important to speak with the clients [advertisers] in order to understand what client wants, what are the clients' goals, and then speak with the media agencies after we speak with the clients, and then try with media agencies to create the best plan for the clients.” Deals



for sponsorship, product placement and branded content are sometimes done directly with large advertisers, but even then, the agency is often involved at some stage. According to one agency respondent and one AVMS respondent in different national contexts, this can cause tensions as agencies can feel bypassed when brought in at the end, or, as another AVMS respondent noted, the agencies can be less prepared for discussions on how to implement that kind of project. Personal relationship, involving lots of meetings and collaborative working on solutions still largely define the long-term close relationships AVMS providers have with media agencies and larger advertisers.


3.2. VSP - advertiser

The relationships VSPs have with advertisers and agencies described by our respondents were remarkably similar to those of AVMS providers. Despite the most popular VSPs being global⁸² players, agencies and advertisers reported dealing with them mainly through local offices at the national level, meaning they are operating mostly at the same level as the AVMS providers so far. One VSP respondent gave the example, “DFS, the sofa company is a relatively large advertiser in the UK and you will have a UK account manager that will deal with making sure that they monetise our platform in the best way possible, that they leverage our platform in the best way possible, to achieve their marketing objectives.”

Though VSPs have conversations with major advertisers to assess their needs and talk to them about possible options in the same way AVMS providers do, the agencies are the key intermediaries between major advertisers and VSPs as well. One respondent from a start-up VSP explained:

“We focus on media agencies and the reason we do that is because of the scale. So, we don't have the resources to focus on driving deep relationships with absolutely every big client and therefore see huge rewards from [the fact] that we are able to service agencies [...] to amplify work on one client across the agency and therefore build a case for more and more agencies' clientship spending with us. Alongside that we obviously represent ourselves to clients. We very often have conversations with the clients that we work with but we're

⁸² It should be noted that 'global' as was pointed respondents did not include China as most services are blocked there.




absolutely crystal clear in that it's their agencies that we deal with, that we book with. Because of us needing to drive those economies of scale." VSP respondent

Another VSP respondent from a more established platform reported having teams dedicated to partnerships with agencies, because they are so crucial to the decision making of advertisers, and stressed the importance of personal relationships. Despite the plethora of tools made available to facilitate buying and planning, another VSP respondent rejected the notion that agencies are in decline and being replaced by in-housing saying, "actually far from it. They are still operating most of that equity". He explained:

"I think advertisers are more and more interested to understand in more details the tech that is being used, get more details as to how the media is working, ...how to better optimise their marketing activity by leveraging the data, and... [they] invest time and resource in understanding how that whole eco system works." VSP respondent

This was supported by three of the agency respondents who noted that in-housing of buying in particular was less prevalent because it is hard for them to keep up with the technology and other developments in the rapidly changing market. One advertiser respondent said that in his company the data and insight roles had moved in-house, but that in the current market what was needed was specialist knowledge and agencies, which have themselves moved from being generalists to collections of specialists providing that. The VSPs therefore seem to have a similar way of building relationships with both agencies and advertisers that still places the agency in the position of vital intermediary between those with the budgets to spend and themselves as inventory holders.

For agencies and advertisers, their relationships with platforms were important for ensuring quality placement and brand safety. One agency respondent whose company has its own premium demand side platform explained that deals are made with inventory holders included in this "marketplace" related to criteria such as player format, sound on/off, and associated content. One of the respondents from a global portfolio brand reported "deep direct relationships" with all the "big digital vendors" including VSPs and social media as well as with the AdTech products and DMPs. He explained that this gives them control over the data, and most crucially helps them ensure a high-quality, brand-safe environment, saying:




“Well, we can choose to switch off our investment globally, basically, at the click of a button. We have a significant amount of leverage over the platforms who are, obviously, needing to continually demonstrate its revenue increase to their shareholders. This enables us to drive their product forward.” Advertiser respondent

There does seem to be a difference between the power dynamics in the relationship that agencies and advertisers have with AVMS providers and those that they have with VSPs. Relationships between AVMS providers and advertisers seem rather balanced. As one AVMS respondent described, *“We have to offer them something that is of value and they have to, we know that we will be in negotiation with them at some point in the future. They have leverage, we have leverage...”* However, even the respondent from the big global advertiser who talked about being able to switch off investment, when asked if that meant they were in a position of strength, responded, *“I don't think anybody is in a position of strength against Google...because they are so dominant and very, very smart”* indicating that a number of companies have to be involved in any protest action. A respondent from a smaller digital-only agency explained using an airline industry metaphor how it would be better for them if there was more competition in their supply, but laughingly added *“If this thing gets public, it's going to get me killed,”* and would only use company names after the recording was switched off because his agency was *“completely dependent”* on Google and Facebook. Whereas there may equally be little choice in the relationship between agencies/advertisers and the major AVMS providers in any national context, in that there were only a handful of leading broadcasters that garnered most of the audience, the relationship there was more of mutual need, whereas it seemed even big global advertisers might feel they were not needed by the big digital players.

3.3. Building relationships and confidence


Both VSP and AVMS respondents mentioned the importance of personal relationships among individuals as crucial to building advertiser and agency confidence in their respective channels, and that this involved heavy investments. One VSP respondent remarked *“it takes a lot of work to build trust and that trust is not built between companies it's built between people.”* This person described teams dedicated to working with agencies and advertisers big and small to help them grow their business as being crucial to that. Four AVMS respondents also described



having dedicated teams and, as one put it “a lot of time spent, a lot of resources” spent on client support.

The key difference between VSPs and AVMS providers here is in the amount of resources they have to devote to working with clients on how to best use their inventory and services, and in supporting them once on board. The claim that major VSPs were embedding their own salaried employees in agencies and major advertisers was repeated by AVMS respondents. This was denied outright by one VSP respondent, who explained that support took the form of “a series of conversations that can happen over multiple months to make sure that they understand how the ecosystem is working, that they are happy with their current setup”. However, a possible basis for this perception could be seen in the account of the start of programmatic advertising from another VSP respondent, “at least the first couple years were just on educating, and there were small teams within all agencies that taught about programmatic and how to bring programmatic products to agencies”. The comparison of this account to the account from one AVMS respondent of their roll out of addressable TV, which involved a team of two people going out across the country to meet advertisers and introduce the product, highlights the extreme difference in resources.

Broadcasters seem to be trying to mitigate this imbalance by pooling resources, and while they have been able to some extent to collaborate on educating agencies and brands about the value of television and their new types of inventory, they have been thwarted in attempts to collaborate in other areas because of competition policy. It was reported by one AVMS respondent that a lawyer had to be present in every meeting they had with another AVMS provider when they were collaborating on a piece of audience research. In both the UK and Belgium, competition rules had prohibited TV broadcasters from working together to overhaul the trading mechanisms and introduce more transparency in pricing. One AVMS respondent commented, “Europe will not be happy when we are exchanging our net members...we cannot exchange or we cannot organise more pricing benchmarks, that kind of stuff”. Attempts to establish joint catch-up services in the UK (Project Kangaroo) and in Germany were both mentioned as examples of when collaboration was stopped by competition authorities. According to two respondents in Italy, the strong rivalry among the AVMS providers is an additional barrier to collaboration, especially in building relationships with clients. Collaboration



across borders appears to be more fruitful with AVMS providers working with ones that are more advanced when introducing addressable TV, and the EBX and AdConnect exchange platforms developed through collaborations among AVMS providers from multiple countries.⁸³ Nevertheless, AVMS providers are facing significant challenges in working together to come some way towards matching the resources of the international VSPs.


Two other issues came up in how the respective channels build relationships with both agencies and advertisers. Firstly, measurement was important in the relationships between inventory holders and agencies, not least because they were crucial for the agencies to be able to show advertisers that their plans were working. Although the variety of metrics and tools for measurement are much more extensive and detailed for online advertising of all types than for the inventory on linear TV, they were regarded with some scepticism by some respondents from agencies and advertisers. One agency respondent said,

“you've just got to be very sceptical and vigilant. When it comes-- because Facebook and Google are so big, there's no real choice we have except to trust them. It doesn't mean we do...We use third parties to track where possible so that we don't have to trust them, I'm less trusting when it comes to random third parties that are coming in.” Agency respondent

Another explained that they have their own monitor for tracking viewability that they report to clients, who understand that this differs from what they are paying for, “you put video on Facebook, they will charge you after the first one, two, seconds or whatever it is. But when we tell you how effective that was at reaching people we're not using those same metrics we're going to say 'they've got to have seen at least 50 percent of that’.” Agencies are creating their own systems, using third party monitor as much as possible to assess the parts of their plans that are implemented online, but the industry-wide audited data for linear TV was still trusted.⁸⁴ The role of metrics and the apparent advantage AVMS providers had in terms of metrics

⁸³ The European Broadcaster Exchange (EBX) is a joint venture founded by Mediaset (Italy and Spain), ProSiebenSat.1 Media (Germany), TF1 Group (France) and Channel 4 (United Kingdom) and RTL AdConnect includes all of RTL(Germany) properties as well a number of partner services. Both are aimed at offering brand-safe environments and pan-European online video campaigns to try to maximise the benefits of multinational scale, particularly in the programmatic advertising. <https://ebx.tv/> and <http://rtl-adconnect.com/>

⁸⁴ For further discussion on the various metrics and how they are used in the industry see the section 6 below.




contributing to trusting relationships does seem to be changing however, due to developments in the agency-advertiser relationships that will be discussed further below.

The second issue that arose was transparency, more specifically transparency in exactly what advertising money is being spent on and where it is going. Rebates and volume discounts have been defining features of the advertising industry for a long time. Agencies used the scale of buying on behalf of their stable of clients to negotiate rebates or discounts that could be translated into margins with sales houses in long-term deals. This arbitrage system was not transparent, except in France, but AVMS respondents reported that they always had a general idea of how much was being taken in and the value of the inventory. In the UK and Belgium, institutionalised trading and financial reporting combined with the industry-wide monitoring of ratings and placement has always allowed all parties to have some idea of spending and confirmation that agreements were honoured. One advertiser respondent said of AVMS providers, “when we spend money with them, we are buying legitimate eyeballs as measured by BARB objectively. That can be relatively transparently assessed because there are very few middle men in that transaction between us, the agency and the vendor”. In France, the Sapin Law, which will be discussed in more detail in section nine, ensured the margins of the agencies and prices paid for inventory were transparent since 1993. The evidence from the interviews indicates that the system of rebates and volume discounts has transferred into online advertising, but without the partial transparency that has characterised the relationships between agencies and AVMS providers, combined with the added layers of actors deriving income from programmatic buying.

One VSP respondent reported, “it's not transparent but it's a very known part of the business and that there will be services pitched by agencies to clients and the clients can either agree to it or not agree to it. Now the benefit for a client is that they in theory get cheaper inventory but the benefits of the agency is obviously there's a huge margin. Potentially upwards of 50 percent if not higher.” It was confirmed by multiple agency respondents that the practice of rebates and volume discounts defined their relationships with VSPs and other online media, but all claimed it to be completely or at least partly passed on to the advertiser.

One advertiser respondent was not convinced, claiming that there was a “trust crisis” in the industry because the revenues of the big media agency groups continue to increase significantly,



though advertising budgets have not, and that agencies were giving plans biased in favour of maximising their own profit and therefore digital. He continued:

“Yes, Google and Facebook give kickbacks and rebates, yes they do. Also, within digital media, the value chain is much more complex than in TV or outdoor newspapers because we have huge amount of technology intermediaries, demand side platforms, supply side platforms, data platforms, as well as different models within the media agencies themselves all taking a cut, most of which is not transparent, most of which is not accessible through conventional auditing. Also, cash rebates are, in a lot of, cases significantly higher in digital than they are in traditional media.” Advertiser respondent

“We have viewer eyeballs going to new things, and actually it's viewer eyeballs on Netflix, not YouTube. Facebook and YouTube and a lot of digital media are complementary to TV. But then the positional stance of the big global players is to try and tap into big global TV budgets. They have leverage to do that. I think that transparency and truth are being ignored, but I believe that's a short-term thing.”


- AVMS respondent

This was somewhat confirmed in a comment from one agency respondent who argued, “If you squeeze our remuneration like we are doing pitches with no fees or fees close to zero then, of course, many of our choices are logically directed to the best option for us at basic economic level.”

There is potential for agencies to be making high margins off of programmatic advertising in particular, which, according to one agency respondent is no longer on a fixed percentage

basis but is now also based on volume and the gap between what they can negotiate and what the clients can do for themselves. Another agency respondent also explained the practice of garnering high margins on the digital parts of media plans, identifying the root cause as the erosion of agency commissions, “everyone became competitive on price...and it became this ever-decreasing circle where you're basically doing it almost for nothing. I suppose agencies were like we've got to find other ways to make money and those perhaps...haven't necessarily been the most regulated practices”.

Two AVMS respondents expressed frustration about the opaqueness of the deals between agencies and online players, citing it as unfair because it may bias media plans and because they are so heavily audited themselves. The interview data indicates that the lack of transparency in



the buying of online inventory may be poisoning relationships among all the actors. Nevertheless, one VSP respondent was optimistic:

“it's generating good conversations between trade associations, initiatives that go into the direction of clarifying how this thing is working, trying to improve, you know, working groups around transparency and so on, which I think is good. It is not a simple thing, it's not like there is one bad guy and everybody else is nice.” VSP respondent

Agencies remain at the centre of the relationships that both VSPs and AVMS providers have with brands, but particularly for VSPs there are often many other intermediaries as well. Both maintain direct relationships with major advertisers, though the resources that the global VSPs can devote to this overwhelmingly outpace those of the AVMS providers. Where AVMS providers do have some advantage is in the trust that agencies and advertisers have in them as a channel because there is perceived to be more transparency in relation to the money going to intermediaries and in the metrics.

04

ADVERTISING “PRODUCTS” AS INTERCHANGEABLE

4. Advertising “products” as interchangeable

People from agencies and brands do not see TV and online video advertising products as interchangeable, but instead as parts of a mix in which each ‘channel’ is used for meeting the specific objectives to which it is most suited.

4.1. AVMS

There was a clear message from across a range of interviewees that there is no substitute for TV and will not be in the foreseeable future. Television was described as particularly “impactful” in Belgium, where the environment was described as conservative and highly localised. In Italy, multiple respondents noted that just “being on TV” is still very important for advertisers as a sign of status for their brands, and in France, it was pointed out that the population still overwhelmingly spends evenings in front of the TV.

Multiple agency respondents said that the TV part of a campaign comes first and is the piece around which other parts of the mix are built. One explained, “To build the reputation of the brand amongst the wider public you need a big advertising broadcast channel at some point to launch that brand. Behind this notoriety and the brand’s image, you can exploit this momentum in a granular way with digital.” TV is seen as having the capacity to enable wide distribution and has that ‘talked about’ character despite shifts in audience attention:

“Even though we are seeing more and more people moving to video-on-demand or streaming over-the-top services or whatever, TV is still that channel you can do that, you can reach a lot of people very efficiently. That’s why at Christmas everyone is all about the TV ad. Everything else should kind of sit around that, so you make it bigger than TV, but that becomes front of the centre still.” Agency respondent

Heavy-investment, long-term options such as sponsorship, product placement and branded content are also valued for their ability to build brands and have long-term influence. Rules on product placement, discussed further in section 9.2 below were relaxed at the EU level in 2007 when a list of exceptions to the overall ban was introduced, and in some countries, such as Italy, there is a lot of leeway for branded content that sits outside of the quantitative limits on spot advertisements. These long-form options may make up a small percentage of annual budgets

according to one industry observer, but have an important role to play, especially in meeting long-term goals. One advertiser respondent explained “we’re buying a certain sponsorship around a certain TV program because there’s a very unique fit between the target audience of the TV program and a brand. It gives us a huge affinity with that audience.” The success of the reality show Love Island on the UK’s ITV was given as an example of this by two others because it uniquely reached the younger audiences that are known to be less consistent TV viewers and the sponsorship by pharmacy chain Superdrug included product placement of its sunscreen brand and other items. One

agency respondent said, “product placement, it has become a very, very important way of advertising because it’s, most of the time, a way of advertising which is exclusive from the clutter, from the day to day classical advertising”, describing it as outside the box and more natural. According to one advertiser respondent, they do product placement and sponsorship for its natural character, “it has value when it’s done in what I call, a true and authentic way to what the brand is.” Both advertisers and AVMS providers confirmed that a limitation of sponsorship and product placement is that the effect of these forms is difficult to measure, especially when they are combined with events or other below the line activities.

Another aspect of television that was described by respondents as having unique value was the quality of the viewing experience, which was considered high quality and safe. One agency respondent proclaimed, “The value of that screen, TV screen versus the value of something I watch on my mobile screen scrolling through, the rate of knots very different... and 100% brand safe.” The fact that TV is regulated seems to contribute to the perception of it as a high quality, safe environment for brands. One advertiser respondent explained that even though there may be violent content on TV and in the news, they know that it has been rated appropriately and that it is supervised by the regulator. Another advertiser respondent noted specific rules: “very

TV inventory includes:

- Traditional TV spots (pre-roll, roll, first in slot, etc.) on linear and VoD
- Sponsorship
- Product placement
- Branded content (native)
- Teleshopping
- Telepromotion/infomercials – extended explanations of new products or services
- Addressable advertising
- Interactive overlays leading to microsites
- Pause button ads – display ads that pop up when the pause button is hit in VoD context
- Content matching – placement of spots based on AI determined matches with programme content


strict watershed on TV or the limitation of advertising minutes each to 8 or 12 minutes an hour, for example, on TV. These are very important elements that ensure the maintenance of, generally speaking, high quality advertising environment." The audience's relationship with TV was also considered by one respondent who noted "there's an expectation of the fact that you're going to get served with a few ads. I think there's an understanding as well from the broadcaster that they're going to try not to be too irritating." TV is considered the most high-quality environment because the user experiences it on a large screen, in comfort and because the regulatory context ensures it is safe for brands and conforms to audience expectations.

Addressable TV

- It is still in its infancy in Belgium, Italy and France, and lead by Sky in the UK
- AVMS providers reported it allows them to reach out to more small budget advertisers, often new to TV
- Agency respondents reported it enables them to better the frequency with which people are served ads
- The dynamics between AVMS providers and telecoms operators, especially over data, differed greatly across the cases.

4.2. VSPs

The main benefits of online video advertising are the precision of targeting and possibilities for measurement, and it therefore serves a very different function than TV. As one advertiser respondent exclaimed, "you know if people are housewives with kids because you have the data to tell who they are." Advertisers can use a variety of data points on characteristics and behaviour to target people who they think are likely to then visit an advertiser's site, make a purchase or walk into their store. "I'm going to be able to behave according to your behaviour, to send you a message that will be more interesting to you," explained an agency respondent. According to agency and advertiser respondents, this ability to match the interests of a particular individual and follow them through to their next online move offers opportunities for engagement that broadcast media do not. For example, one agency respondent remarked, "it means we can be more creative, we can be more engaging, we can find more immersive ways of connecting with people that we couldn't do in a broadcast talking to people way."



When talking about the value of online video advertising agency respondents also mentioned that it is particularly useful for smaller campaigns that may be local, or just trying something out


Agency views of YouTube

- Seen by some as “channel network” more than a sharing platform
- Not so “unregulated” because it has its own rules about quantity, skippability and sequence.
- Its 6 second unskippable spot set a new norm for online video ads
- Limited because it does not offer the ability to buy against specific channels on its service

because, as one put it, “with digital you can pick as small as you want and then, grow it.” It was also mentioned that advertisement that is not appropriate for TV can be put on VSPs. One agency respondent gave the example of an ad that was considered too scary for TV and was instead shown on YouTube and before adult rated films in cinemas. The 6 second non-skippable format was pointed out as being particularly useful and seemed to be generating its own creative norm with one agency respondent commenting, “They’ve become very popular. We recommend them quite often for our clients actually, because they feel more like a digital

format.” The format of online video is varied, and according to interviewees required different creative work and entailed different expectations.

One of the frequently mentioned down sides of online video advertising stems from the variety of ways it can be presented. It was acknowledged that the ads viewed online are often on small screens, while scrolling and often skippable. Some interviewees spoke of the amount of effort required to manage the environment and the viewer experience, with brand safety being a key concern, with one agency respondent referring to the online environment as “the Wild West”. Despite the challenges agency and advertiser respondents seemed to see online advertising as a necessary part of their media plans. “Ultimately, it’s not a matter, do you like it, do you not like it. This is where the eyeballs are,” explained one agency respondent. Online video was described as filling in the gap that has been left with audiences, particularly younger audiences moving away from linear TV. For example, one agency respondent said, “with the TV reach is decreasing year-on-year, we see how most of our clients have integrated their audiovisual strategy combining TV and online video with the aim of, for example, gaining new incremental reach points on the target.” Another reported that his agency no longer has a separate TV strategy:



"We really evolved from TV strategy to a video strategy, so it's not only television and online video, but it's a multiple screen strategy on which we-- Most of the time of course, we have our TV layer, but we have our mobile layer and then we have our desktop layer, laptop layers, tablet layers et cetera, in order to optimise the reach and most of the time to avoid the loss in reach of television. We're better now with the combination of both than 10 years ago where online video activities were very low and there was only television. We have now a higher reach thanks to the combination of both media, so we're very glad of course."

Agency respondent

Online video advertising is considered an important part of the media mix in any major campaign, doing a different job than TV advertising through its targeting capacity, usually as a complement to the flagship TV element, and also reaching the audiences that are no longer watching much TV. At the same time, it offers a low-level, targeted option for smaller campaigns that do not need to reach a mass audience or are precursors to larger investments.

Influencers

Influencer advertising is separate to both TV and VSP or other online video advertising and is often handled by brands through specialist agencies via their public relations departments as opposed to their marketing departments. Most agency and advertiser respondents said they see it as distinctly different from product placement, and as one agency respondent said in terms of strategy, "it wouldn't be one versus the other because they are totally not the same thing". For respondents who dealt with them directly, influencers were seen as useful because they can be "authentic" and speak directly about the brand or product with more detail than can be communicated in advertising spots. There are great variations in the extent of disclosure and it seems the field is still developing the delicate balance between enough transparency and not so much that it becomes "mercantile".

However, influencer marketing was also described as "a bit of a minefield" by one advertiser respondent. Both agency and advertiser respondents reported that a lot of effort had to be invested in ensuring they were vetted extensively and the right people were used. One agency respondent explained the charm and risk of influencer marketing "when we work with them we need to be comfortable to relinquish a significant amount of control in the content and the story that happens around our brand, because they know best how to tell their story...But it means that we don't end up with a cookie cutter idea and with 10 influencers who all produce very similar content". According to another agency respondent, the way agencies try to mitigate the risk of influencers producing bad content is to work regularly with the same ones whose style they approve of, though even then they still sometimes get "surprises".

05

CONSIDERATIONS IN ADVERTISER BUDGET DISTRIBUTION

5. Considerations in advertiser budget distribution


Advertisers and the agencies representing them plan advertising budgets based on the objectives, the type of product or service, a variety of metrics, price and sometimes concerns about or affinities to particular channels, and these decisions are made in a context increasingly shaped by internationalisation and attention to performance.

As was discussed above, media agencies are still crucial in the distribution of advertiser budgets. Though the final decisions rest with the advertiser, these decisions are on the approval or not of strategies developed inside agencies. In the accounts given by agency respondents, five factors were identified that contribute to how they devise the plans that are presented to advertisers' marketing departments for approval.

5.1. Decision factors

The most important consideration is the **objective(s)** of the client. The overall objectives mentioned in the interviews can be loosely grouped into brand awareness, boosting sales, changing attitude, or distinguishing from the competition, but they can be subtler or combinations of these. The elaboration of objectives, which takes the form of a brief to the agency, includes identification of the target audience(s) and any creative assets that the advertiser already has that might be put towards meeting the objective. Understanding this objective and how best to meet it on the side of the agencies then involves extensive research involving client data, data from media owners, and data from various 3rd party data providers. One agency respondent explained, "we can start analysing the competition, analysing the target and the target media fruition, and select the media mix that better suits to the brief, giving a specific role to each selected media". For another respondent, understanding the intended audience was the point of departure for planning how to meet the advertiser's objective, and another explained their response to the brief was to do research about the client's challenge, such as on past campaigns in that industry or with that problem (e.g. switch in attitude), then build an idea of who audiences are and develop strategy for reaching them.

The objectives are shaped considerably by the **type of product or service** that needs to be sold. Fast moving consumer goods that everyone needs, such as personal hygiene or cleaning




products, will aim for mass audiences, perhaps targeting based on gender or family status. Specific fast-moving goods such as pet foods, or baby formula will have narrower intended audiences. One advertiser respondent, whose portfolio included a broad range of fast-moving consumer goods explained that channel choices will be influenced by who they need to reach for a specific product:

“most of the time we use TV to generate mass coverage and reach, whereas for let's say radio we might be looking at the more targeted communications within specific demographics or cities versus Facebook, which we can use to be hyper-targeted and much more personalised in terms of how we can communicate to very distinct behavioural demographics. Each of the media broadly has a specific role that we play in the campaign and also at different stages of the campaign as from building mass awareness and reach down to micro-targeting.” Advertiser respondent

Slow moving large goods such as automobiles may aim for brand awareness and reputation building, which can include reaching audiences that are not likely to actually be buying the product, whereas luxury goods such as perfumes and high-end watches may have quite narrow target audiences and want status enhancing placement, and thus prioritise frequency in certain channels over reach.

Metrics and **price** are two other factors that shape decisions and they seem to go hand in hand. An array of different metrics is used that are discussed further in the section on metrics below. Potential reach and frequency remain crucial, but various types of behavioural data that might indicate forms of consumer follow through are also factored in. Larger agency respondents reported using econometric modelling. They compile large amounts of data on consumer behaviour and past performance of various campaigns and media. The metrics are put together to establish cost per impression or cost per impact, which guides the more specific plans to maximum efficiency in reaching the desired audience. One advertiser respondent answered the question of how budgets were divided:

“If you're asking about why do we select TV, or ITV 1 versus a billboard on JCDecaux on Bond Street, this is typically done using rich data sets that agencies provide to us or do on our behalf and they will be weighing up considerations about coverage and reach, cost per impact, and the quality of impact that each of these touch points would deliver in our media



plans. These each have different types of costs associated with them and they differ within country and even within media channels drastically, but also differ a lot between countries."


Advertiser respondent

Finally, agency teams devising strategies and detailed media plans consider their **client's attitude** towards various media, including concerns over brand safety. In Belgium a kind of local loyalty was reported in that advertisers want to support local media. A platform has been launched for the buying of online advertising inventory in "quality" Belgian media after advertisers and agencies had apparently reported that a disproportionate amount of their budgets was going to Google and Facebook because the process was so easy. In Italy, according to two agency respondents, advertisers often want to be seen on TV, regardless of whether or not it is the best strategy for their brand. One agency respondent who works with a number of small and medium clients said that rarely asked for metrics and measurement data, and that even his small clients serving only a particular area still wanted to have ads on TV. Brand safety was a commonly mentioned concern that agencies had to take into account and it was expressed as a concern by the advertisers interviewed. The level of tolerance for risk or "benchmark" for brand safety was said to differ, as one agency respondent explained, "The whole point of YouTube is that its content you can't get on TV. The issue here is that because it's such different content, a lot of people don't feel as secure about running on it". Agencies invest a lot in trying to ensure brand-safe placement using "white lists", curated banks of suppliers, or other means, and engage in extensive monitoring.

"We put a brief out to the market to come back with some interesting ideas on how we can deliver this. And they have the strongest idea and then we probably would shortlist and show two or three to the client and they might not all be TV. There might be other bits and pieces as well."

- Agency respondent

As was demonstrated above, AVMS inventory and VSP inventory are not perceived as interchangeable, but instead as having very different functions appropriate for meeting different objectives. Agency respondents described the decision-making around the development of media strategies and the distribution of budgets among channels as if it was solving a puzzle or concocting a recipe in which the balance needs to be just right. As one agency respondent commented, "We know which are the positive and negative factors and arguments for media, but it's not that



we're-- We are not having a battle between offline and online." It is important to note that the AVMS and VSP options are part of a mix that also includes, print, online display and search, as well as outdoor and below the line activities. Agencies are using vast amounts of data from multiple sources and specialist knowledge about the benefits, risks and nature of the various options to try to devise plans that efficiently achieve their clients' objectives, and possibly, as was claimed by some above, to ensure their own margins.

5.2. Decision-making context


The decision-making regarding specific campaign budgets is taking place within the evolving context of the relationship between agencies and advertisers in which two trends seem to be having an impact. The interview data indicates a growing trend towards internationalisation that is coupled with an increasing focus on short-term performance driven by elevated roles for procurement and finance within the advertisers. The experience of one agency respondent illustrates this:

"I had, in January, a very important advertiser where the decision was made that marketing director wouldn't exist anymore in [country] and was replaced by a trader on a cluster level for different countries. We had a conference call with these people and they just have one way of thinking. It's okay I have been appointed now for one-year mission in order to get the best profits for these brands, and I don't give a damn about how we will create this..."

Agency respondent

This same respondent reported that since he had started in his position he had seen the percentages of clients making decisions on a local level shrink to 20-30%. One industry observer provided one reason for these trends, "At the macro level, there is a clash between the CMO and the CFO. Marketing spend is increasingly seen as discretionary expenditure that can be easily cut and of little strategic importance. Marketing directors or CMOs increasingly do not have direct budget control, but it is procurement directors". This was largely corroborated by the statements from one advertiser respondent, whose role was in procurement:

"so my function on an annual basis is to review on a broader level how to allocate budget most efficiently across different channels and vendors so that we can maximise our discounts and our cost efficiencies...then on a marketing campaign by campaign basis where more



granular decisions are made by the agency and the marketing teams." Advertiser respondent

The focus on efficiency and financial KPIs has meant that agencies and inventory holders have had to adjust their pitches and plans to be, as one respondent described, less about "the value of the quality or the context...and more about the net cost and the discounts and optimisation and that kind of metrics." Consultancy firms, such as Deloitte and Ernst & Young, that had previously had their place in the financial and audit side of the businesses, are getting increasingly involved in marketing and, as one industry observer noted, they come from a very different culture than those in marketing.

Another aspect of the trend towards internationalisation seems to be the fact that advertisers are dealing with inventory holders that operate globally. As was demonstrated above, most of the relationships are still maintained on a local level between country offices; however, these may operate within the context of deals made with some inventory holders at a global level. As one advertiser respondent explained:

"So, with the likes of Facebook, obviously, YouTube, Google, Twitter, Snapchat, etc., yes, they are global partnerships and they are the same products effectively, everywhere around the world. So yes, you're making some global decisions but the majority of the time it's global principles and best practices in the way that you work with these people but most of the decisions when it comes to the implementation of the advertising is done at a local level."

Advertiser respondent

Our interviews reflected similar considerations in decision-making as were mentioned in the literature reviewed in section 2.1 above. The accounts emphasised the point evident in the previous section that the advertising options offered by AVMS providers and VSPs serve specific purposes in each media plan. Decisions about the mix of channels used and how much is spent on each are made based on a number of factors and the analysis of large amounts of data. If the trend toward internationalisation of decision-making, including increasing involvement of centralised procurement divisions and consulting firms continues, these decisions may increasingly favour the VSPs as their options lend themselves better to measurable performance indicators.

06

THE VALUE OF METRICS AND DATA

6. The value of metrics and data

The market for video advertising is absolutely dependent on metrics, which now involve a vast array of data points from a variety of sources, but there is a deficit in standardisation and ownership of the data has become an important issue.


6.1. Metrics for planning and reporting

Reach and frequency remain the most important metrics for planning and assessing advertising campaigns, with reach seemingly the most important. As one agency respondent answered, “the most important metrics is a reach because a client always reasons and defines the success of a campaign in how many people, how much audience they have been able to reach through their campaign.” Reach and frequency for linear TV in all four cases are measured by independent bodies formed by the industry and using standardised systems. Though one agency respondent expressed some concern about the quality of the panel used in his national context, these metrics are universally trusted and valued by those of our respondents who dealt with them. The measurement for AVOD was less clear. Efforts are underway in the UK and Belgium to establish reliable, audited measurement of AVOD audiences, but these are still in development. Addressable TV provides detailed and reliable data on viewing, however as such services are not yet widespread and are being implemented only by one or two AVMS providers in each case, there are not yet audited metrics available.

“Data enables us to be more accountable for what we do in terms of measurement for example, but it also means we can be more targeted with how we deliver our advertising.”

- Agency respondent

In online advertising the metrics used are immensely varied, and as was discussed in section 3.3, there is a heavy dose of suspicion about many of them. One agency respondent described, “Typically, there's a funnel. It's going to be the usual stuff of impressions, clicks, visits, re-visits and then, conversions. Then, recurring business, lifetime value created. I think this is pretty standard. Different advertisers have more or less sophisticated ones.” There is therefore a large amount of data gathered on the response of the viewer, which contribute to these. Qualitative metrics on the ad, such as those measuring viewability, are also important. One of the most important metrics for online advertising is return on investment




(ROI) which as one agency respondent said, “looks at people who, in theory, have been served an ad and then gone to the website to purchase,” but added that this is fraught with the problem of attribution because “off the shelf” measurement systems tend to attribute the last thing clicked on, while the actual picture of what influenced the individual may be much more complex. Another agency respondent described “attribution modelling,” which takes into account all the types of ads online (e.g. social, fixed display, video) that the individual encountered and model what contributed to the sale. Nevertheless, this does not include the offline contributions.

According to the majority of the agency respondents, econometric modelling is the important step where all the metrics come together. Although one agency respondent commented it is probably better used as a “directional tool rather than an absolute tool”, the evidence of its value to the agencies was clear in the interviews. Four agency respondents claimed that they are able to combine the reach and other metrics from each channel along with a variety of business metrics, including intermediate ones such as websites visited, or test drives booked, which one industry observer noted were of growing importance to the industry. One agency respondent explained:

“what we're looking at is we've been able to track the effectiveness of every one of those media partners in its ability to deliver a sale at the end of the day, we're attribute a cost per action against all of those. And then we will make adjustments and we will re-plan based on historic performance.” Agency respondent

This is how agencies compare the reach achieved on television, the reach on YouTube, but also according to one agency respondent, “the reach that the one platform contributes to another one.” Being able to effectively compare metrics from TV and from VSPs was a challenge that came up in many of the interviews. There were clear calls from agency and broadcaster respondents for a “common video currency” across TV and online that would include criteria for an impression such as viewability, length of view, and skipping. It was apparent in the accounts that this is not an international, industry-wide discussion, but instead being dealt with by negotiations among stakeholders in each national context. In Belgium, two respondents reported slow moving or even stalled cooperation from the side of the VSP, in Germany the



discussions were said to be more advanced, with one VSP respondent voicing enthusiastic optimism that a solution would be launched there in early 2019.


6.2. Data used for targeting

A vast array and amount of data is used for the purposes of targeting campaigns, both offline and online. It features heavily in the phase of identifying and understanding the target audience mentioned in section 5 above. Four agency respondents described using data from their clients, such as purchase history and loyalty programmes, data from across previous campaigns, and data from a range of third-party suppliers of consumer data. As one agency respondent described:

“It's about a mix of stuff, everything from the clients, the clients campaign data to, we use third-party data sources like people Axiom, Master Card data or hundreds of different types of data sources...back in the day it was TGI survey data - a massive chunky survey that everyone filled out, which still happens and don't get me wrong there's still a role for TGI, but it is more about that fast moving data, we used to call it slow moving data was like the TGI surveys, BARB database” Agency respondent

Target Group Index (TGI) surveys of large samples of the population are able to give information about groups in society for the purposes of understanding the general habits, behaviours, affinities, etc. of target groups. The word “granular” was frequently used by respondents to describe the extreme level of detail that more modern data providers can supply. One agency respondent described how Oath (AOL and Yahoo) is able to provide information on cinemagoers because it can track the receipts people receive when buying tickets online, including what they see, how often and when. This respondent and another agency respondent did express a bit of discomfort with some of the third-party data on offer. The other pointed out that there is a presumption that the legality of the data rests with the supplier, but that even if data is legal, sometimes he presents the option to the client with reserve, pointing out that the individuals may not be aware they are being targeted with that level of granularity.

Advertisers’ own data on their customers is much less controversial and is used not only to re-target existing or previous customers, but also to identify potential new ones. One agency respondent explained that they use the data on existing customers to create a “twin” profile




that represents the people who are not already customers that they will then target. Agencies are able to use data from across the campaigns that they have run previously to understand more about that target audience and also about what media channels work best with them. This was described as very valuable by both agency and advertiser respondents. “It could be customer data, it could be cookie data, ad servers, it could be web analytics data, and those kinds of things,” explained one advertiser respondent adding that this is why they are entering into contracts with a number of the ad tech companies directly because then they own the data produced by the campaigns rather than the agencies. We confirmed with one of the major ad tech providers that the agency or advertiser with whom they have a contract is the owner of the data even when it is generated by their platform.

6.3. Data behind walls

From the evidence in the interview data it is clear that data ownership, and the ability to collect and analyse are crucial to the business of video advertising and sources of power. At the centre of this are the major global platforms, with Google and Facebook being most often mentioned, but also including Oath and Amazon. The term “walled garden” was used by eight respondents from across the categories to describe the situation that exists when data is kept within a certain environment and that environment includes multiple parts of the ecosystem. The most frequently mentioned was Google, not so much as a VSP (YouTube), but because of its DSP and analytics tools. As one AVMS respondent commented:

“Google is a whole beast and it’s all because they have the machine to buy and to sell, so it’s a full stock. Basically, they manage the advertisements, uploading its investment in their machine, which decides where the money is going or which publisher and one of the publisher is them. Then they track everything, they measure everything” AVMS respondent

Statements about Google owning most of the sources of data both for targeting and for measurement metrics were made by three agency respondents as well. One agency respondent pointed out that clients usually have the web analytics necessary in the targeting phase on a Google platform, which binds them into using that platform for activating the campaign. For another, the issue was the veracity of the attribution models in such systems, “I think there is always a risk that if you had a significant amount of Google products in your ad plan and then



you are using a Google product to measure that.” Google was not alone though, in being the object of frustration. Facebook was considered worse by some agency respondents because it sets a viewability standard they consider inadequate, so they must explain to clients why their KPI data from a third party differs from that which Facebook uses to charge them. One agency respondent highlighted the issue of data ownership saying:

“It's well known that you don't get the same amount of data as Google and Facebook will get. For instance, you get, at best, impressions in aggregate from Facebook and then when Facebook-- I think this example is probably true. When Facebook track, they track in a way that's very favourable to them.” Agency respondent

However, he added that one does not have to use Facebook's measurement, but instead the aggregate data can be used in other ways using other tools to measure.


Amazon is coming

Nine of our respondents across the categories mentioned the steps Amazon is making to enter this market. It is expected by all to have a large impact because it has access to so much purchase data and its personal assistant, Alexa, is seen by some to have the potential to rival Google.

VSP respondents confirmed that the only way to buy their inventory is through their platforms, and that, though some third-party tracking may be allowed, their data cannot be taken out of their environments. Most VSP respondents expressed feelings of responsibility regarding data and some suspicion of others in the ad-tech business. One VSP respondent explained:

“in terms of what we do as a platform we make it very explicit to advertisers that they are not allowed to take any of our information off platform, in all our contracts. It has to stay within the [anonymised] ecosystems, so we are not allowing you to profile our users... we feel quite strongly that we have good control of our data. Because we make it explicitly clear in an ecosystem driven by data that we don't allow that side of the industry to exist on our platform and then in terms of user data, we obviously comply in terms GDPR.”

Another explained that their platform allows a small number of vetted third-party measurement vendors unique access to their data, such as impressions and viewability, for use in modelling, and only a handful the ability to do pixel measurement, which can track actions at the level of the IP address.



Two AVMS respondents complained that they do not have access to the data that is generated around their own content on YouTube or Facebook. Though, as was mentioned above, the agencies and advertisers using DSP may own the data generated by their campaigns, there seems to be at least the perception that publishers do not have equivalent access. The AVMS providers represented in our sample are keenly aware of the need to generate their own databases, and two stated clearly that they intended to adopt the same walled garden policy for the data gathered through their addressable TV services. Two AVMS respondents indicated that they felt up against the power of Google and Facebook to gather data from their vast user bases. Speaking about data another AVMS respondent remarked, “if we are not able to fight with the same weapon, we will lose the war.”

For the agency respondents, the proliferation of walled gardens was not helpful because it makes it hard to compare across channels and media. The challenge was most clearly articulated by one agency respondent who said:

“The challenge for us, I mean, I’ve got my video here, but the challenge is the walled gardens that people operate within. Facebook, even the broadcasters, ITV hub, All4, Sky that all in their separate walled gardens you can see what you’re doing within that, but you can’t see how it joins to the next bit.” Agency respondent

Access to data may face another challenge in the future. Two VSP respondents pointed out the fact that Apple has changed the defaults for its Safari browser to no longer allow third party cookies and that Firefox as announced intentions to follow suit. Cookies are vital for the gathering of the data for both targeting and performance metrics. This is the context of the debates around the new ePrivacy Regulation that we discuss in section 9.6 below.



Consequences of GDPR

The EU General Data Protection Rules came into effect on 25 May 2018. The rules, which are explained in section 9.6, apply to everyone, including companies from outside of the EU. Our respondents most often spontaneously mentioned the GDPR and elaborated various consequences it has had on their work or in the industry. Some of the AVMS respondents described the significant burden that ensuring compliance entailed in terms of human and financial resources and the bottleneck on some of their inventory that occurred as they had to renew consent. One even recounted that they had thought they were compliant but found that the programmatic system involves data passing through so many intermediaries they had to re-do consent again.

Some agency respondents acknowledged the burden on AVMS providers and publishers but appreciated that the process meant the data was fresher and up to date. Advertisers said all the data upon which they based their campaigns had to be redone, and one remarked that it was restricting the third party and even second party data they could get, but they claimed overall it was a good thing. One VSP respondent recounted that they had initially stopped all third-party pixel measurement but had since entered into agreements with a strictly vetted handful of companies to allow them. One commented, “it [their database] may have ended up being smaller, but there’s a lot of argument for the quality we’re left with that is better than where we started.” Advertiser, agency and VSP respondents all had noticed a loss of some players, mainly third-party data suppliers, but this was perceived by the majority as a good thing. One VSP respondent said certainly all the big players were still active and another said he had hoped it would do more to get rid of the “nonsense in the industry”. One agency respondent commented that those now missing are ones that served unviewable impressions anyway. Five respondents from across the categories argue that the GDPR had increased the dominance of the US giants, mainly Google, who had cut off a number of SSPs, thereby pushing more inventory holders on their own platform.

07

THE ROLE OF PROGRAMMATIC


7. The role of programmatic

As we discussed in section 2.4 above, programmatic advertising is most often thought of only as the real-time open auction buying of online advertising space. However, it actually covers a variety of automated systems that offer the possibility to buy across a large number of inventory holders. The comments from our respondents provide clear evidence of its growing importance in the industry. One VSP respondent called it the new norm, however its use seems to be varied across our four cases. In Italy, for example, one agency respondent said, “we planned last year around eight million of web campaign, but I would say 500, 600K in programmatic. Strange situation, right?” In both Italy and France, respondents stated that while agencies are pushing for more use of programmatic, the clients (advertisers) were more suspicious. A Belgian agency respondent said that they still have a lot of direct deals, but that programmatic is growing in importance in their online area, adding that while it may be possible for addressable TV, there is no demand for it in that area.

The interview data also showed clearly that programmatic advertising is very complex. One agency respondent remarked that they need a whole programmatic team, explaining that there is “lots of trouble shooting, especially when testing new products,” and, “a lot of experience that goes into buying effectively.” This was corroborated by another agency respondent who warned that if you do not really know what you are doing, you can end up unwittingly buying low quality placements, for example with sound off or small sized displays. Another agency respondent said part of the complexity comes from the fact that there are so many players involved, not just the intermediaries, but also the various tech providers and media owners. The account of one respondent with experience in one of the programmatic systems illustrated this as he described that his system worked directly with some inventory holders, but mainly with a large number of exchanges through which groups of publishers offered their inventory and also with “literally hundreds and hundreds of partnerships with companies that track, deliver creative, report on the creative on behalf of the advertiser.” Despite the complexity, based on the interviews the benefits make it work it.

“It's divided into tons of different bits and pieces and each layer of technology is connected with literally hundreds of third parties”

- VSP respondent




Efficiency was mentioned or described as a benefit of programmatic advertising by five of our respondents from across the types. One aspect of this was that the sheer numbers in the various online inventory options would not be manageable otherwise. One VSP respondent pointed out that there are billions of ads served all the time through programmatic means. An agency respondent's account was illustrative:

"Media planners could not call 100 different sites to negotiate advertising with them. So everyone was working on the same 20 top sites in the market that were capturing most of the advertising resources that were engorged with advertising and there was 95% of the Internet audience that was not affected by advertising...The first benefit is what it has allowed us to industrialise, that is to say, to extend our coverage to a large number of sites that have their audiences." Agency respondent

Another aspect of the efficiency mentioned was a cost savings in terms of getting reach or achieving other KPIs that made the investment in programmatic expertise worthwhile. As one agency respondent remarked, "If they're managing a quarter of your budget, which is maybe £1m or something, then paying them a few grand a month isn't going to be that much of a loss, if you could see them getting an extra 10% out of your budget." This makes it an attractive option for agencies whose clients seem to be under increasing pressure to reduce costs while achieving significant ROIs.

Programmatic advertising plays a crucial role where specific targeting and/or short-term ROIs are required in a campaign. Targeting in this context is not just about reaching people fulfilling certain characteristics, but also reaching certain people with certain messages. It can mean paying more to show a different message to someone who is a returning customer or who has searched for something before than for others. It also allows ad sequencing. One VSP respondent gave the example of an advertiser wanting to reach a target group 8 times, but rather than showing the same ad 8 times, each person can be shown 8 different ads in sequence that tell a story, and which ads follow may even change depending on how the individual reacted to the previous ones. The targeting and subsequent data gathered about each individual (anonymised) gives those placing the ad feedback that they can use to adapt a campaign as it is ongoing and modify it to suit particular parts of their target. As one agency respondent explained:




"You can see everything, so you can follow that customer, see exactly where they've been, what they've done, how they've interacted with your brand, what they viewed, what they've engaged with. Phenomenal, brilliant insight. You can look at response. You can see if those ads drive the response, is that creative work better or is that one? Or is that audience better than that one? Is that delivering a stronger? We can optimise. The opportunity for optimisation in the programmatic world brilliant." Agency respondent

Nevertheless, there were serious concerns voiced by our respondents about the programmatic advertising system. One concern is for the amount of money that is taken by the numerous intermediaries and the lack of transparency around that, which was discussed in section 3.3 above. The other main concern is for brand safety. One VSP respondent argued that, "when you're buying it via algorithm models then you don't know where it goes really. You can audit it as much as you possibly want but you can't actually tell what it is that you're going against." However, there seemed to be a feeling shared by most agencies and advertisers that things were improving in terms of brand safety, that tools have been created to help them better ensure ads are placed appropriately.

"It's not on the roadmap for television, but it will be as soon as we go to one video currency."

- AVMS respondent

According to our respondents, some addressable TV inventory is available programmatically in the UK and in France. However, in the UK, the AVMS provider involved is also the telecommunications provider, so is doing it on its own network. In France, the question of who owns the data needed to feed into such a system was resolved by statute in favour of the AVMS providers. It was also reported that AVMS providers in Europe are getting involved in programmatic advertising by buying companies operating in that space E.g. RTL bought SpotX and Clipped. Nevertheless, three of our AVMS respondents said that it was a long way off for them and would first require much more addressability and automation, as well as agreement on a standard metric for video. They were also aware of the risk mentioned by one industry observer that opening up TV inventory to programmatic systems would give Google, and other big platforms invested in programmatic systems access. One AVMS provider whose company already had addressable TV stated they have no intentions soon to open up to third parties and another whose company recently launched addressable TV said "We're



certainly not eyeing it [programmatic] now, or Google buying on our TV channels through programmatic with their platforms. We know that this is where the market is going. We'll be looking at a way to create a closed ecosystem"

Though it may not be on the cards for TV very soon, the evidence indicates that programmatic advertising will be an increasing part of the story. Although several respondents confirmed there are still a number of people involved in the system, particularly in the planning side, it was also mentioned that the future will see the introduction of ever more AI into the system, for which agencies and other actors should prepare.

08

CONTRACTS AND PRICING

8. Contracts and pricing

Prices and contract conditions are subject to negotiations, except for where price is determined by real-time auction or bidding, with little transparency.


In this investigation, we attempted to find out how AVMS providers and VSPs set their prices and what kind of contract conditions define the relationships in the ecosystem. However, none of the interviewees or others who we contacted were able to provide sample contracts or templates, nor go into details about prices. Only a few of those interviewed could discuss some of the things they would look for in a contract. Therefore, in this section we augment the interview data with evidence from the literature.

Agencies will usually have contracts with AVMS providers that involve discounts or rebates based on the scale and duration of their bulk buy, often conducted in the context of relatively institutionalised trading systems. One of our respondents illustrated the conversation that would be had with the media agency, saying they would tell the agency:

"This year, I want more budget respect last year, because I know that the clients that are one, two, three clients last year investing well in digital market at one million. Last year, I received 10% of one billion, this year I expect for 20% because- and I offer you a best price in order to achieve the 20% of total investments of price." AVMS respondent

For sponsorship deals, the contracts can get quite complicated as they would also include licensing and usage rights in relation to the programme brand and associated content or products. There are similarities, it seems, to those that the agencies or advertiser might have with influencers that also have to cover the secondary use of what is produced, for example what can be also used on the advertiser's own social media accounts, or in other parts of the campaign. One agency respondent commented, "you're entering into a world of the types of things of like contracts that celebrities have with brands around product endorsement things."

In online advertising, there are two broad categories of online advertising auctions: search and display. Video would fall into the display category. In search advertising auctions the advertiser pays only if their ad elicits a click; in display advertising auctions, advertisers may select a basis



for payment.⁸⁵ According to *Wenjuan Ma et al.*, there are four most commonly employed mechanisms for pricing online advertising inventory: first price negotiations, first price reservations, first price auctions, and second price auctions.⁸⁶ First price negotiation refers to one-on-one negotiations between an advertiser and a supplier of advertising inventory.⁸⁷ Prices determined in this manner are typically formalised in a sales contract and publishers also sell some inventory on a first come, first served basis at fixed pre-set prices, often to advertising networks.⁸⁸ This process for setting prices is referred to as first price reservation. It seems to be in this context where various options related to the KPIs for the campaign come into play, and the rules set by the platforms. For example, two respondents mentioned that Facebook charges for only 50% viewable and 2 seconds of play on videos, but that others offered better viewability conditions. Other respondents said that viewability was something they looked for or that clients looked for in contracts, along with click through rates, brand safety or measures of ROI. These things are not always dealt with in clear contracts however. In Italy one respondent said these were a matter of “gentlemen’s agreement” rather than contract, and one respondent in Belgium said:

“We do not really have contracts with them, no. It’s really client per client. We have a lot of discussions with them because they cannot commit themselves to very brand safe environments for instance. They try to protect themselves and we try to protect ourselves. We want to have these kinds of contracts with them, but it’s not always the case.” Belgian respondent

With both first price and second price auctions however, advertisers bid for opportunities to advertise with various types of online outlets.⁸⁹ First price auctions and second price auctions differ in how the prices paid by winning bidders are set as with first price auctions the bidder offering the highest price wins the auction and pays the amount bid.⁹⁰ The bidder offering the highest price also wins a second price auction, but in this case the winner pays the price offered

⁸⁵ Eric Bax et al., ‘Comparing predicted prices in auctions for online advertising’ (2012) 30 (1) *International Journal of Industrial Organization* 80


⁸⁶ Wenjuan Ma et al. (n 55) 4.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*, 5.

⁹⁰ *Ibid.*



by the second highest bidder.⁹¹ An important difference between first and second price auctions is that a bidder's best strategy is to bid their true valuation in a second price auction, while with first price auctions there is an incentive to offer a bid less than an item's value to the bidder on the chance that a less than full valuation bid will still win.⁹² One respondent explained that his agency usually has a contract with another intermediary that offers the "managed service" for programmatic planning and delivery, and this would include the target audiences and parameters for targeting, adding "It means that if we want to buy across ten thousand different websites we don't have to have 10000 different invoices."

Finally, respondents confirmed that all contracts now have to include detailed language about compliance with GDPR. The VSP respondents were particularly adamant about this. One explained:

"we make it very explicit to advertisers that they are not allowed to take any of our information off platform, in all our contracts. It has to stay within the [anonymised] ecosystems, so we are not allowing you to profile our users. But we don't allow that side of the industry to work on our platform." VSP respondent

Another recounted how immediately following GDPR implementation day, they had to cut ties with all of the third party measurement platforms that had before been able to insert a pixel to gather data. They since have reinstated a smaller number of them that have been vetted for GDPR compliance, but in a more formal, contracted way.

⁹¹ Ibid.

⁹² See also Sissors and Baron (n 9) 340.

09

THE LEGAL AND REGULATORY FRAMEWORK

9. The legal and regulatory framework

The ecosystem for video advertising illustrated in Figure 1 operated at a global and national level, however the legal instruments governing it are either regional (EU) or domestic. Therefore, it may be that different legal regimes are applicable to a single advertising campaign.⁹³ The current legal framework is also very fragmented with different levels of harmonisation across countries and the great number of instruments involved makes the analysis very complex. For the purpose of this particular study, we focus on the Audiovisual Media Services Directive (and its revisions), rules governing sponsorship and product placement, misleading and comparative advertising, purchase of advertising space, media plurality and competition issues, taxation, and data use. Where there is a regional instrument harmonised across our cases, or there is a national instrument unique to a particular case, these have been discussed singularly, whereas where we found differences across the case, the cases are disaggregated.


9.1. The AVMSD

The AVMSD of 2010, which codified the changes made to the original 1989 Directive,⁹⁴ set out a country of origin principle applicable to providers of broadcasting channels as well as for VOD services. In November 2018, this was amended again bringing VSPs into its scope.⁹⁵ Based on the presumption that traditional broadcasters, VOD and VSPs all compete for the same audiences

⁹³ Although, it is arguable that the US legal regime has been extended beyond the US territory due to the location of most influential actors. However, it must be acknowledged that recent instruments such as the GDPR and the forthcoming ePrivacy Regulation have limited this expansion.

⁹⁴ The successive pieces of legislation are: Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities; Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [Official Journal L 202 of 30.7.1997]; Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities; Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (Text with EEA relevance) *JO L 95 du 15.4.2010*, p. 1–24.

⁹⁵ Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities *OJ L 303, 28.11.2018*, p. 69–92. Henceforth ‘new AVMSD’.



and advertising budgets, new obligations for VOD and VSPs were introduced. According to article 28a-b (supported by recitals 4-6 and 44-49) of the 2018 Directive, Member states need to ensure that VSPs take the ‘appropriate measures’ to protect minors from harm and the general public from content inciting violence and hatred as well to protect them from content which results in a criminal offence under EU law.⁹⁶ Once the 2018 Directive is fully transposed in 2020, VSPs will have to comply with the same qualitative rules for advertising as audiovisual media services,⁹⁷ and VSPs will be responsible for the advertising inventory sold directly by them or others. Quantitative limits on advertising for linear broadcasting have been a defining feature of the Directive since the beginning. These have been relaxed over the years, and the 2018 revision moved from allowing 20% of time in any given hour to be allotted to advertising spots, to allowing up to 20% of the period between 6am and 6pm to be allocated.⁹⁸ The same rule applies for the period between 6pm and 12pm.⁹⁹

Article 28a (1a) of the new AVMSD also encourages co-regulation and self-regulation through the establishment of codes of conduct to cover additional issues such as the exposure of ‘children to commercial communications for foods and beverages containing nutrients and substances with a nutritional or psychological effect’¹⁰⁰. Whilst the new directive appears to encourage EU member states to increase co-regulation by setting out criteria for this,¹⁰¹ VSPs are likely to simply change their terms and conditions to satisfy this requirement. Although there might be some alignment throughout the EU territory due to the compliance mechanisms regulated by domestic regulatory bodies, this is unlikely to address the levelness of the playing field for advertising budgets.¹⁰²

⁹⁶ Article 28a (1) (a)-(ba) new AVMSD (n 95). This intends to also ensure that compliance with the E-Commerce directive 200/31/EC is achieved.

⁹⁷ Article 9 and Article 28 new AVMSD (n 95).

⁹⁸ Art 23(1) new AVMSD (n 95).

⁹⁹ Ibid.

¹⁰⁰ Article 9(3) new AVMSD (n 95).

¹⁰¹ Article 4a new AVMSD (n 95).

¹⁰² Sally Broughton Micova, *The playing field between YouTube and television will be a bit fairer, but far from level* (Media Policy Project Blog, 9th October 2018) available at <http://blogs.lse.ac.uk/mediapolicyproject/2018/10/09/the-playing-field-between-youtube-and-television-will-be-a-bit-fairer-but-still-far-from-level/>

AVMSD & BREXIT

The guidance piece *‘Broadcasting and video on demand if there is no Brexit deal’* published by the UK government in September 2018 states that the country of origin ‘will no longer apply to services under UK jurisdiction that are broadcast into the EU, as the UK would be classified as a third country’. However, as the UK is a signatory party to the Council of Europe’s Convention on Transfrontier Television (ECTT), this instrument will then define the relationships with the EU countries also party to this Convention. Freedom of reception should still be permitted between the UK and both EU and non-EU countries signatory to the ECTT. In other words, Ofcom licences should still be recognised in a no-deal Brexit scenario for ECTT countries. For non-ECTT EU countries (e.g. Belgium) the UK services need to be correctly licensed in these territories by the time the UK leaves the EU. This may lead to a scenario where the audiovisual service requires two different licences. The ECTT does not cover VOD services or VSPs. The UK would also not be under obligation to transpose the changes made to the AVMSD in 2018, though the 2010 rules will likely stay in place for a while as those were transposed into national-level instruments.

9.2. Sponsorship and product placement


Sponsorship is allowed under EU law, except in news and current affairs programming, with member states setting criteria for how it must be made transparent to the viewer. Member States may prohibit the sponsorship of children’s programmes. Member States may choose to prohibit the showing of a sponsorship logo during children’s programmes, documentaries and religious programmes.’¹⁰³ In terms of prohibited products, article 11(a) of the new AVMSD covers: cigarettes and related products¹⁰⁴ and specific medicinal products only available on prescription. In a change introduced with the 2018 AVMSD, product placement is lawful for all audiovisual media subject to exceptions.¹⁰⁵ According to the new directive, product placement should not be allowed in relation to news and current affairs programmes, consumer affairs programmes, religious programmes and children’s programmes.¹⁰⁶ Though the definition of product placement in the revised Directive includes user generated content, none of the other

¹⁰³ Article 10(4) new AVMSD (n 95).

¹⁰⁴ See also, Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ L 152, 20.6.2003, p. 16); Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC (OJ L 127, 29.4.2014, p. 1).

¹⁰⁵ Recital 33 new AVMSD (n 95) It had been banned in the 2010 AVMSD with exceptions for where it was allowed.

¹⁰⁶ Recital 34 + article 11 (2) new AVMSD (n 95).



provisions related to product placement apply to VSPs, meaning that it remains allowable in children's programmes and the other categories in which AVMS providers cannot have any production placement.

9.2.1. Belgium

Authorised by the Flemish decree relative to media published on 27 March 2009, product placement must respect the conditions set out in the 2010 AVMS Directive.¹⁰⁷ Interestingly, article 100(1)(4) of the decree only makes it mandatory for broadcasters to clearly communicate to viewers that products are being placed in the programme when the programme has been sponsored by the broadcaster or a subsidiary. An icon must be placed at the beginning, end and after each break of the programme, and the programme should not encourage the purchase or rental of the products or services of the sponsor or a third party (article 100(1)(2) decree).


Product placement is also authorised in the French community since 19 December 2009 as permitted by article 21 of the decree adopted on 26 March 2009 on audiovisual services. Product placement against remuneration is only authorised in cinematographic works, sports programmes and entertainment programmes whereas other placement of products without remuneration (as props) are authorised in any other type of programme. The Conseil Supérieur de l'Audiovisuel (which has no regulatory power) provides advice to ensure compliance with the requirements of the directive. The rules from the AVMSD regarding editorial independence and disclosure are transposed into the decree, which adds that identification can be done through the display of an icon during 10 seconds at the beginning or end of a programme as well as after each break.

9.2.2. France

The law n°2009-258 adopted on 5 March 2009 relative to audiovisual communication and new public television services (which amended article 14-1 law n° 86-1067 from 30 September 1986 relative to freedom of communication) gave the power to the Conseil Supérieur de l'Audiovisuel to determine the requirements which must be satisfied for product placement to be lawful.¹⁰⁸ French law is a bit narrower than the AVMSD in terms of the programmes that can carry product

¹⁰⁷ Article 98-101 decree.

¹⁰⁸ See Délibération n° 2010-4 du 16 février 2010 relative au placement de produit dans les programmes des services de télévision JORF n°0054 du 5 mars 2010.



placement, as it is only authorised in cinematographic works, fictional audiovisual content and video clips unless the content is aimed at children (in which case it is not authorised). In any other circumstances, product placement is not authorised.¹⁰⁹ French law goes beyond the AVMSD in the list of products that cannot be placed: tobacco and cigarette-related products, energy,¹¹⁰ alcoholic beverages,¹¹¹ gambling and games of chance,¹¹² telephony,¹¹³ travel agencies,¹¹⁴ matrimonial services,¹¹⁵ medicine,¹¹⁶ baby milk and firearms¹¹⁷.

For all authorised products, the product placement must satisfy the following requirements:

- 1) Editorial independence must be respected in terms of content and scheduling;
- 2) Must not encourage the purchase or rental of the products or services of the sponsor or a third party. Additionally, no explicit reference may be made to the products or services or trade mark of the advertiser;
- 3) Finally, it should not give undue prominence to the product, service or trade mark in question.

The broadcaster has a duty to inform consumers that the content features product placement. The disclosure rules in France are the most stringent among our cases, as disclosure must take the form of an icon during one whole minute at the beginning of the programme, at each break and during the end credits. If the product placement is taking place in a video clip, the icon needs to appear during the entirety of the video.

9.2.3. Italy

Legislative Decree No.44 of 15 March 2010 updated the Broadcasting Law No. 177 of 2005 to implement the AVMSD of 2007, and in doing so inserted an Article 15 on product placement. This article matches the provisions in the AVMSD almost exactly, therefore there is no deviation

¹⁰⁹ Evin law applicable. See also Décret n°92-280 du 27 mars 1992 pris pour l'application des articles 27 et 33 de la loi n° 86-1067 du 30 septembre 1986 et fixant les principes généraux définissant les obligations des éditeurs de services en matière de publicité, de parrainage et de télé-achat;

¹¹⁰ Publicité dans le domaine de l'énergie : arrêté du 28 novembre 2006, décret du 28 novembre 2006, décret du 28 décembre 2010.

¹¹¹ Loi no 91-32 du 10 janvier 1991 relative à la lutte contre le tabagisme et l'alcoolisme (known as the Evin law) JORF n°10 du 12 janvier 1991 page 615.

¹¹² Ordonnance n° 2012-351 du 12 mars 2012 relative à la partie législative du code de la sécurité intérieure


¹¹³ Articles L5231-3 et L5232-1-1 du code de la santé publique.

¹¹⁴ Loi no 92-645 du 13 juillet 1992 fixant les conditions d'exercice des activités relatives à l'organisation et à la vente de voyages ou de séjours JORF n°162 du 14 juillet 1992 page 9441

¹¹⁵ Loi n° 89-421 du 23 juin 1989 relative à l'information et à la protection des consommateurs ainsi qu'à diverses pratiques commerciales JORF du 29 juin 1989 page 8047

¹¹⁶ Articles R.5045 to R.5054-6 du *code de la santé publique*

¹¹⁷ Publicité pour les armes à feu : Loi du 12.07.1985



in product placement rules in Italy. The 2010 Decree also updated the Broadcasting Law's provisions related to sponsorship to match those in the AVMSD, with one additional provision:

*“Sponsors using local broadcasters, also analogical, may express themselves through sound and visual signals, transmitted when programmes are interrupted and accompanied by the name and the brand of the sponsor and in all forms permitted by directive 89/552/EEC, and successive amendments.”*¹¹⁸

This provision opens up avenues for what our interviewees referred to as branded content and which was apparently a popular option for advertisers. As it was described, the advertiser would not give any remuneration for the programme that would be designed in line with the brand's narrative or identity, but remuneration was based on the purchase of the space in the ad breaks in that programme. Italian respondents acknowledged that this was unique to the Italian context and not allowed in other jurisdictions such as in the UK.

9.2.4. United Kingdom


Unlike the AVMSD and laws in other jurisdictions, the UK Communications Act 2003, as amended in 2010 to implement the AVMSD makes a clear distinction between product placement and 'prop placement'. Product placement is defined as “the inclusion in a programme of, or of a reference to, a product, service or trade mark where the inclusion is for a commercial purpose, and is in return for the making of any payment, or the giving of other valuable consideration, to any relevant provider or any person connected with a relevant provider, and is not prop placement.” The term prop placement refers to “the inclusion in a programme of, or of a reference to, a product, service or trade mark where the provision of the product, service or trade mark has no significant value, and no relevant provider, or person connected with a relevant provider, has received any payment or other valuable consideration in relation to its inclusion in, or the reference to it in, the programme, disregarding the costs saved by including the product, service or trade mark, or a reference to it, in the programme”¹¹⁹.

The rules for product placement mirror those in the AVMSD with additional prohibition in religious programmes, consumer advice programmes and current affairs programmes.¹²⁰ There

¹¹⁸ Article 39(4) of the Legislative Decree 177.

¹¹⁹ Note on Ofcom Broadcasting code, 9.05.

¹²⁰ See Ofcom Broadcasting Code, 9.12.



is a longer list of products which are prohibited from product placement in programmes produced in the UK: alcoholic drinks; foods or drinks high in fat, salt and sugar; gambling; baby milk; all medicinal products; cigarette-related products; and any product, services or trademark which may not be advertised on television (e.g. weapons).¹²¹

The UK is the only jurisdiction where we found evidence of action being taken to regulate product placement and sponsorship in online UGC, or in other words in influencer content.¹²² Guidelines for ‘vlogging’ are set out UK Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing, which was created by the Committee of Advertising Practice (CAP) and is administered by the Advertising Standards Authority (ASA), the body that works with advertisers across various industries and sectors to ensure the respect of the code. The general idea is that the consumer should not be misled as to the nature of the commercial relationship between the vlogger and the brand.

If the vlog content is controlled by the advertiser and the vlogger receives a remuneration, then he or she needs to disclose this information to viewers in a clear manner at the beginning to ensure that consumers understand the commercial nature of the message.¹²³ In relation to product placement, the guidance advises that clear identification of the product placed must be made either through onscreen text, holding up a sign or speech. In the case of sponsorship where an advertiser sponsors the content without controlling it, this is not covered by the CAP code. As there is no control by the advertiser, the Code would not require disclosure, or for the vlog to be considered an advertorial. Nevertheless, the CMA would expect the nature of the commercial relationship to be disclosed to satisfy consumer protection laws.

¹²¹ See Ofcom Broadcasting Code, 9.13.

¹²² The Italian competition and market authority, Autorità Garante della Concorrenza e del Mercato, issued “letters of moral suasion” to some influencers and brands to bring the existing consumer code to their attention but has not yet developed an additional instrument. <http://www.agcm.it/media/comunicati-stampa/2018/12/L'Antitrust-chiude-anche-la-seconda-moral-suasion-su-influencer-e-marchi,-ma-avvia-istruttoria-per-possibili-promozioni-occulte>

¹²³ Rule 2.4 CAP <https://www.asa.org.uk/advice-online/video-blogs-scenarios.html>

9.3. Misleading and comparative advertising

Regulation of misleading advertising at the EU level dates back to 1984,¹²⁴ and the basic definitions and principles have been carried forward since. Misleading advertising is now covered by Directive 2006/114/EC concerning misleading and comparative advertising¹²⁵ and Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market ('Unfair Commercial Practices Directive').¹²⁶ Misleading advertising is defined as:

“any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor.”¹²⁷

Article 3 of the 2006 Directive states that all features of the ad will be taken into account to determine if it is misleading, but lists three types of information that will particularly be considered:


- “(a) the characteristics of goods or services, such as their availability, nature, execution, composition, method and date of manufacture or provision, fitness for purpose, uses, quantity, specification, geographical or commercial origin or the results to be expected from their use, or the results and material features of tests or checks carried out on the goods or services;
- (b) the price or the manner in which the price is calculated, and the conditions on which the goods are supplied or the services provided;

¹²⁴ 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 *Official Journal L 250*, 19/09/1984 P. 0017 – 0020 (No longer in force).

¹²⁵ See articles 2(b) and 3 of Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version) *OJ L 376*, 27.12.2006, p. 21–27.

¹²⁶ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (Text with EEA relevance) *O L 149 du 11.6.2005*, p. 22–39.

¹²⁷ Article 2 (b) Council Directive 2006/114/EC of 12 December, 2006 concerning misleading and comparative advertising *Official Journal L 376*, 27/12/2006 P. 21.



(c) the nature, attributes and rights of the advertiser, such as his identity and assets, his qualifications and ownership of industrial, commercial or intellectual property rights or his awards and distinctions”.¹²⁸

Comparative advertising is any advertising that explicitly identifies a competitor or their goods or services and is allowed within the EU as long as it complies with a number of conditions. These include not being misleading, comparing things intended for the same purpose and on the basis of relevant verifiable features, not discrediting or denigrating, not taking unfair advantage of reputation or distinguishing marks, use replicas, or create confusion.¹²⁹

These rules apply to all forms of advertising and therefore equally to advertising on AVMSs and VSPs. In our cases we found that national legislation for the most part matched the EU Directive with slight variations in some instances that would also apply to all forms. Belgian and UK laws give more extensive lists of features that would be under examination to determine if something is misleading, and French law also requires comparative advertising to include time frame information for prices and bans the use of opinions in such advertising. Though the rules apply to all advertising in all four cases, there are differences in terms of enforcement. The first instance is usually a self-regulatory body. In the UK, the backstop to this is the communications regulator, which would only apply to media services, not VSPs, whereas in Italy the backstop would be a competition case through the courts, which would apply to both AVMSs and VSPs. The backstop in Belgium and France is also the courts, but as their frameworks are more complicated the case would not necessarily be on competition grounds.


9.3.1. Belgium

The implementation of EU directives on this matter is covered by specific provisions in the Belgian economic code. More specifically, articles VI.97 to 100 and VI.105, 1° of the Economic Code, which provides a different definition and a rather more detailed list of types of information that would be under particular examination:

“A commercial practice is deemed to be misleading if it contains false information and is therefore untruthful or, in any manner whatsoever, including by its general presentation, it

¹²⁸ Ibid. Article 3.

¹²⁹ Ibid. Article 4.



induces or is likely to mislead the average consumer concerning one or more of the following, even if the information presented is factually correct, and that, in either case, it leads to or is likely to lead to a commercial decision that would not otherwise have been taken:

1. the existence or the nature of the product;
2. the main characteristics of the product, such as its availability, its advantages, the risks it presents, its execution, its composition, its accessories, the after-sales service and the processing of the complaints, the mode and date of manufacture or performance, delivery, suitability for use, use, quantity, specifications, geographical or commercial origin or results that can be expected from its use, or the results and essential characteristics of the tests or checks carried out;
3. the scope of the company's commitments, the motivation of the commercial practice and the nature of the sales process, as well as any statement or symbol that makes it appear that the company or product is sponsored or provides direct or indirect support;
4. the price or method of calculating the price, or the existence of a specific price advantage;
5. the need for a service, a spare part, a replacement or a repair;
6. the nature, qualities and rights of the enterprise or its intermediary, such as its identity and assets, qualifications, status, accreditation, affiliation or links and industrial, commercial or industrial property rights; intellectual property or its rewards and distinctions;
7. the rights of the consumer, in particular the right to replace or refund under the provisions of the Act of 1 September 2004 on the protection of consumers in case of sale of consumer goods, or the risks that he may incur.”¹³⁰

Comparative advertising has been allowed in Belgium since the Law on Trade practices of 1999 (article 19 of the 29 Mai 1999 law) and is currently authorised under the same conditions as outlined in the 2006 Directive.

¹³⁰ Loi du 21 décembre 2013 portant insertion du titre VI "Pratiques du marché et protection du consommateur" dans le Code de droit économique et portant insertion des définitions propres au livre VI, et des dispositions d'application de la loi propres au livre VI, dans les Livres Ier et XV du Code de droit économique.

9.3.2. France

Initially covered by a Law on finance from 2 July 1963,¹³¹ misleading advertising was only really defined for the first time in 1973 with the Royer Law. Under this piece of legislation, misleading advertising was defined as false or misleading advertising which is publicly likely to mislead the consumer. This offence was then codified in the Consumption Code, articles L. 121-1 and L. 121-1-1 in 1993 and in force until the Châtel Law in 2008.¹³² The Châtel Law implements the directive 2005/29/CE in French legal order and amended article L.121-1 to expand the scope of the offence to deceptive marketing practices. However, this text was once again amended following the Hamon Law in 2014.¹³³

In the same year as the adoption of the Châtel Law, a new law introduced a new provision in the Code of Consumption providing a list of situations in which deceptive marketing practices would be presumed. Finally, from 1 July 2016, articles L. 121-1 and L. 121-1-1 of the Consumption Code became L. 121-1 to L. 121-5. This is simply a cosmetic change as the content of the provisions remains the same.

Article L. 121-1 does not define the prohibited practices any more than the Directive does. The format of the advertisement does not seem to be relevant insofar as these provisions are applicable to the analogue and the digital environments. However, embellishments of products and services remain outside the scope of these provisions.


In France, comparative advertising is regulated by a series of general and specific instruments: article 1240 Civil code, article L716-1 to L716-16 of the Intellectual property code and articles L122-1 to L122-7 of the Consumers code. Though this type of advertising exists since 1992 in French texts,¹³⁴ it has been used scarcely due to the restrictive rules in place then. Since 2001, comparative advertising has gained some popularity especially in relation to big retail groups to defend their prices. The most important provisions can be found in articles L122-1 to L122-7 of the Consumers Code. These provisions reflect the conditions set at the EU level, with the additional provision that, if price is compared, the advertisement must indicate the duration for

¹³¹ Article 44 de la Loi n°73-1193 du 27 décembre 1973 d'orientation du commerce et de l'artisanat.

¹³² Loi n° 2008-3 du 3 janvier 2008 pour le développement de la concurrence au service des consommateurs dite « Loi Châtel ».

¹³³ Article 29 de la Loi n° 2014-344 du 17 mars 2014 dite Loi Hamon.

¹³⁴ Loi n°92-60 from 18 January 1992.



which the price advertised constitutes the advertisers price, and the rule that comparative advertising cannot rely on opinions or personal assessments.

9.3.3. Italy

The Italian Civil Code (article 2598) regulates comparative advertising through unfair competition provisions stating: “Subject to the provisions concerning the protection of distinctive signs and patent rights, acts of unfair competition are performed by whoever: [...] 3) Avails himself directly or indirectly of any other means which do not conform with the principles of fair practice in the trade and are likely to injure the competitor's business.” Hence, should comparative advertising fail to comply with the principles set out in article 2598 of the Italian civil Code, then it is likely to amount to unfair competition which can be pursued in front of ordinary Italian courts.


This general law was supplemented by more specific instruments, some of which follow the EU harmonisation in the area and some of which have been introduced to regulate some areas requiring specific targeted intervention. The current framework is contained in the Legislative decree no. 145 of 2 August 2007, as amended by Article 4(1) of the Legislative Decree no. 104 of 2 July 2010 which mirrors the EU law except that its list of conditions leaves out the requirement that such ads not create confusion. Those who engage in the advertising media must respect the advertising self-regulation rules (deriving from the Italian self-regulatory Code of Advertising and the law mentioned above) monitored by the Istituto dell’Autodisciplina Pubblicitaria.

9.3.4. United Kingdom

The EU Directives were implemented in the Consumer Protection from Unfair Trading Regulations of 2008,¹³⁵ and the Business Protection against Misleading Marketing Regulations 2008.¹³⁶ Generally designed to cover unfair sales and marketing practices, these Regulations are primarily aimed at protecting the consumers and honest businesses. Section 2(5) of the consumer protection regulations provide a prohibition of misleading actions including advertising, with a definition that contains all the elements in the EU level definition but matches almost exactly that in the Belgian law and similarly allows that it could contain

¹³⁵ The Consumer Protection from Unfair Trading Regulations 2008 No. 1277.

¹³⁶ The Business Protection from Misleading Marketing Regulations 2008 No. 1276.



information that is factually correct. Like the Belgian law, the UK regulations contain a more extensive list of things to be considered to determine if something is misleading, which contains all the same factors with the addition of the motives for the commercial practice and the nature of the sales process. The business protection regulations mirror the EU's 2006 Directive exactly in the definition and features of misleading advertising, and also includes the same language on comparative advertising as in the EU law.


In the UK, the Department for Business Innovation and Skills is responsible for reviewing the legal instruments covering misleading advertising. Based on the presumption the seller needs to provide honest and legal information to the consumer, the failure to observe these enables the Office of Fair Trading to investigate and intervene if necessary. If the seller is based in the UK, then it is subject to the Advertising Standards Authority and its code (CAP) of practice which regulates and monitors advertisements. The ASA consequently bears an important role in enforcing the law governing both unfair and misleading ads, including unfair comparative advertising, and it operates on a complaints-based system. If an advertiser fails to comply with a ruling, a series of sanctions are possible:

- withholding of media space or advertising agency services (ad alerts);
- subject all future ads to approval prior to publication (pre-vetting);
- the removal of online paid-for search ad linking (online);
- Persistent offenders can also be referred to other bodies such as Trading Standards or Ofcom.

Media service providers can also be referred to the communications regulator Ofcom, if they fail to respect the CAP code and do not cooperate with the decisions of ASA.

Political advertising

Paid political advertising on AVMSs is banned in all four of our cases. Efforts to address political advertising online are nascent, mainly focused on ensuring disclosure, and largely tied to efforts to combat disinformation. In February 2018, the Italian communications regulator AGCOM issued guidelines for online platforms that relatively closely mirror those for offline media. These ask that “all political actors enjoy same equal access to political communications means”, suggesting platforms provide information and tools to parties. The guidelines also require complete disclosure and apply the same restrictions on the publication of polls and the pre-election ‘silence period’ as exist for offline media. As the only example of



statutory intervention we found, in July 2018 French legislators passed changes to the country's nearly 140 year old law on disinformation. The law now requires full disclosure of sources and funding for online political advertising and gives authorities extra powers to require rapid delisting during election campaigns.

At the EU level, the Commission led an initiative resulting in a voluntary Code of Practice, the signatories of which commit to enabling disclosure of political ads and “making reasonable efforts” to disclose “issue-based advertising”. The signatories, which include Google and Facebook, also commit to disrupting the advertising and monetisation incentives for users that misrepresent themselves or their purposes, using measures such as engaging with third party verification and allowing monitoring of ad placement.

9.4. Taxation


Whilst AVMS providers are national companies with headquarters established in member states and full taxation obligations to that state, the most prominent VSPs are global companies with more complicated taxation situations. Being multinational, every subsidiary pays its own tax bill separately and these subsidiaries may buy or sell to another. This allows these multinational groups to choose where they are being taxed by choosing to be taxed in the most favourable country.¹³⁷ As the OECD discussed for many years without success until now,¹³⁸ the European Commission is looking into introducing a new tax targeting digital services companies within the EU territory. There seems to be agreement that digital services are currently undertaxed, but there is a divergence of views as to how the objective will be met. One of the prevailing challenges relates to the fact that there is currently no broad harmonisation of tax regimes in the EU, though some coordination action has taken place to decrease tax obstacles and efficiencies or tax evasion. EU policymakers are working on a three percent tax plan for the advertising sector, based on the Commission's proposal from March 2018 as an interim measure

¹³⁷ Evidence of this has been reported widely in the popular press, for example:

<https://www.theguardian.com/commentisfree/2017/dec/11/tech-giants-taxes-apple-paradise-corporation-avoidance>.

¹³⁸ A recent OECD report established that countries generally fall under one of the following categories: 1) A need for a taxation reform at large; 2) countries in favour of a targeted reform of taxation rules to grant taxation rights over the profit of some ‘highly digitalised businesses’; 3) There is no need for a taxation reform the current Base Erosion and Profit Shifting projects are sufficient. See OECD/G20 Base Erosion and Profit Shifting Project, Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS (Paris: OECD Publishing, 2018), available at:

<http://dx.doi.org/10.1787/9789264293083-en> ; OECD (2015), 'Addressing the Tax Challenges of the Digital Economy: Action 1 – 2015 Final Report', Organisation for Economic Co-operation and Development (OECD), Paris.



until a more comprehensive solution is reached.¹³⁹ This tax would target larger companies with annual global revenue of over €750 million and annual EU revenues of €50 million.¹⁴⁰

There is reported to be no unanimity amongst the EU member states, which impedes the introduction of this tax at present.¹⁴¹ The French minister, Bruno Le Maire, is a key supporter of this EU digital tax and hopes that it can still be approved before the end of the year. In the meantime, there are national-level initiatives. Italy is in the vanguard as it already introduced a 3% webtax applicable to advertising on digital platforms in its 2018 Budget, which goes into effect on 30 June 2019.¹⁴² Under this new law, annual revenues of individuals or businesses that have total worldwide revenues higher than €750 million per year and annual profits stemming exclusively from digital services amounting to higher than €5.5 million in Italy, are subject to a 3% tax.¹⁴³ This law taxes major platforms' sale of intangibles whose nature makes the activity essentially automated, with minimum human intervention, and would be impossible without the technology (e.g. programmatically sold advertising). The law does not specifically address foreign companies, but it did evolve from the regulator's attempt to assess the impact of global VSPs on media pluralism. Italian media operators are required to submit an annual report (called the Economic Information System) to the Italian Communications Regulator (AGCOM), which includes disclosing advertising revenues generated in the territory whether or not the media company has its headquarters in the Italian territory. Based on the annual reports, AGCOM will determine whether a single operator generates more than the 20% of the total revenues allowed by media plurality rules. In a case against Google,¹⁴⁴ a court ruled that the company had to provide the information related to the sale of advertising space and other advertising activities carried out in Italy to AGCOM, even if they are taxed elsewhere.

¹³⁹ See the Commission's proposal and accompanying documents: https://ec.europa.eu/taxation_customs/business/company-tax/fair-taxation-digital-economy_en

¹⁴⁰ Commission Staff Working Document Impact assessment SWD(2018) 81 final/2 p 70:


https://ec.europa.eu/taxation_customs/sites/taxation/files/fair_taxation_digital_economy_ia_21032018.pdf

¹⁴¹ See for example: <https://www.politico.eu/pro/eu-digital-tax-dead-as-countries-eye-national-paths/>

¹⁴² Article 1, paragraphs 35-55 of the Italian 2019 Budget laws. Bilancio di previsione dello Stato per l'anno finanziario 2019 e bilancio pluriennale per il triennio 2019-2021. (18G00172) (*GU n.302 del 31-12-2018 - Suppl. Ordinario n. 62*).

¹⁴³ The scope of this new law will be further specified by a decree to be adopted by 30 April 2019.

¹⁴⁴ Tribunale Amministrativo Regionale per il Lazio Sezione I Sentenza 14 febbraio 2018, n. 1739



In October 2018, UK Chancellor Philip Hammond announced his plans to introduce a similar Digital Services Tax in the next UK Budget.¹⁴⁵ However, given the difficult political context in the UK leading to uncertainties for businesses after March 2019, some industry actors have expressed concerns about a potential chilling effect on the UK advertising industry and on medium sized competitors to the US giants.¹⁴⁶ Belgium has not announced an intention to introduce this tax at national level at the time of writing this report.

France's Sapin Law

So far, in a uniquely French feature, the purchase of advertising space has been regulated in France since the so called Sapin Law from 29 January 1993 (chapter II title II). Prior to this law, some intermediaries were buying important advertising space to then resell it to advertisers. These intermediaries created pressure on media companies to get better financial deals due to the amount of space bought per transaction, and acted as gatekeepers on advertisers' access to premium inventory. Whereas in other countries abuse of this arbitrage system was mitigated through structured share-based systems, in France the approach was to introduce transparency in the process by focusing on the purchase of advertising space by intermediaries. According to this legislation, an agency can only be remunerated by the advertiser and must communicate any discount or tariffs advantages achieved to the advertiser in order to avoid unjust profit margins by agencies. This law predates programmatic advertising and therefore did not automatically apply to the numerous intermediaries in that system.

This law was amended in 2015, by decree, to broaden its scope to the Internet. Henceforth, also in online advertising an advertiser is entitled to know the cost of an entire campaign as well as the price paid for each advertising space purchased. The decree includes specific rules in terms of programmatic advertising or other real-time bidding. Since 1 January 2018, intermediation charges (whether human or AI) must be communicated to advertisers. Here, three types of information now have to be communicated by the media owners:

- Information which ensures effective execution of services and their features (i.e. the results of the provision of service as well as information relating to the content of advertisements – article 3, 1 of the decree);
- Information relating to the technical quality of the service (i.e. which technological tools are relied on or what are the technological competences involved in the process

¹⁴⁵ It is also worth noting that the UK adopted a Diverted Profits Tax in 2015, which has a broad application and captures some of the challenges posed by digitalisation. V. Holder, "'Google tax' take swells to £281m as levy starts to bite", Financial Times, 13 September 2017 available at: <https://www.ft.com/content/4f7aed86-989f-11e7-a652-cde3f882dd7b>

¹⁴⁶ Jon Mew, 'New tax proposals risk harming the UK digital advertising market' (29 Oct 2018) *The Drum*, available at <https://www.thedrum.com/opinion/2018/10/29/jon-mew-new-tax-proposals-risk-harming-the-uk-digital-advertising-market>

- art 3, 2 Decree);
- Information relating to the means implemented to protect the image of the brand (art 3, 3 Decree).

Some practical uncertainties remain, such as who is the recipient of these new obligations. According to the decree, the editor or management of a particular website is responsible. The problem is that in digital advertising there are multiple actors and the role of each actor is not always singular or clear. The current interpretation is that only if the platform directly commercialises ad space will it be considered as editor for the purpose of these new obligations.

9.5. Media pluralism and competition


Despite several attempts at introducing EU-wide rules dedicated to the control of media ownership,¹⁴⁷ there is currently no specific EU legislation regarding media ownership. Consequently, rules aimed at protecting media plurality and diversity are established at national level under the supervision of the European Commission. The role of the Commission is to monitor that national media plurality rules do not impede the functioning of the single market, but this does not mean that the EU does not intervene in this area. The acquisition of control of a media organisation may fall within the scope of the concentration regime and therefore must be subject to approval by the EU Commission, which will consider the national interests in its assessment.¹⁴⁸ For example, the Commission ruled on Facebook's acquisition of WhatsApp and more recently on the proposed takeover of Sky plc by 21st Century Fox.¹⁴⁹ Furthermore, following the freedom of movement of capital, the TFEU prohibits national restriction on foreign holdings in domestic companies unless these are established outside the EU. Accordingly, once a non-EU undertaking is established under the law of one of the EU member states, this undertaking can benefit from the freedom of establishment in the EU.

Having a general application, EU competition regulations can therefore affect media ownership in the EU territory. Article 1 of the Regulation 139/2004, sets out a series of thresholds for worldwide and community-level turnover above which the acquisition of more media assets by

¹⁴⁷ See for example the 1992 Green Paper on Pluralism and Media Concentration in the Internal Market.

¹⁴⁸ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) OJ L 24, 29.1.2004, p. 1–22; Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings OJ L 133, 30.4.2004, p.1.

¹⁴⁹ Case M.7217 Facebook/WhatsApp acquisition 2014; Case M.8354 Fox/Sky 2017



a media organisation shall qualify as a 'concentration with a Community dimension'.¹⁵⁰ If the merger or acquisition of direct or indirect control meets these thresholds, the undertakings must notify the EU Commission without delay and the Commission will assess its compatibility with the single market objectives, and may prohibit the deal. In all of our four cases, additional sector specific rules on media ownership are in place, with restrictions on cross media ownership and in the case of France, limitations on foreign ownership, all of which apply to AVMS providers and other traditional media, but not VSPs.

9.5.1. Belgium

There is no federal law covering the whole Belgian territory dealing with media plurality, though the general competition law would apply. Sector specific rules concerning media ownership are decided by the Regions, where the instruments have evolved differently, though most target audiovisual broadcasting. The main broadcasting act for the Flemish Community is the Act of 27 March 2009 on radio and television broadcasting.¹⁵¹ The main broadcasting acts for the French Community are the Act of 26 March 2009 on audiovisual media services¹⁵² and the Act of 14 July 1997 on the Belgian radio and television of the French Community.¹⁵³ For the German-speaking Community, the main acts are the Act of 27 June 2005 on audiovisual media services and film showings¹⁵⁴ and the Act of 27 June 1986 on the Belgian radio and television centre of the German-speaking Community. For the region of Brussels, the main act is the Act of 30 March 1995 on electronic communication networks, electronic services and broadcasting activities in the bilingual region of Brussels-Capital. According to these instruments, broadcasters, cable companies and net operators in the Francophone community have to declare their structures of ownership and control rights and their degree of independence, and in Flanders, the licensing scheme precludes any legal person applying for a broadcaster licence from holding more than one licence at any level of the licensing regime - local, regional, national or cable broadcasting.


¹⁵⁰ Article 1(2-3) Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) *OJ L* 24, 29.1.2004, p. 1–22.

¹⁵¹ Decreet betreffende radio-omroep en televisie van 27 maart 2009 [consolidated version of 2017, in Dutch] <https://codex.vlaanderen.be/Portals/Codex/documenten/1017858.html>

¹⁵² Décret coordonné sur les services de médias audiovisuels (version consolidée par le CSA au 21 août 2018) <http://www.csa.be/documents/2882>

¹⁵³ Décret du 14 juillet 1997 portant statut de la Radio-Télévision belge de la Communauté française [RTBF] <https://ds1.static.rtbf.be/article/pdf/decret1997-1260799038.pdf>

¹⁵⁴ http://medienrat.be/files/Dekret_27_Juni_2005_Stand_28_Maerz_2017.pdf




Therefore, whilst the Flemish community limits the number of licences one undertaking can hold, the French-speaking part does not. Instead, the changes in the ownership structure of licensed broadcasters have to be submitted to the Conseil Supérieur de l'Audiovisuel (CSA) within one month from the entering into force of any change. Where a natural or legal person possesses, directly or indirectly, more than 24% of the capital in two different broadcasters (radio or television), or where a number of broadcasters attributable to such a person achieve an audience share of more than 20% in the French-speaking community, a 'significant position' is presumed on behalf of that person, and the CSA must assess whether it infringes the right of the public to have access to a plural broadcasting sector.

9.5.2. France

The regulation of media ownership in France is governed by Law n°86-1067 of 30 September 1986 relative to the Freedom of Communication (last amended in 2018) and the modified Law of 1 August 1986 for the daily press, which themselves are supplemented by subsequent laws and decrees. This law contains several restrictions:

- Cross-ownership restrictions (article 41-1 Law n°86-1067, as modified in 2004): An operator may not be involved in more than two of the following: 1) holding 20% interest of a national daily newspaper; 2) have a television audience of 4 million; 3) have a radio audience of 30 million. The same rules are applicable in the digital world (see article 41-1-1 Law n°86-1067, as modified in 2004);
- Foreign ownership (for print and television): here, non-EU investment is limited to a share of 20% of the capital of a daily newspaper or of a terrestrial broadcasting in the French language;

Specific ownership restrictions on television: in essence, there are three limits applicable, based on capital share, number of licences (taken together with the audience share) and the participation in more companies in a given sector (article 39 Law n°86-1067, as modified in 2009). To sum up, a physical or legal person cannot own more than 49% for a national TV channel and 33% for a local TV channel of capital or voting rights in a station whose average annual audience exceeds 8 % of the total audience. However, if a person holds two stations, he cannot hold more than 15% in the second. If a person owns three stations he cannot hold more than 5% in the third. Since a decision from the constitutional court in 1986 (Decision n°86-217



DC of 18 September 1986), constitutional status was granted to the principle of plurality of sources of information (deriving from article 11 of the declaration of human rights of 1789). This decision then became the basis for the introduction of anti-merger provisions, which aim to guarantee media plurality (and only applicable to the private sector). Since 2000 the broadcasting regulator, the Conseil supérieur de l'audiovisuel (CSA) together with the competition authority (Conseil de la concurrence) are responsible for the issue of media concentration.


9.5.3. Italy

The Italian media landscape has been characterised by the dominant role of television in comparison to other media and this has been reflected in legislation. According to the AVMS Code n. 177/2005 (amended by decree n. 44/2010) a variety of legal instruments aimed at safeguarding pluralism are in place.

In particular, Article 5(1)(g) on general principles to safeguard pluralism places: "an obligation to separate accounts for companies operating in the digital television broadcasting sector, in order to allow the recognition of fees for access and interconnection to communications infrastructures, highlighting the charges related to the general public service, the assessment of the activity of installation and management of infrastructures separate from the supply of contents or services, where carried out by the same subject, and the verification of the absence of cross-subsidies and discriminatory practices, providing, however, that:

1. the national content provider that is also a service provider adopts a separate accounting system for each authorisation;
2. the network operator in the national television sector, who is also a supplier of content or a provider of associated interactive services or conditional access services, is required to separate the company; this provision does not apply to television broadcasters that broadcast only by cable or satellite, as well as to local content providers and network operators in the local area;"¹⁵⁵

¹⁵⁵ Legislative Decree 31 July 2005, n. 177 "Testo unico della radiotelevisione" *Gazzetta Ufficiale* n. 208, 7 Sept 2005 – Supplement n. 150. The elaboration of this for specific AVMS providers with dominant positions appears in AGCOM's Resolution 136/05 Art 1 (1) (b) n. 1, which requires them to keep separate accounts and sales houses for digital and non-digital services.



In addition, Article 43 of the 2005 code establishes restrictions on market share, merger agreements, the numbers of licenses and cross-media ownership, and dominant positions are forbidden. One of our interviewees from an Italian AVMS reported that these rules have presented a challenge in that these separate companies cannot easily share the kind of data important in today's advertising market.


9.5.4. United Kingdom

The regulation of media ownership in the UK is covered by the Communications Act 2003. Where media mergers raise public considerations, the Secretary of State can intervene. The Secretary of State can also ask Ofcom (and if necessary, the European Commission) to investigate any mergers that could hinder media plurality, diversity and/or standards (under the plurality test enshrined in section 375 and onwards). The rules stipulate that there must be three separate commercial companies providing newspapers, radio and terrestrial television for every local area of the UK. In addition, if an operator owns more than 20% of market share of national newspaper circulation, it cannot own more than 20% of an ITV licence. Similarly, if an operator owns more than 20% of market share of a regional ITV licence then it is prohibited from holding 20% or more in a large national newspaper. Foreign ownership of broadcasters and ownership by advertising agencies has been allowed since the 2003 Act. In its last review, Ofcom concluded that plurality currently still exists in the digital environment. Although lowering the barriers to entry (the 20% rule) would perhaps increase plurality and reduce the influence of any provider, there is no current evidence that current traditional providers have lost influence due to the rise of news disseminated online, especially as consumers still consume the news content of traditional news organisations while on social media platforms.¹⁵⁶

9.6. Data protection

As evidenced by our interviews, data is the lifeblood of video advertising markets. It also emerged that the levelness of the playing field was perhaps most affected by the ownership of, access to, and the ability to use, data. Given the importance of data in this industry, one might have expected the use of data to feature predominantly in the debates surrounding the

¹⁵⁶ Ofcom, 'The operation of the media ownership rules listed under Section 391 of the Communications Act 2003 Ofcom's report to the Secretary of State' November 2018
https://www.ofcom.org.uk/data/assets/pdf_file/0030/127929/Media-ownership-rules-report-2018.pdf p. 10.



adoption of the new AVMSD. However, there appears to have been little discussion on audience insight and data analysis. Recitals 21 & 51, together with articles 6a and 28b(3) of the AVMSD do go some way to ensure that the personal data of minors shall be protected and “not be processed for commercial purposes, such as direct marketing, profiling and behaviourally targeted advertising” across all types of services.¹⁵⁷ There are no other sector specific rules on data at the EU level or at the national level in the cases we investigated. Instead, the use of data is governed by the General Data Protection Regulation¹⁵⁸ (GDPR) which entered into force in May 2018 and the ePrivacy Directive 2002/58/EC (as last amended in 2009 by Directive 2009/136), which is expected to be replaced by the ePrivacy Regulation after the 2019 European elections.¹⁵⁹ Despite the remaining differences in the interpretation of the GDPR, there is no doubt that all actors in the digital advertising ecosystem could be liable for breaches in rules, even in cases where the actor (e.g. the advertiser) did not gain access to any of the personal data used in the targeting ads.¹⁶⁰

In substance, the GDPR contains provisions covering the processing of personal data of individuals (i.e. data subjects). Article 4 of the GDPR enshrines key definitions to differentiate controllers from processors. A controller is responsible for determining the purposes and means of processing personal data, whereas a processor is responsible for the processing of data on behalf of the controller.¹⁶¹ It is the data controllers who must ensure that data subjects have given informed consent to the use of their data.¹⁶² Personal data must be processed in a lawful manner,¹⁶³ and data processors are not exempt from the new obligations. Nevertheless, it is the data controller who must provide general information to data subjects, such as clearly disclosing

¹⁵⁷ Article 28b(3) new AVMSD (n 95).

¹⁵⁸ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) *OJ L 119*, 4.5.2016, p. 1–88.

¹⁵⁹ Text proposed by the EU Commission: Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications) COM/2017/010 final - 2017/03 (COD).

¹⁶⁰ C-210/16, *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH* (2018) ECLI:EU:C:2018:388.

¹⁶¹ Article 4 (7)-(8) GDPR (n 158).

¹⁶² Articles 7(1)-(3) to be read in combination with recitals 32-33 and 42-43 GDPR (n 158). Informed consent means that consent must be explicit, specific, freely-given, plainly-worded and unambiguous affirmation (opt-in). Accordingly, the GDPR prohibits pre-ticked opt-in boxes and requires granular consent option for all processing operations, a single affirmation does not comply with the GDPR (see recital 32) (n 158).

¹⁶³ Articles 6 and 9 to be read in combination with recitals 40-41, 44-50 and 51-56 GDPR (n 158).

when data is being collected, stating the legal basis enabling the processing,¹⁶⁴ the purpose for which the data will be processed, the duration of data retention as well as whether data will be shared with third parties or outside the EEA. Finally, data controllers are responsible for keeping records of processing activities and these records may be requested by the supervisory authority.¹⁶⁵ As data subjects could potentially lose the protection granted under the GDPR over their personal data if the data is transferred outside the EEA, the GDPR restricts these transfers unless the personal data is protected in a different manner or if one of the few exceptions applies.¹⁶⁶

Table 1: Amendments to national law implementing GDPR in the cases examined

UK	Italy	France	Belgium
Data Protection Act 2018 which is the third generation of data protection law in the UK.	Legislative Decree No. 196/2003, the Italian Data Protection Code "Privacy Code" somewhat updated to implement GDPR through an enabling law the "European Delegation Law" No. 163/2017	The new law on data protection adopted on 20 June 2018 ¹⁶⁷ amends the law of 6 January 1978 relative to information technology and civil liberties ¹⁶⁸ in order to comply with the GDPR	Law of 30 July 2018 ¹⁶⁹ and a law adopted on 3 December 2017 to create a data protection authority.

The forthcoming EU ePrivacy Regulation aims at addressing issues surrounding electronic communications networks and services such as the treatment of traffic data, cookies and spam. It will complement the GDPR and aims to preserve the free movement of data and services. According to the proposal, the new regulation will bring the definition of consent in line with that used in the GDPR and includes the same conditions. Like the GDPR, it will be applicable even to non-EU companies.

¹⁶⁴ The lawful purposes are stated in article 6 (n 158).


¹⁶⁵ Article 30 GDPR (n 158).

¹⁶⁶ See article 44 and recitals 101-102 GDPR (n 158).

¹⁶⁷ Loi relative à la protection des données personnelles s available at <https://www.legifrance.gouv.fr/eli/loi/2018/6/20/JUSC1732261L/jo/texte>

¹⁶⁸ Loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés ; an English but not updated version is available at <https://www.cnil.fr/sites/default/files/typo/document/Act78-17VA.pdf>

¹⁶⁹ Projet de loi relatif à la protection des personnes physiques à l'égard des traitements de données à caractère personnel, Doc 54 3126/008 available at <http://www.lachambre.be/flwb/pdf/54/3126/54K3126008.pdf>




Cookies are crucial for the gathering of the data used to target advertising and ROI indicators. Article 8 of the proposed Regulation covers the use of cookies and related technologies, and states the use of technology to collect users' information, processing and storage capabilities are prohibited unless:

- It is necessary for the sole purpose of carrying out the transmission of an electronic communication;
- The end-user has given consent;
- It is necessary for providing an "information society service" requested by the end-user;
- It is necessary for audience measuring (subject to restrictions);
- It is necessary for security, fraud prevention or detection of technical faults in a time-limited capacity;
- It is necessary for a software update (subject to additional requirements); or
- It is necessary to locate end-user equipment in response to an emergency communication.

There remain some questions as to how specific consent is to be captured. Article 10 in the proposal adds to this provision by covering the instances where third parties can store information on the end-users' devices. As the GDPR requires privacy by design and default, a possible interpretation of article 10 indicates that browsers will need to adopt as default the rejection of cookies unless it falls within one of the exceptions which does not require consent. This is likely to impact on the gathering of data and targeting of consumers, as if the user does not change the settings, websites will be unable to override the user's settings, therefore requiring browsers to request consents on a case-by-case basis.¹⁷⁰ To temper these measures, EU policy makers have suggested that consent requests could be dealt with by browser settings. One of our interviewees expressed concern that two major browsers were already preparing to launch an option that would make cookie refusal the default, which he predicted could seriously affect the industry. This initiative could lead to further concentration and power in the hands of

¹⁷⁰ Some browsers such as Firefox do have plugin which allows users to accept or reject all cookies, not all browsers currently have this option.



the few companies currently dominating the browser market (Google, Apple, Mozilla and Microsoft), some of which are also heavily vested in the advertising ecosystem.¹⁷¹

Competition authorities are increasingly interested in the exploitation of data in the advertising sector.¹⁷² Here, the recent opinion from the French competition authority is particularly relevant.¹⁷³ It notes the fragile competition balance in the exploitation of data in the digital advertising sector whereby the data market increases generally to the benefit of two dominant actors: Google and Facebook. It argues that any new entrants, or smaller and national-based actors, must compete with global actors with a competitive edge in the market, as such global players benefit from important network effects across their services, enabling them to reach wider audiences, collect more data, sell inventory and innovate in technology (i.e. vertical integration model).

Free flow of non-personal data

In June 2018, a political agreement between the EU Council and the Parliament on a new Regulation on the free flow of non-personal data was reached. This regulation will ensure the portability of data across borders. It will prohibit data localisation restrictions thus enabling the storage of data anywhere in the EU territory and foster the creation of self-regulatory codes for cloud services and data portability. Finally, it will ensure that authorities can gain access to data for regulatory control.

¹⁷¹ It is also worth noting that the Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services COM(2018) 238 final might affect programmatic and big data in the online advertising market which perhaps calls for further co-regulation in the sector.

¹⁷² Autorité de la Concurrence de la République française, Avis n°18-A-03 du 6 mars 2018 portant sur l'exploitation des données dans le secteur de la publicité sur internet, (March 6. 2018) available at <http://www.autoritedelaconcurrence.fr/pdf/avis/18a03.pdf> ; AGCOM, Big data: Interim report in the context of the joint inquiry on 'Big data' launched by the AGCOM deliberation No. 217/17/Cons available at <https://www.agcom.it/documents/10179/10875949/Allegato+4-9-2018/f9befcb1-4706-4daa-ad38-c0d767add5fd?version=1.0>

¹⁷³ Ibid.

10

CONCLUSIONS AND RECOMMENDATIONS


10. Conclusions and recommendations

- AVMSs and VSPs are competing for the same budgets and building relationships with the same advertisers in largely the same way.
- The playing field is not even.

The first question we set out to address with this investigation was the extent to which VSPs and AVMSs are competing on the same playing field. We have found that advertising on TV and advertising through online video, on VSPs and other services, do not serve exactly the same function for advertisers. They generally are used to meet different campaign objectives and they are not considered interchangeable in media plans. However, AVMSs and VSPs are certainly competing for the same budgets, and this difference will likely blur as TV becomes more addressable and VSPs are more present on the big screen of connected TVs.

Agencies and advertisers are using complicated econometric models and huge amounts of data to help them make decisions about how to distribute budgets across channels and specific providers, which presents challenges because of a lack of standardisation of metrics, except for linear TV. For example, in the absence of a standard criterion for viewability, some agencies set their own standard regardless of what specific VSPs use for charging purposes. Media strategy teams and planners consider not just the various options on TV and VSPs, but also radio, print, out-door and various below the line options (e.g. events, in store promotion). They see many of these options as complementary and talked about getting a mix of channels, as if creating a recipe. Nevertheless, many agency respondents mentioned moving more and more towards addressability and especially, programmatic advertising.


The opportunities for targeting and tracking impact available online were clearly appreciated by all in the demand side of the ecosystem, and many of our respondents expressed that there is still much value in the long term and well-tried effects of television. Our investigation uncovered two main drivers towards online addressable options. One is that budgets are not increasing in the current climate, making the potential for short-term efficiency and optimisation gains important. Another is the increased involvement of procurement and finance in the marketing



decisions of advertisers. There is an increased focus on performance, and on efficient and measurable KPIs that is characterising how marketing budgets are being distributed among channels. Our evidence indicates that on the playing field for advertiser budgets, data is an essential element of competition, and inventory holders such as AVMS providers and VSPs must be able to address the need for advertisers to demonstrate performance.

The field itself is currently uneven. With the recent changes to the AVMSD that are due to be implemented by September 2020, and rules for misleading and comparative advertising applying to both channels, there is little difference in the qualitative rules for advertising for AVMSs and VSPs. There is a difference in relation to product placement and sponsorship rules. The AVMSD lists types of programmes in which product placement is prohibited on AVMSs, such as consumer advice and children's programmes, but VSPs are not bound by these prohibitions. AVMS providers are bound by rules about how to disclose product placement in each of the jurisdictions we examined, and we found initiatives underway to provide guidelines for those creating content for VSPs, vloggers and influencers, that mirror the disclosure rules for AVMSs. The discrepancy in the kinds of content in which product placement is allowed will need to be revisited if VSPs begin the kind of investment in original content in which subscription VOD players have engaged, or if product placement in UGC in those categories raises concerns similar to those being addressed by the prohibitions in AVMSs. Though there is no need to regulate UGC producers such as vloggers and influencers, national regulators should provide disclosure guidelines similar to those for content on AVMSs, and the European Regulators Group (ERGA) should investigate whether there is a need for the AVMSD's product placement exceptions to be extended to VSPs.

Another difference is in rules on paid political advertising, as it is common for there to be full bans on paid political advertising on television, including AVOD. There are initiatives underway in all four of our cases to address this, with Italy at the forefront taking a similar approach to online political advertising as for offline media, and France updating laws to ensure transparency of political advertising online. It is expected that this issue will soon be dealt with at the national level. Many of our AVMS respondents complained that VSPs "play by different rules" in terms of content standards and other obligations related to editorial responsibility. It was also clear in the responses from agency and advertiser representatives that the significant investment made




by AVMS providers over the decades to abide by these rules and fulfil these obligations is a big part of what makes them still an attractive and trusted option. Our investigation indicates that in the competition for advertising budgets the discrepancies in content standards and obligations are not the main sources of unevenness. The main reasons that the playing field on which AVMSs and VSPs are competing for advertising budgets is not level are related to resources and data.

Firstly, we found strong evidence that AVMS providers and VSPs take similar approaches to building relationships with agencies and advertisers, but that there is a vast imbalance in the resources they have with which to do this. The attitudes of those interviewed from agencies and advertisers shows that AVMS providers, having invested individually and as an industry over a long time, benefit from being already established and trusted. The fact that those on the demand side are used to the metrics for TV advertising and that these are open industry-wide standards and are audited, gives AVMS providers some advantage. They know it works for what it does. However, for AVMS providers, the competition now centres around showing that what TV does remains important, and with AVOD and increasingly addressable TV, that AVMS inventory can do more. Global VSPs are in a much better position to invest in training and educating advertisers and agencies about the benefits of targeting and the tools they can provide to increase efficiency and demonstrate ROI. They have more human and financial resources to engage in the personal contact that our investigation indicates remains critical to relationships in this ecosystem. As global companies,¹⁷⁴ they are able to deal with large global advertisers at a different level than nationally based AVMS providers. As we discussed in section 9.4 they also enjoy the taxation benefits of being transnational companies, which likely contributes to this imbalance, so there is a need for more forensic investigation to inform policy in this area.

AVMS providers operate primarily on a national level and have a long history of competing with each other, but we found ample evidence of a new-found interest in cooperation in all four cases. Though in Italy, respondents reported that national-level cooperation remained difficult, AVMS providers were involved in international collaborations acting as join exchanges. Also, at the transnational level AVMS providers are involved in joint efforts to promote TV as an

¹⁷⁴ Even the respondent from a start-up VSP was already operating across continents, if not fully 'global'.




advertising option and to generate evidence of its effectiveness for advertisers. At the national level, however, efforts to work together on their offer to advertisers or on data gathering and analysis have come up against competition rules that have prohibited cooperation. Our analysis showed cross-media ownership rules in place in all four countries as part of policy to support media pluralism. In the UK it was reported that an AVMS provider had to have a lawyer in the room for every meeting with another provider even for cooperation on a shared study of audience behaviour. In Italy, one AVMS provider reported that its TV service has to be a separate company from its digital service, with implications for data use. We do not suggest that all cross-media ownership rules be repealed as was done in Australia,¹⁷⁵ or that media pluralism is not important. We suggest that member states revisit media pluralism policy and that competition authorities and communications regulators might work together to find a better balance between protecting diversity of media content and enabling AVMS providers to co-operate on some levels. AVMS providers will never be able to match the resources of the biggest global VSPs, but they could do a lot more collectively at the international and national level to engage in the kind of educating and relationship building that VSPs are doing, and to make better use of the data they have.

What industry can do now

1. Focus on transparency of margins and prices to create more accountability for where money is being spent and better understanding of the link between advertising revenues and content generation.
2. Work on developing better measurements for KPIs that are standardised and comparable across channels, as well as drawing equally on their respective strengths.
3. Prepare for increased competition for attention from non-advertising dependent media such as Amazon Prime and Netflix.

Standardisation of measurement within and across channels would also contribute to levelling the playing field in terms of communication and relationship building with advertisers. This is not really an area where we see a role for policy intervention, though perhaps regulators could provide ‘good offices’ for national level discussion. This requires work within the industry as was


¹⁷⁵ See <https://theconversation.com/media-reform-deals-will-reduce-diversity-and-amount-to-little-more-than-window-dressing-83957>



described as happening in Germany with the Joint Industry Committee in order to achieve a common currency for video. Standardisation is not only about achieving agreement on what counts as an impression in video advertising. It is also about examining the metrics used to address the KPIs set by advertisers and seeing how they relate to the kind of evidence collected or that could be collected by the different channels. With the identified shift to the language of a CFO and procurement goals within advertisers, AVMS providers need to be able to speak that language. Here, there would be a role for industry associations and other transnational associations also to work together to ensure solutions or best practices at national levels are shared.

We found that access to data and the ability to use it effectively is the other main reason that the playing field is uneven. On the one hand, VSPs can leverage the consent that they gather from their vast and global user base for targeting purposes and for the kind of tracking of an individual's post exposure journey needed to provide ROI results and make attribution claims. On the other hand, AVMS providers have only recently been requiring registration and sign in for users to access their AVOD and other online offers, and this is still giving them a rather limited type and amount of data on their users. Addressable TV, which involves gathering data on households and allows the capturing of some data related to the response of viewers, is nascent in our four cases, more advanced in the UK and France than in Belgium and Italy.


There is also an imbalance in access to online campaign-related data. This kind of data was shown to be very important to our respondents for planning and for measuring against KPIs. Agencies and advertisers get this data in aggregated and anonymised form by virtue of the contracts they have with the platforms they use for buying online, such as the Google Marketing Platform that was mentioned in the interviews. Those publishers, including VSPs and any online services or addressable options offered by AVMS providers, on whose media campaigns are placed, do not. The responsibility for getting consent for the processing of that data lies with the publisher as the data controller. According to some of our AVMS respondents, getting this consent right was a significant burden. At the same time, they claim that they often do not get back any of the data on the campaigns run on their services in aggregated and anonymised form in a way that would allow them to speak to the effectiveness of their inventory and address the



KPI demands of advertisers. A parallel might be if BARB, Auditel or Mediametri data was only available to agencies and advertisers.

Google (which owns YouTube) and Facebook have created what several respondents referred to as ‘walled gardens,’ in which the data about their users and related to the campaigns run on their VSPs or on any other service for which their systems manage the buying must remain. As we understood from agency respondents, this creates challenges for them in terms of comparing services. AVMS providers are imitating this model by trying to create their own little gardens, but most are lacking the ownership in the other parts of the ecosystem to really benefit. Some larger AVMS providers in Europe are investing in adtech directly, and one of the areas in which they are co-operating cross-nationally is in the establishment of their own exchange platforms, but these are still only parts of the system. While most of our respondents were happy that GDPR was contributing to some clear out of players in the programmatic advertising market, an equal number expressed, in some way, concern about the concentration of so much of the ecosystem in the hands of a few major players, most mentioned being Google and Facebook. We think it is now the right time for competition authorities to assess competition in the market for online video advertising and to do so in collaboration with data protection authorities. More than six months have passed since GDPR implementation and the new ePrivacy regulation is on the horizon. There appear to be inefficiencies created by the tendency towards ‘walled gardens’ and concerns about dominance that are linked to the way the roles of controller, processor and ‘owner’ of the anonymised data are taking shape in this ecosystem that merit investigation. This is something that could be led at the EU level, but with which national-level competition and data authorities should engage as well.

Finally, a lack of transparency is a problem throughout the ecosystem, with two exceptions. Advertiser and AVMS respondents were suspicious of agency margins, particularly what they might be skimming off of programmatic advertising and how that might influence their planning decisions. Respondents from all categories were suspicious of the various intermediaries in the programmatic system and concerned about the amount of money from advertising budgets that is getting taken out by the players along the way. The audited and available measurement systems for TV combined with the financial reporting requirements placed on AVMS providers by regulators give market players some ideas about how money is being spent on TV inventory,



which many respondents felt gave some transparency, particularly in France where the market for advertising operates under the Sapin law discussed in section 9 that requires disclosure of margins and prices. We recommend that EU-level policymakers look into adopting such measures to introduce transparency requirements similar to the French Sapin law into fair trading policy at the European level.

In the meantime, there are several challenges facing all the players in the ecosystem, whose revenues are all tied to advertising, that would be better met with collaboration. Competition for audiences is coming increasingly from the non-advertising funded content providers, such as Netflix and Amazon Prime. Amazon's entry into streaming and linear broadcasting could be another big disruption in the market for everyone, because of its unique access to actual customer purchase data. Certain browsers have already begun to block cookies by default, and this is likely to spread if the ePrivacy Directive is changed as expected. Overall there is a need for more standardisation and transparency in the audiovisual advertising markets, and for more collaboration among players on the long-term health of advertising funded audiovisual media.

Recommendations

1. As they implement the AVMSD, **Member states** should devise co-regulatory mechanisms that will be effective in enforcing content and advertising standards on VSPs and adhere to the Directive's intention of levelling the playing field. **The Commission's** guidance as to what qualifies as a VSP and criteria for co-regulatory mechanisms should be designed to maximally even out conditions among advertising-dependent services.
2. **Member states** should include transparency requirements similar to the French Sapin law in fair trading policy. EU policy makers should consider harmonising this at the EU level.
3. **Member states** should revisit media plurality measures, including cross-ownership rules, with a view towards enabling AVMS providers to co-operate in some areas, in which greater scale or scope may be crucial to allowing them to compete against global VOD and VSP services, without reducing the pluralism of views and content available to citizens.
4. **Competition authorities** and **data protection** authorities should work together to assess possible concentration in the programmatic advertising system and in the wider market for video advertising.
5. Though there is no need to regulate UGC producers such as vloggers and influencers, **national regulators** should provide disclosure guidelines for product placement similar to those for content on AVMSs, and the **European Regulators Group (ERGA)** should investigate whether there is a need for the AVMSD's product placement exceptions to be extended to VSPs.
6. **The European Commission** should closely monitor the implementation of national-level taxes on the B2B revenues of platforms, such as Italy's 3% "webtax," to assess the effects on the wider ecosystem and other businesses and consider roll out across the Union.
7. **Industry bodies** with support from **national regulators** should work towards standardisation of measurement within and across channels, including both agreement on a 'common currency' measurement for video and innovative ways in which the need to service KPIs can be addressed by all players.

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