COMMERCIAL COMMUNICATIONS

The Journal of Advertising and Marketing Policy and Practice in the European Community
Sponsored by DG XV (The Directorate General for the Internal Market and Financial Services) of the European Commission

January 1997
Volume 1 Issue 5

A forward-looking policy approach

John Mogg, Director General, DG XV

John Mogg

We asked for responses to the Green Paper and we are certainly receiving a variety of them. As the articles in this issue demonstrate, the debate is lively: please do not hesitate to air your views. You have plenty of time since we have extended the deadline until the end of March. This is because the four committees in the European Parliament (Economic and Monetary Affairs and Industrial Policy Committee (lead), Legal Affairs and Citizens Rights, Environment, Public Health and Consumer Protection and the Culture, Youth, Education and Media Committee) have only recently begun to prepare their opinions on the text. It seems unlikely that they will have adopted their final positions before the end of January. The number of Parliamentary committees involved demonstrates the wide scope of the initiative and the political interest that it has attracted.

One point of confusion that has appeared in early responses to the Green Paper concerns the issue of a notification system for new regulations impacting on Information Society services such as new on-line commercial communication services. The Green Paper explained the need for such a mechanism to prevent new barriers to the Internal Market and emphasised the need for a forward-looking commercial communications policy framework. Many of our early respondents have reacted positively to this suggestion.

However, some have suggested that the Green Paper actually made this proposal. This is not correct. The proposed amendment to extend the scope of the existing notification system applying to regulations affecting the free circulation of goods for technical standards to cover new regulations impacting on Information Society services was adopted under separate cover by the Commission on the 30th August 1996[1].

The new proposal carries four key messages:

First, it defines Information Society services as all existing or new types of services that will be *provided at a distance, by electronic means and on the individualised request of a service receiver.*

This 'service' definition would cover, for example:
- on-line commercial communication services,
- on-line professional services (solicitors' services, psychologists, stock-brokers, on-line health services, etc.)

IN THIS ISSUE

C1-AA-96-005-EN-C

C88:XII/95

COMMERCIAL COMMUNICATIONS
Sponsored by DG XV
(Internal Market & Financial Services)
European Commission

EDITORIAL
Mike Sainsbury, *Editorial Director*
Kate Maitland Smith, *Managing Editor*
Esther Grant, *Production Manager*
Toby Syfret, *Research Consultant*

Published by **asi,**
34 Borough Street
Brighton BN1 3BG, UK
Tel: +(44) 1273 772741
Fax:+(44)1273 772727
e-mail:asi@dial.pipex.com

- interactive entertainment services (video-on-demand, on-line video-games, virtual visits to museums, etc.)
- on-line information services (electronic library, on-line meteorological services, on-line financial information services, etc.)
- virtual shopping malls, etc

On the other hand, this definition would not cover (because they are either not offered at a distance, or not offered via electronic means, or not supplied on individual demand):
- television broadcasting services (including near video on demand services)
- radio broadcasting services
- teletext
- non-electronic direct marketing services (for example, mail order catalogues)
- voice telephony services (including via GSM)

Second, the proposal seeks to ensure that the Internal Market is preserved and that no new regulatory barriers appear. The proposed instrument will ensure that all draft rules directly affecting these services will be notified to the Commission and reviewed with the other Member States to ensure that they are compatible with the free movement of services and the country of origin control principle (i.e. the one stop regulatory shop whereby once a service offered in a Member State respects the laws of that Member State it can benefit from the legal certainty of circulating freely throughout the European Union irrespective of the laws of the other Member States). It should be noted that following the jurisprudence of the Court of Justice, if a Member State fails to notify such a regulation, then such rules should not be applied.

Third, the Commission has signalled its objective to make the European Union attractive to potential investors in new Information Society services by ensuring that the Internal Market regulatory framework will be effectively applied.

Many service regulations in the United States are regulated at State level. This leads to significant fragmentation and legal uncertainty in that market. By ensuring that this well established framework is effectively applied it ensures that consumers are protected in the most efficient manner since the country of origin principle ensures the most effective redress against fraudulent or misleading Information Society services by ensuring that their complaints are dealt with by the regulatory authorities and Courts with the most effective power to sanction offenders i.e. the ones under whose jurisdiction the offending supplier falls.

Fourth, through this proposal of an Internal Market driven approach to regulating the Information Society, the Commission demonstrates its wish to find an internationally agreed basis to regulate such new services.

[1] COM (96) 392 final; readers wishing to receive a copy should fax their details to DGXV E-5 on Brussels 2957712 or send an e-mail giving their full postal address to E5.@dg15.cec.be stipulating the language they would prefer.

Editorial

Since it was distributed, the most frequently asked question about the Green Paper on commercial communications to be put to this office has been about the composition and functioning of the proposed 'review' committee. Whilst the detail of this has yet to be determined, associated with this is another question which needs to be addressed by readers of this publication with some urgency.

It seems clear that what we can refer to as the 'main' committee will need to draw on expert opinion from a wide range of interested parties. This process would be helped, and further benefits may well arise, with the establishment of what might be termed a 'shadow' committee.

This 'shadow' committee could perform a number of important functions. It would obviously follow the progress of the 'main' committee closely and should be able to provide valuable guidance as to the priorities the committee should be setting. As already mentioned, it should also provide the 'main' committee with the opportunity to access expert opinion easily. There would also be a role to play in helping to shape the development of the electronic network proposed in the Green Paper and in developing the debate in the pages of this newsletter.

If such an idea is accepted in principle, the question then is about how such a committee might be composed. In our view it will need to reflect the composition of the 'main' committee as closely as possible. There would thus be fifteen standing members and these could be complemented by a further fifteen offering specific expertise as the evolving agenda required. The 'shadow' committee will also need to reflect the range of interest groups involved in considering the regulation of commercial communications in the Internal Market.

There would, of course, be a number of specialist committees communicating with any such 'shadow' committee. These would reflect the particular concerns of specific groups; consumer associations, sales promotion practitioners, broadcasters, advertising agencies and so forth. Many of these committees already exist and one could imagine that they too would be a useful source of expertise from which the two principal committees could draw.

We would appreciate your views on this idea and suggestions as to how the 'shadow' committee might be established. You may also have other ideas as to how the Commission's proposed committee could be supported. There seems little doubt that some sort of support structure would be a great help to the efficient operations of the process.

If you have not already done so, please copy, complete and return this form to ensure you continue to receive your copy of *Commercial Communications*. You may also indicate whether you wish to receive the publication in French, German or English.

Name..... Tel:.....

Company..... Fax.....

Job Title..... e-mail.....

Address..... Language.....

.....

.....

Sales promotion - boon or bane?

Victor Ross
Former Chief Executive
and European Regional Director
Reader's Digest

Whether sales promotion ('SP') is a good thing or not seems to depend on where you live in the EU. In the UK it is a flourishing activity, and no restrictions (other than those of good taste, commonsense, and above all free-market discipline) apply. Discounting abounds, free sweepstakes accompany everything from fashion catalogues to magazine subscriptions, and incentives are even offered to acquire more incentives - e.g. coupons that can be turned into Airmiles. It certainly makes for colourful shopping; Napoleon should have called the British a nation of shoppers rather than shopkeepers.

Things are very different in Germany where most sales promotion devices are either 'verboten' or severely restricted. Discounts, the shopper's friend, are, for instance, limited to a paltry 3%. Premiums are allowed as long as their value is trivial, which is a bit like saying that you may abseil from any height provided the length of your rope does not exceed 3m.

Neighbouring Austria has a different angle on the premium: never mind its size so long as you don't tell the customer how big it is. This is abseiling without any rope at all. But to make up for it, discounts can be any size, without restriction.

Examination reveals that there is no consistency in the restrictions placed upon sales promotion practices in countries that might be expected to take a similar approach. It can therefore be concluded that no issue of principle is involved.

Let us look at another pair of European neighbours: Sweden bans sweepstakes but permits the use of premiums as an incentive to purchase; Norway does not, unless there is an affinity between the premium and the merchandise or service. But who is to decide how far the elastic band of affinity stretches? Free bicarbonate of soda with lunch for two would probably qualify, but would a voucher for dry-cleaning one's tie after a lobster dinner?

If my list is light-hearted (i.e. eclectic but accurate), the argument is not. Examination reveals that there is no consistency in the restrictions placed upon sales promotion practices in countries that might be expected to take a similar approach. It can therefore be concluded that no issue of principle is involved. Nor is there any consistency in the reasons given for restricting SP. In some countries it is done to prevent 'unfair competition', i.e. to protect the seller; in others, where hostility to vigorous marketing needs less disguise, to protect the buyer. Both lines of reasoning are spurious and hark back to an economic model that is outdated.

A moment spent looking at what SP actually does will make this clear. Every SP device is a finger beckoning to a customer: look at me, buy me, stay with me. Typically, it appears in the form of an incentive to take that last step towards a buying decision - a discount, a gift, a prize, a little extra something to tip the scales. Living in a commercial environment, we are showered with invitations to look, to sample, to act, to be loyal: from the cigarette cards of long ago to the Airmiles of today, from sweepstakes to British Telecom's discounts for chatterboxes. SP activity is the last link in the chain of persuasion that begins with advertising and ends with the 'clincher' that confirms the decision and makes the sale.

This is how the supplier sees it. But what about the customer's perspective? To be effective, SP has to perform a service the customer values. Which then are

the customer's needs that SP, in league with all the other mechanisms of the free market, seeks to satisfy?

The consumer - and indeed every human being - is in constant pursuit of gratification. The nature of gratification is complex and multidimensional. (It can include abstaining from consumption, e.g. vows of poverty, dieting, saving, giving to charity.) In the crossfire of competing alternatives, SP flags choices and draws attention to material satisfactions available at a given moment in a given place. This is not confined to, but brilliantly exemplified in, the supermarket: for many shoppers the special offers, the discounts, the coupons and games of sales promotion are the navigational aids they rely on to maximise the gratification they derive from shopping.

People buy food to stay alive, but also to enjoy eating it. They dress to keep warm, but also to make statements about themselves. SP enables them to add another layer of gratification: bargain hunting, collecting gifts, playing games, having fun.

SP thus works on two levels. Below the surface of harmless entertainment, SP does its serious job of stimulating economic activity. There is clear evidence that in the UK severe pressure on food and petrol prices (and thereby on the retail price index) is exerted by competitive sales promotions in super- and hypermarkets and on petrol station forecourts respectively. Perhaps the fact that the UK has among the lowest food and petrol prices in Western Europe is not unconnected with its liberal SP regime, although no one would claim that this was the sole reason for so happy a state of affairs.

Do I hear cries of 'false gods', bogus satisfactions, shoppers being tricked into having what they want instead of what they ought to have? That the signals emitted by discounts, the blandishments of gifts, the hopes raised by the possibility of winning a prize, lead to the 'wrong choices' - to real gratification perhaps, rather than to cholesterol-counted biscuits and sensible shoes?

Views such as these can indeed still be heard. They belong to a diminishing band of consumerist dinosaurs fighting over a shrinking reservoir of clients. As a result of good work done by them in the past, and the near-magical efficacy of enlightened self-regulation on the part of the leading practitioners of the marketing arts, the overwhelming majority of consumers have become super-sophisticated, long outdistancing their would-be protectors. If there is any threat to them today, it comes from their demands having become impossibly fragmented, their expectations toweringly high. They seek out investments that are politically correct; they want food free of synthetics and furs that are nothing but; they know their rights and don't want to be patronized; and if there is any doubt, they take their pound of flesh and have it weighed by a consumer protection official. Meanwhile the consumerist bureaucracy fails to understand the non-material aspects of consumer satisfaction and insists on re-fighting battles that have long been won.

Victor Ross

Meanwhile the consumerist bureaucracy fails to understand the non-material aspects of consumer satisfaction and insists on re-fighting battles that have long been won.

Given that there are only limited resources available to satisfy those ever-increasing expectations, SP, by sharpening the tools of competition, works for the consumer.

Here is a model of a typical Reader's

Simplified model of Book Sales Campaign

		Option A (without SP)	Option B (with SP)
		Units	**Units**
A	Sales ('000s)	200	275 (1)
B	Unit sell price	100	94.75 (2)
C	Revenue A x B	20,000	26,056 (3)
	Costs		
D	SP per unit sold	-	6.50 (4)
E	Product cost p/unit	30	27 (5)
F	Total Product Cost (A x E)	60,000	74,250
	Net revenue available to cover direct mail, fixed and variable costs, overheads	140,000	168,438
	Net profit on transaction	5.20%	5.73%

Digest sales campaign (simplified but not falsified) with and without SP. The product happens to be a book, the selling method direct mail, the SP device a sweepstake. The Reader's Digest has conducted hundreds of these in the UK - the results vary in magnitude, but never in principle.

This constitutes double jeopardy, because not only does it mean that individuals are deprived of satisfactions that others in the wider market are enjoying, but the providers of those satisfactions are hamstrung in competing across borders.

The model reveals interesting aspects of SP that spread benefits all round.

Note 1 As a result of the combined effect of the sweepstake and the price reduction, sales have increased by 37.5%.

Note 2 The price reduction of 5.25% would not of itself have produced the observed increase in sales; in fact, it would not even have covered its cost. It is the multiplier effect of the sweepstake and the price reduction that drives up sales.

Note 3 Revenue goes up almost pro rata.

Note 4 6.5 is the share contributed per unit sale to the cost of the incentive, in this case to the pool of prizes distributed in a sweepstake, a total of 17,875 (A x D).

Note 5 Another aspect of the virtuous circle: as sales go up, unit costs come down, enabling the price cut to be even deeper.

In this type of promotion, there are no losers. Reader's Digest has made more profit both absolutely and percentage-wise; the customer has paid less for the same book, and had the fun of participating in a sweepstake. The printer has enjoyed a longer print run. Some lucky punters have won prizes. Ultimately the tax man will gather in a larger haul.

The case, convincing though it is, must not be allowed to rest there. At this moment, consumers all over the EU are being denied the tangible as well as the intangible benefits of SP. This constitutes

double jeopardy, because not only does it mean that individuals are deprived of satisfactions that others in the wider market are enjoying, but the providers of those satisfactions are hamstrung in competing across borders.

And all in the name of unfair competition. Unfair to whom? To slate as unfair the consolidation of a thousand little price cuts into a few worthwhile prizes, or the addition of pleasure (i.e. value) to a purchase with a well-chosen gift - in short, the exercise of ingenuity in providing gratification - is no more sensible than calling the craftsman unfair to the ham-fisted.

What a curious change of sides. The consumers' champions who once saw so clearly the need for regulation to protect the unwary from exploitation, have allowed their prejudices to harden into a patchwork of producer protection, where the fear of competition counts for more than the concern for the end user. And in losing sight of the end user they have also lost sight of the end product of commercial activity which is to make the sales that fund the economic life of the country. In that sense, SP is a life-enhancing pursuit which must be unshackled everywhere and allowed to do its vital work.

Summary

1. SP performs an important economic function: it sharpens competition between producers; it tends to lower prices of merchandise and services; it creates awareness of economic opportunities.

2. At the same time, SP performs a welcome psychological function for the consumer. It adds value to what is bought, aids the decision-making process, and sometimes provides free fun.

3. The benefits that SP can confer are not evenly available throughout the EU. Some countries allow free rein to SP under a benign system of self-regulation; others restrict or forbid SP practices in the name of preventing allegedly unfair competition

4. Such discriminatory availability of a proven benefit disadvantages consumers who have no access to it and inhibits crossborder commerce by impeding EU-wide campaigns.

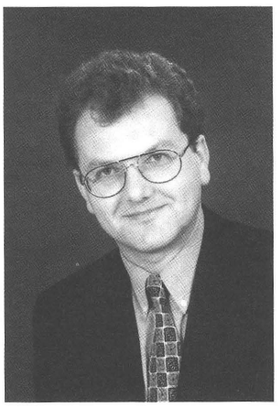
5. The cost of perpetuating restrictions on SP, particularly the limitation of discounts, premiums and prices, is incalculable and undermines the spirit of free enterprise.

6 Outmoded notions of unfair competition must change when that which is being competed for - the satisfaction of consumer demand - has changed. The promotion of fair trade is a more comprehensive and worthier aim than the prevention of unfair competition.

The consumers' champions who once saw so clearly the need for regulation to protect the unwary from exploitation, have allowed their prejudices to harden into a patchwork of producer protection

Sales promotion and unfair competition

Dr. Reiner Münker
Director
Zentrale zur Bekämpfung unlauteren Wettbewerbs E.V.
(Office of Fair Trading)



Reiner Munker

I. Introduction

All promotional activities undertaken by a business ultimately serve to promote sales. This entrepreneurial effort is expressed by the various types of sales promotion campaigns.

In all European legal systems sales promotions, like any other promotional activity, are governed by a legal regulatory framework. As there is no such thing as unrestricted competition, sales promotion campaigns have to be viewed against the provisions of national law which apply and, perhaps, against EU regulations relevant to the particular case.

As regards the German legal provisions, which are set out in detail below, it needs to be understood that this area of law has been shaped primarily by the business world. The German law against unfair competition grants businesses and business organisations affected by unfair trading practices the right to make civil-law claims. No provision is made by the German Act Against Unfair Competition (hereinafter 'UWG') for any kind of state intervention.

The history of the law shows that legislative procedures were initiated and followed up primarily by business. Business has always expressed its determination that fair competition is a serious matter. Understanding this is important, as it explains why the regulatory framework should not be rashly branded as an obstacle to entrepreneurial activities.

It is appropriate to apply the principle of performance when drawing the line between fair and unfair competitive practices.

The purpose of commercial competition is its reliance on the principle of performance. It is therefore appropriate to apply the principle of performance when drawing the line between fair and unfair competitive practices. It forms the basis for the distinction between performance-oriented competition on the one hand and non-performance-oriented competition on the other (for a detailed discussion see: Baumbach/Hefermehl, Wettbewerbsrecht, 18th Edition, Introduction UWG, Marginal Note 96).

Performance-oriented competition is positive competition, where each business promotes its sales through efficiency. This type of competition is to be distinguished from non-performance-oriented or negative competition. In negative competition, a business obstructs its competitors, clearing the way for its own sales (Baumbach/Hefermehl, *idem*).

It is important to bear in mind that it is in the interest of competitors to have a performance-oriented competitive environment. Equally, consumer protection ranks very high, as consumers are to be protected from manipulation and misleading practices, as well as from discrimination.

II. Legal regulatory framework

1. German Law on Gifts ('Zugabeverordnung')

The German Law on Gifts generally prohibits the granting of a free gift if the gift is granted subject to a sales transaction against payment. Both the so-called 'main article' and the gift may be either a product or a service (Article 1 Paragraph 1, Law on Gifts).

This general ban on gifts is based on the knowledge that the promise of a supposedly free gift constitutes a distortion of genuine and performance-oriented competition, which is based on the price competitiveness and quality of a given product. When receiving a free gift the buyer is manipulated and mislead as to the actual pricing of the article (for further details see Baumbach/Hefermehl, Zugabeverordnung, Marginal Note 5).

This provision is based on a particular cost concept. From a businessman's perspective, every 'cost-free' gift ultimately represents a false calculation, which will necessarily be taken into account when calculating the price of the main article and of the 'gift'. Thus the consumer does not receive a particular product or service 'as a gift', as suggested. Instead, the consumer pays for the gift when buying the main article. The true price of both main article and gift have been disguised.

If gifts were allowed without restriction, competition as a whole would have to re-

sort to this advertising device, as the practice of handing out free promotional gifts has an especially suggestive effect and is thus of particular appeal to the consumer. However, in view of the way prices are calculated, as outlined above, the general use of this advertising device would result in the price level for the main article itself being raised to that of main article plus 'gift'. This cost factor cannot be ignored when evaluating gifts or other measures forming part of 'value' advertising.

The scope of the German Law on Gifts is not limited to business transactions with private retail consumers; it applies to all marketing stages, i.e. also to transactions between manufacturers and retailers.

However the Law on Gifts does, on the guidelines outlined above, admit certain gifts, which are listed in Article 1 Paragraph 2 of the German Law on Gifts. These include low value promotional objects (Article 1 Paragraph 2a); accessories or ancillary services customary in trade (Article 1 Paragraph 2d); and customer magazines (Article 1 Paragraph 2e). The reimbursement, in part or in full, of travel costs for short-distance public transport is now also considered an ancillary service customary in trade, provided that it is adequate in relation to the value of the relevant goods or services (Article 1 Paragraph 2d, Law on Gifts).

2. Rebates Act ('Rabattgesetz')

As with the Law on Gifts, the legislative regulations underlying the Rebates Act are based on the idea of a ban on rebates in principle (Article 1 Paragraph 1 of the Rebates Act). If a rebate is granted, this rebate must have been taken into account in the initial price calculation. The Rebates Act, which in no way constitutes a tool for the protection of small and medium-sized businesses, depends on the basic idea that 'no price discount is granted gratuitously' (Baumbach/Hefermehl, Rabattgesetz, Marginal Note 8). It does not deny a businessman the right to free pricing: after all, it is every businessman's task and self-evident right to fix his own prices. The Rebates Act merely ties a businessman to the prices stipulated and demanded by him, and it does not allow any deviation from these prices in individual cases, and/or for the benefit of certain groups of consumers. General price reductions do not fall within the scope of the Rebates Act.

Unlike the Law on Gifts, the Rebates Act merely applies in relation to the retail consumer, who might also be a business-to-business customer. However, it provides for specific possibilities for granting discounts in this context (Article 9 Number 1 of the Rebates Act). The Rebates Act does not apply to transactions between producers and retailers, where all rebates are admissible.

If a rebate is granted, this rebate must have been taken into account in the initial price calculation.

Yet the Rebates Act does not prohibit all types of rebates. German law permits rebates in special cases when rebates are granted for efficiency reasons. This refers first of all to volume discounts (Article 7 of the Rebates Act). The purchase of a large volume of goods reduces the cost of sales for traders. Accordingly traders may pass this benefit on to their customers as a volume discount.

A special provision, Article 13 of the Rebates Act bylaw, allows producers of branded goods, who do not market their articles directly but through the retail trade, to reward consumers for showing customer loyalty.

3. Article 1 UWG

Article 1 of the UWG Act prohibits all unfair competitive practices in principle; in determining whether a practice used in the market is fair or unfair, the guiding principle is primarily that of a performance-oriented competition (see I. above).

This rule, which is drafted as a blanket clause, has proven its usefulness in practice, as it enables a flexible response to new kinds of advertising practices. The rule is based on case law and therefore offers legal certainty when applied in practice. Since its creation in 1909, the main categories of cases established in practice and by the German courts are as follows: touting; obstruction; exploitation; breach of the law; and market disruption. The categories pertinent to the present discussion are touting,

Gifts are not a tool employed in performance-oriented competition; rather, they are a vehicle designed to promote the sale of an otherwise obviously not very attractive main article by disguising its price.

particularly by means of 'value' advertising, and obstruction.

4. Article 3 UWG: prohibition of misleading advertising

It should be added that the general prohibition of misleading advertising is another obvious framework regulation which applies to sales promotions. The prohibition of misleading advertising is likely to form part of any competition regime; not least is the way it is given particular expression on a European level in the form of Directive 84/450.

III. Sales Promotions in practice and their legal evaluation

1. Gifts

Article 1 Paragraph 1 of the German Law on Gifts prohibits the use of gifts in sales promotions for the reasons outlined above (under II.1). Gifts are not a tool employed in performance-oriented competition; rather, they are a vehicle designed to promote the sale of an otherwise obviously not very attractive main article by disguising its price. This ban on gifts is consistently applied by German law in the interest of a performance-oriented competition.

Take the example of the following promotion: 'Two meals for the price of one'.

Here consumers were invited to purchase special vouchers from a catering establishment before the actual meal. They were asked to use these vouchers to pay for one meal: the meal for the second person was free. This type of advertising is prohibited under German law (BGH WRP 91, page 648 - 'Two for One').

Even the offer of 'free car transport' as part of a ferry crossing for a family of several people is unlawful (OLG Hamburg, WRP 78, page 900). This example is a particularly clear illustration. The car transport cannot be cost-free: its high value must have been taken into account when calculating the total price of the ferry crossing. The real price was thus concealed and the consumers were deceived.

2. Sales contests offered to the trade

A form of advertising popularly used by manufacturers is the offer of sales contests to the trade. Such sales contests generally take place in the form of campaigns of limited duration offering, say, a particular premium if a certain quantity of goods is purchased. Such premiums constitute a gift and are therefore not admissible.

Sales contests may also be in the form of a free draw for valuable prizes amongst the 'best' in a competition. Such incentives carry the danger that the retailer might, during sales talks with his customers, no longer advise the customer according to objective criteria; instead, his marketing activities, including the advice given to customers, might be governed by the wish to win the sales contest. Influencing the market process in such a way is incompatible with the principle of a performance-oriented competition (for further details see: Baumbach/Hefermehl, Article 1 UWG, Marginal Note 898).

3. Loyalty rewards

A reward for loyalty granted by a producer of branded goods to his loyal customers by means of special coupons does not constitute a gift. This type of sales promotion is admissible according to German law (Article 13 of the Rebates Act bylaw); however, there is an upper limit to the actual amount of the loyalty reward. A loyalty reward may constitute up to 10 per cent of the value of the branded article (BGH WRP 81, page 91 - 'Rama-Mädchen').

4. Special offers

Sales promotion may also take place as reduced offers of a limited period.

The retail trade itself can speed up the clearance sale of certain goods by means of special offers (Article 7 Paragraph 2 UWG). There is, however, a limit to such promotions: reduced offers may not be grouped so as to leave the public with the impression that a bargain sale of a substantial part of the product range is taking place (Article 7 Paragraph 1 UWG).

Similarly, manufacturers are free to try to promote the sales of their products through the retail trade by setting their prices in a particularly favourable way.

Manufacturers are not, however, allowed to influence competition by, for example, prescribing particular prices to the retail trade (Article 15 of the German Act Against Restraints of Competition). Such restraint of competition is inadmissible, both explicitly and through sales messages to the consumer, as such messages ultimately exert an indirect influence on the retail trade to adopt the prices fixed by the producer (cf. Baumbach/Hefermehl, Article 1 UWG, Marginal Note 901).

Consider the promotion by a confectionery manufacturer who printed on the packages of his products: '4 for the price of 3'.

In doing this, the manufacturer ultimately forced retailers to sell this promotion pack, which was larger than the normal pack, for the same price (BGH WRP 78, page 371 - '4 zum Preis von 3').

The European Court of Justice refers to this aspect - i.e. manufacturers influencing retailers' pricing and its prohibition by national German law - in its 'Mars decision' (ECJ, judgment dated 6 July 1995, Ref. C 470/93, reprinted in WRP 95, page 677).

The European Court of Justice justifies overruling the antitrust provision in Article 15 of the Act Against Restraints of Competition by saying that the constraint imposed upon retailers not to increase prices during the promotional period is of benefit to the consumer. This argument is, however, not conclusive. Ultimately retailers cannot afford to 'give away free gifts'. If retailers cannot increase prices with such promotions, they will make up for it by resorting to mixed costing and take this item into account in some other way. This does not benefit the consumer and the non-application of Article 15 of the Act Against Restraints of Competition is not justified. Moreover, the ECJ's reasoning is contradictory as it justifies a practice restricting competition in respect of trading between manufacturers and retailers with consumer protection concerns.

It is therefore doubtful whether European law ultimately calls for and/or justifies a restraint of national competition in relations between manufacturers and retailers.

5. Promotion Packs

In practice, sales promotions are often realised by selling a particular pack of goods and adding an extra article, which may or may not be related to the main goods. Often such promotions are intended by business to make consumers who purchase a particular article from 'their' producer aware of the diversity of the product range.

This is to be welcomed in principle, particularly in relation to performance-oriented competition. There are, however, limits to this type of promotion where the enclosed article leads to the price of the main product being disguised.

The German Law on Gifts also applies to promotion packs. These have to be designed in such a way as to avoid the impression that the enclosed article is 'free'.

Moreover, if an unrelated extra is enclosed with the main article the tie-in of goods thus achieved might mean that the customer is unable to draw a distinction between his price expectations in respect of the main article on the one hand and that of the enclosed extra on the other. Extras that are alien to the original product will therefore often need to be made available individually and independently of the promotion pack. Only then can the consumer get a clear idea of the pricing for the individual items in the promotion pack.

Producers wishing to attract consumers by means of performance-oriented competition should not, and would not want to, raise any objections to this practice.

6. Lotteries

The organisation of draws and lotteries has always had a particular importance in sales promotion. In consumers' eyes, draws and lotteries are particularly alluring and thus particularly efficient. They are a way for the businessman to gain the attention of the public and to get consumers specifically interested in the products on offer. Such competition for consumers' attention embodies the performance idea on which positive competition is based.

If retailers cannot increase prices with such promotions, they will make up for it by resorting to mixed costing and take this item into account in some other way.

By contrast, the term 'negative competition' applies where lottery promotions are not limited to getting consumers' attention but to entice consumers, in the way the particular lottery promotion is organised, to purchase a product merely in order to be able to take part in the lottery. Linking the sale of a product with participation in a draw is therefore an unfair competitive practice (cf. Baumbach/Hefermehl, Article 1 UWG, Marginal Note 155).

Nor can such link-ups between the sale of goods and participation in a draw be justified from the consumers' perspective. Consumers have to be able to decide freely, on the basis of quality and price competitiveness, whether they wish to purchase a given product. If a consumer's passion for gaming is exploited by, either directly or indirectly, linking the sale of a product with a draw, the consumer's perception of the objective arguments for and against buying this product becomes blurred.

7. Sample promotions

When launching a new product it is of considerable importance for the producer to present the new product to as many people as possible and to gain consumers for this product. Apart from using a wide range of commercial communications techniques, this may also be achieved by handing out merchandise samples to customers, so customers can judge the quality of the product being promoted for themselves.

Competitors who might not have the same financial resources are defenceless against such behaviour...

Providing households with merchandise samples, even on a large scale, is in accordance with performance-oriented competition. Sample promotions do not obstruct competition in an unfair manner, as competitors can continue to offer their services unrestricted. Moreover, consumer interests are not violated because customers can compare all services on offer and are free to decide and choose (cf. Baumbach/Hefermehl, Article 1 UWG, Marginal Note 856).

On the other hand, competition is not performance-oriented when the large-scale distribution of free articles extends not just to samples but to the actual product itself and therefore results in the market being distorted. Such competitive behaviour can only be adopted by a very well funded supplier. Competitors who might not have the same financial resources are defenceless against such behaviour; what is more, they are restricted in their competitive activities through the exercise of one competitor's overwhelming market power (cf. Baumbach/Hefermehl, *idem*).

From the point of view of performance-oriented competition, there can be no justification for giving away original goods cost-free and in large numbers, especially as this will result in the market being distorted. If a business wishes to draw the attention of consumers to a new product and to provide them with the possibility of sampling the product itself, a merchandise sample is perfectly sufficient.

IV. Conclusion

The fair trade rules outlined above as well as their practical application leave businesses with a large scope for using sales promotions within the framework of real and positive competition. A business might wish to draw the public's attention to a product through a special offer and thus help clear stocks. Alternatively, it might use promotion packs to direct the attention of customers to another product from its diverse product range. Businesses can highlight their range of products by means of lotteries. Or they can launch a new product by handing out samples to consumers. These possibilities cover a wide scope within which businesses can organise positive competition, i.e. performance-oriented competition.

However, in the context of sales promotions businesses are not allowed to obstruct their competitors through the use of tools unrelated to their performance, nor may they deceive consumers as to the actual pricing and thus adversely affect the freedom of consumers to make up their own minds. Such behaviour cannot be justified from the point of view of positive competition.

Do promotions need media support?

Abbas Bendali
Research Director
Euro RSCG

The advent of barcodes and scanning technology has revolutionized the process of gathering data for large-scale panel research. The immediate consequences for end-users of this research have been:

- more frequent information
- greater reliability
- greater precision.

Organisations that have traditionally carried out large-scale panel research on consumers and retailers have gradually changed their methods to make use of this new technology.

In this context, Nielsen and Euromedia have been operating a joint research project in France known as SYSMIC since 1991, to measure the effectiveness of advertising and promotions. Essentially, this work has made it possible to establish an ongoing correlation between Nielsen panellists' purchasing behaviour and their exposure to the media.

The role of Nielsen's marketing data and their media component SYSMIC has paved new ground in marketing research in general, and advertising effectiveness research in particular.

In order to respond to the needs of consumer products advertisers, Mediapolis, Nielsen, NRJ Régies and M6 Publicité have carried out a joint research project aiming to quantify the impact of manufacturers' promotions supported by television and radio advertising.

Major-brand promotional campaigns are becoming increasingly frequent, particularly on television; examples include bingo games and cash-back offers.

The main aim of such promotions is to influence the consumer's short-term behaviour. They serve a different function to traditional advertising, whose primary purpose is to develop the image of a brand, and which therefore has more long-term objectives.

We need therefore to look at whether these promotions are achieving their aim of generating short-term sales.

The results of this work constitute the first stage of the project. This is a descriptive stage, whose main objective is to review the situation and identify the main priorities for future research in this area.

Survey methodology

Manufacturers' promotions are an important way of stimulating short-term sales or generating consumer loyalty. They are different from retailer promotions which are primarily aimed at the point of sale and which might include the provision of shelf signage and leaflets.

Promotions may take many different forms, including: cash back offers; competitions; extra quantities of the product; loyalty vouchers; coupons or prize draws.

Major-brand promotional campaigns are becoming increasingly frequent, particularly on television

Scope of survey

For reasons concerned with the availability of information, standardisation of data and the usability of the results, the scope of the survey was limited to the following: food products; single-product manufacturers' promotions; television and radio; and recent campaigns, carried out between January 1994 and June 1995.

Methodology

This survey required the use of large-scale, sophisticated research tools (see 'Resources used'). In order to define and describe these campaigns and then quantify their impact, data was obtained from three different sources:

- The media: quantitative and qualitative details of spending;
- Retailers: sales volumes, products available, prices, level of promotion;
- Consumers: observing purchasing behaviour based on promotions in the stores they use and their exposure to the media.

Using the SECODIP qualitative data-

Offers of cash back now or later were by far the most common form of manufacturers' promotions, and in fact were those most often given media support

base, 26 campaigns were identified as complying with the survey constraints.

We used a combination of all the various methods we had available to analyse variations in sales of brands before, during and after the media campaign in the light of the product mix variables: nature of promotion (extra quantity, cash back offer, competition etc); stock levels of products being promoted; profile of the brand and its market (market leader/challenger, degree of market fragmentation, own-brands market share); amount of advertising (budget, frequency, length of campaign); media mix (radio, TV, or both); content of TV commercial; amount of promotion by retailers; attractiveness of price. We also considered these household behaviour pattern variables: frequency of purchase; share of purchases and degree of exposure to media campaigns.

Description of campaigns

The campaigns analysed covered the majority of the brands in the food sector. More than three quarters of the campaigns related to coffee, chocolate, dairy and meat products.

Offers of cash back now or later were by far the most common form of manufacturers' promotions, and in fact were those most often given media support. Competitions and extra-quantity offers were the second most common form of promotion used by advertisers. Loyalty vouchers, purchase coupons and prize draws represented only 20% of the campaigns analysed.

The campaigns were divided roughly equally between television (46%) and radio (42%). One in ten campaigns used a mix of the two media.

The media budgets allocated to these campaigns were significant: the gross spend on TV was FF 8.5 million, and on radio FF 2.5 million. This was twice the normal budget for the food sector.

In the case of television, this high level of spending occurred because traditional image advertising was being carried out alongside promotions.

In this respect, it is interesting to note that two thirds of the TV commercials for the promotion were based on the content of the image commercial, and the remaining one third were made specifically for the promotion.

It was possible for a product to be promoted on TV or radio but not to be widely available in the stores, because only one in two products had their stock levels increased significantly.

This apparent contradiction can partly be explained by:

- The relatively long period of time taken by the product to be transported from the factory to the warehouse and then to the shelf in the store. In the case of food products, this can sometimes take three months. It is possible for there to be a time-lag between the promotion being advertised in the media and sufficient quantities being available in the shops.
- Details of manufacturers' promotions are not always given on the packaging of the product, and the customer may therefore not be aware of them.

Categories of campaigns

As a result of this survey, the campaigns were divided into three categories based on the change in market share which occurred.

Category 1 (20% of cases): market share remained unchanged or fell slightly (2% to 4%)

This category contained mainly the leading brands in markets where own brands had a large share. This category had the highest level of brand loyalty of the three.

In most cases, the media campaign for the promotion had a significant budget (averaging FF 9 million for TV and FF 4.6 million for radio) and followed an

image campaign which had been run in the previous weeks.

Category 2 (45%): market share increased by 3% to 10%.

This category had the lowest level of media support of the three categories, with an average budget of FF 3.2 million for TV and FF 1.3 million for radio.

Manufacturers' promotions were usually 'money back later' offers with little advertising at the point of sale. However, total sales of the brands increased by several percentage points during and after the promotion.

Category 3 (35%): market share increased by more than 10%.

These involved a significant level of media spend, with a budget averaging FF 12.5 million for TV and FF 3.4 million for radio, and the campaign often lasted longer than the product purchase cycle. These were brands competing in a fragmented market, with no dominant market leader and with a high volume of advertising. There was also significant product support in the form of retailer promotions. The brands had the least stable market share of the three categories.

Extra-quantity offers and competitions were over-represented in this group.

The main lessons of the survey

Eight out of ten media-supported promotions led to a gain in market share for the brand. Half the promotions led to a significant gain which often continued after the campaign.

Analysing the characteristics of these three categories, we can identify those variables that determine the impact of media-backed promotions on sales.

There are a number of these variables. They are linked to the following factors: the type of promotion the manufacturer decides to use; whether the product is actually on the shelves; the support given by retailers in the form of point-of-sale promotions and the amount of media advertising for the promotion.

Type of manufacturer's promotion and market for brand

Some manufacturers' promotions have a greater effect on sales than others, despite having the same media budget. This is true of extra-quantity offers and competitions, provided the manufacturer does not have unrealistically high expectations of the potential gain.

However, the type of promotion must be tailored to the level of competition within the market. This will depend on whether the brand is a leader or challenger, the relative market share of own brands and premium brands, and the degree of loyalty enjoyed by the different brands in the market.

Logistics and retailer support

The product must be available on the shelves in the maximum possible number of points of sale when the media campaign is launched. This might seem like common sense, but it is not always the case.

Once the product is available at the point of sale, the campaign will be more effective if the various forms of retailer support are provided in tandem with the media campaign, rather than separately.

Use of media

This survey brought out at least two important facts:

1. There is no one media mix that is more effective than others when it comes to advertising a promotion. Each of the three categories included campaigns that had been advertised on radio, television or a combination of the two. If the promotion is to be effective, it is essential that the image campaign be properly tied in with the promotional campaign.

2. The amount of money spent on campaigns is an essential factor in their impact. It is important to decide whom the advertising for a brand is targeting:

Some manufacturers' promotions have a greater effect on sales than others, despite having the same media budget

Resources used

SCANTRACK, performance measurement: The Nielsen retailer panel; 450 large and medium-sized points of sale with scanner checkouts, located throughout France; week-on-week monitoring of brand sales indicators; weekly survey of point-of-sale promotions, particularly retailer promotions (highlighting particular products, price cuts and leaflets)

SCAN 9000, the consumer survey: The Nielsen consumer panel; 9,000 panel households using approximately 40 large stores with scanners; ongoing, computerized survey of purchases at checkout using a magnetic card to identify the panellist; weekly survey of point-of-sale promotions, and particularly retailer and manufacturers' promotions.

SYSMIC, link between purchasing behaviour and amount of advertising and promotion: SYSMIC is the media component of SCAN 9000, produced in partnership between Nielsen and Euromedia; six-monthly survey of exposure to media (TV, radio, press, cinema); audiences extrapolated using market reference data (Médiamétrie, AEPM).

MEDIA SURVEY, monitoring and identifying the amount of advertising for the brand and its competitors: SECODIP survey; quantitative survey of media spending (sector, product, medium, amount); qualitative survey (type of advertisement, sound recording or video).

- retailers, to encourage them to stock more of the product and thus create a more favourable environment for commercial negotiations, or
- both retailers and the consumers at whom the promotion is aimed.

The retailers' response will be reflected in their levels for the brand; in most cases, the message is conveyed effectively.

However, the consumer's response in terms of buying the product will depend on how much they have seen the promotion advertised in the media and at the point of sale.

The following graph uses examples from each of the three categories of campaign to show the change in market share among two groups of people before and after the campaign:

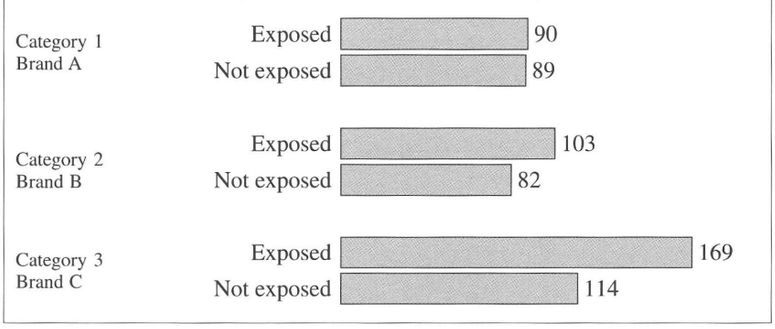
- both groups had seen the promotion advertised at the point of sale;
- however, one group had also seen it advertised in the media and the other had not.

In Category 1, the product's market share decreased or stayed the same for both groups.

In Category 2, there was an increase in market share among the group who had seen the media campaign. Advertising the promotion at the point of sale but not in the media did not lead to an increase in market share.

Finally, in Category 3 it can be seen that a manufacturer's promotion advertised at the point of sale and also given significant media support resulted in an increased market share.

Market Share before and after the campaign
(100 = Market share 'before')



Conclusion

It goes without saying that measuring the effectiveness of advertising, and thus the return on one's media spend, is a complex process involving many variables.

However, if we look only at fast-moving consumer goods, the information available using scanning technology means that we can directly measure the effect of advertising and promotions on sales.

This survey of media-supported promotions has enabled us to look at the links between two key variables in the product mix and two important consumer product strategies: promotions with and without media support.

Clearly, the two are very closely linked, and if they are properly organised they will have a mutually reinforcing effect. People are exposed to a great deal of advertising; they are more likely to notice point-of-sale advertising for a promotion if they have already seen it advertised in the media, and vice versa.

This research will be continued and expanded to include other sectors (drinks, health and beauty products, and cleaning products). It will also include other media, and particularly the press, which is often used to publicise promotions.

Commercial Communications -

a Green Paper that will fail to please

Richard Thomas
Director of Public Policy
Clifford Chance

Introduction and Summary

The Internal Market was supposed to have been completed by the end of 1992. It has taken until mid-1996 for the European Commission to publish a Green Paper which confirms that there is little or no coherence or consistency across Europe as to how marketing should be regulated. The central conclusions of the Green Paper, *Commercial Communications in the Internal Market*, are that differing national regulations can create obstacles for cross-border trade and that the situation may get worse with the creation of further divergences and with the growth of new 'Information Society' services, such as direct selling through the Internet.

Businesses, consumers and the public at large have much to gain from an expanding and healthy Internal Market. In principle, a business should be able to sell its goods or services anywhere within the Community and consumers should be able to buy from anywhere. Commercial communications are essential for that goal, but there are perfectly legitimate reasons for a range of regulatory restrictions on the content and manner of commercial communications.

The Green Paper outlines 'basic policy orientations'. The aim is to tackle existing regulations which create barriers to cross-border marketing and to ensure that future measures (whether at national or Community level) are developed in conformity with 'Community objectives', particularly the promotion of the Internal Market. This is primarily to be achieved with an 'assessment methodology' to ensure that initiatives are precisely targeted on public interest objectives and do not amount to unlawful barriers to trade. This will rely largely upon attempts to apply 'proportionality' tests - deciding whether a restrictive measure goes beyond that which is necessary to achieve legitimate objectives.

Unfortunately, the Green Paper's approach represents a missed opportunity. The proposals are over-ambitious and (it is feared) unworkable. Moreover:

- ***Commercial interests***

- will regret that the proposals are somewhat abstract and bureaucratic and have not been prioritised;
- will be disappointed with the failure to give any concrete commitment to tackle manifestly unjustifiable restrictions.

- ***Consumer and public interest groups***

- will fear a de-regulatory programme directed at dismantling safeguards and protections which address legitimate concerns without any coherent approach to erecting substitute arrangements;
- will regret the absence of any commitment to take firm action against phoney protectionism.

- ***Political interests***

- will be reluctant to address areas of high controversy which appear to challenge national interests and/or conflict with principles of subsidiarity.

Despite the likely problems with the Commission's proposals, there is a need for a workable programme of action. This response concludes with a suggested way forward. The starting point has to be a concrete Statement of those types of restriction which are considered to be legitimate and proportionate and those which are not. On the basis of such an approach it may be possible to bring forward suitable Community legislation. It will certainly be possible to identify those national restrictions which are blatantly incompatible with Community law with a view to infringement proceedings. There is also a need for the Commission to address self-regulatory measures, redress and - above all - cross-border enforcement.

Unfortunately, the Green Paper's approach represents a missed opportunity. The proposals are over-ambitious and (it is feared) unworkable

The right approach is to develop a bench-mark in terms of what is recognised as legitimate and proportionate as the subject matter of regulatory restriction and then to review individual national restrictions against that coherent framework

What has Gone Wrong?

These proposals are however over-ambitious and represent a missed opportunity. It is feared that - as currently put forward - they are doomed to failure. It is possible to suggest some of the problems which lie behind the disappointments of the Green Paper:

1. In particular there is little acknowledgement that:

- In any market, a basic framework of regulation and/or self-regulation is needed by all players (users, suppliers, carriers, consumers and others) if advertising and other marketing efforts are to command public confidence and achieve effectiveness. This is as important for the commercial communications industry (not least to build trust and acceptability for their messages) as it is for those on the receiving end. In terms of public policy and public acceptability, it will be extraordinarily difficult to mount a de-regulatory ('dismantling') programme purely in the name of Community principles.
- It would be a Herculean (and probably impossible) exercise to identify and disentangle the explicit and envisaged policy objectives of thousands of different national regulations and their detailed sub-provisions.
- Behind each such regulation, there lies a complex web of political, historical, cultural and other circumstantial motivations. Each regulation, however imperfectly, represents the manifestation of democratic decision-making within the Member State where it was adopted, usually reflecting a mix of national aspirations, concerns and values.
- The regulation of advertising and other forms of marketing is a sensitive and controversial topic, where passions can quickly be aroused if familiar safeguards are seen to be threatened from remote sources. The Green Paper does not satisfactorily address subsidiarity issues or the problems of challenging deeply-held traditions and systems built up over many years. De-regulation can be an assault on the principle of subsidiarity as much as regulation.
- Commercial communications seek to inform and to persuade. They will only be effective if they are acceptable to the target audience and to the social, cultural and legal norms of that audience. The audience is always local. The existence of the Euro-Consumer (except in relatively niche areas) remains elusive. Direct marketing prospers by focusing on the *different* characteristics of target audiences. Even where marketeers are ready to 'Think Global ..' they are advised to '.. Act Local'. Most marketeers will wish to ensure compliance with local values and acceptability. Leaving aside language and social barriers, few marketeers would wish to support a marketing mix, which may be consistent with Community law, but which flouts the local regulatory traditions. The Green Paper acknowledges that the Commission's survey revealed that more users named cultural problems as impeding trade than mentioned regulatory problems. Indeed, only 19% thought that regulatory problems were the most serious, while 92% felt they had encountered cultural difficulties. Carriers, consumer associations and self-regulatory authorities all also thought that culture was a key concern.

2. *The proposed approach starts at the wrong end. The proposed starting-point is each national restriction, assessed by reference to jurisprudential criteria. The right approach is to develop a benchmark in terms of what is recognised as legitimate and proportionate as the subject matter of regulatory restriction and then to review individual national restrictions against that coherent framework.*

3. There is no recognition of the role which can be played by effective self-regu-

lation. In particular, one might expect a discussion about the scope for pan-European self-regulation as a substitute for national regulation. If the overall thrust is to be de-regulatory, self-regulation (where it can be made to work) could play an important part in maintaining the necessary standards, protections and benefits which are currently achieved through divergent legal provisions.

4. There is no discussion of the machinery through which consumers (and others adversely affected) may seek compensatory redress in respect of offending marketing materials which originate in another Member State.

5. There is virtually no discussion of enforcement machinery. The systems, resources and policies which are put in place for enforcing national regulations are often more important than the substance of the regulations themselves. This applies two ways - adequate enforcement to ensure effectiveness of regulatory measures and over-zealous or discriminatory enforcement as a barrier to trade.

6. Nor is there any acknowledgement of the need for machinery to *prevent* the despatch of offending materials from one Member State to another.

7. The reliance which the proposals place upon rather imprecise administrative and bureaucratic processes will frustrate those (producers and consumers) who do wish to attack blatant national regulations which are discriminatory in effect and impossible to justify objectively.

What is to be done?

The Commission should abandon its proposals for a mechanistic, but abstract, 'assessment methodology'. Likewise little benefit is seen in establishing the proposed Committee. It should also abandon its proposed 'scatter-gun' approach, substantially reducing its range of initial targets.

A simpler, better-targeted and more effective approach is needed if any worthwhile progress is actually to be made with the removal of unacceptable barriers. The starting point should be to build widespread support for a balanced overall objective, for example:

'To ensure that regulatory restrictions and enforcement practice which impact on Commercial Communications are as consistent as possible across the Internal Market, while respecting protections and safeguards which are considered acceptable and appropriate to achieve defined general interest objectives.'

A programme to achieve such an objective might then proceed along the following lines:

1. The Commission (in full consultation with all interested parties) should develop a comprehensive, authoritative and (above all) concrete Statement of the types of regulatory restriction impacting on commercial communications which are considered to be unjustified or disproportionate by reference to stated 'general interest' objectives. This will provide the central and objective benchmark (rather than abstract criteria) for reviewing national restrictions. This would be case-by-case by reference to the types of restriction, rather than starting case-by-case with individual national measures.

The Commission should abandon its proposals for a mechanistic, but abstract, 'assessment methodology'. Likewise little benefit is seen in establishing the proposed Committee

2. In other words, what is needed is:

a) an elaboration of general interest objectives in terms of the goals which it is considered to be legitimate to achieve through regulatory activity; and

b) a clear indication, as a matter of proportionality, of the types of regulatory activ-

ity which go beyond acceptable limits for the achievement of each such objective.

3. Using and adapting the Commission's Regulatory Tables, the Table opposite sets out for initial consideration and discussion a tentative framework to indicate the ground which needs to be covered in developing the proposed statement.

4. This exercise will not be easy, but it will have a *balanced and focused* methodology which should command widespread support. The central challenge, which is both a technical and a political process, will be, for each objective, to specify the grounds for deciding on which side of the acceptability/proportionality boundary particular types of restriction will fall. It is suspected that - given a suitable lead from the Commission - a surprising degree of consensus may emerge between commercial and consumer/public interests on most (though not all) issues which may well 'squeeze' purely national interests. Even if not 100%, this would provide a solid foundation.

5. Once broad agreement has been reached on the content of such a statement, there are two main (though not mutually exclusive) options for the Commission. It could use the statement as the basis for legislative proposals directed at achieving a coherent and consistent approach to the regulation of commercial communications across the Internal Market which would command widespread commercial, public and political confidence.

This exercise will not be easy, but it will have a balanced and focused methodology which should command widespread support.

6. Alternatively - or additionally - the Commission should use the statement to pursue a genuinely case-by-case strategy, initially focusing on a small number of national restrictions which are considered to be particularly objectionable as unjustified and/or excessive barriers to trade. (For example an outright ban on a particular type of sales promotion or on advertising by professionals might be selected for the initial review.) In appropriate cases, infringement proceedings under Article 169 of the EC Treaty *should* be threatened and commenced.

7. Alongside the above activity, the Commission should actively support efforts by the European Advertising Standards Alliance (EASA) and others to establish instruments of pan-European self-regulation, consistent with the elaborated general interest objectives, which will be effective (in substance and enforcement) and widely-respected.

8. The Commission should work with enforcement bodies within Member States (and the International Marketing Supervision Network) to bring forward legislative proposals for *preventing* the despatch of commercial communications from one Member State to another where such communications:

(a) would be unlawful in the Host Country ...

(b) ... under regulations which are acceptable within the parameters of the statement.

9. As a related, but separate, exercise there may be a case for the Commission to develop European or global proposals for a balanced approach to the regulation of commercial communications which use the Internet and other forms of electronic distance selling. This is an area where:

- there is little specific regulation at the moment;
- existing national regulations directed at commercial communications in general are either ineffective or have unintended consequences;
- there is less scope for political and public controversy in defence of a status quo;
- there is an obvious need for an international approach.

GENERAL INTEREST OBJECTIVE WHICH NEEDS TO BE FORMULATED	TYPES OF RESTRICTIONS CONSIDERED TO BE PROPORTIONATE AND ACCEPTABLE	TYPES OF RESTRICTIONS CONSIDERED TO BE DISPROPORTIONATE AND UNACCEPTABLE
Privacy	* Bans on intrusive advertising (e.g. cold calling, telephone marketing), where recipient has not given adequate consent	* Outright bans on any form of direct approach to recipients
Protection of Minors	* Restrictions requiring special measures when communicating with minors (e.g. warnings, parental consent) * Outright bans on specific types of communication (e.g. credit, gambling, tobacco, alcohol)	* Outright bans on all forms of communications directed at children * Outright ban on advertising of toys
Public Morality	* Requirements reflecting widely-accepted standards of taste/decency within the Member State * Bans on advertising which discriminates in terms of race, sex etc. * Requirements which reflect respect for minorities, women etc * Requirements which reflect other defined societal values	* Taste/decency standards which cannot be justified in such terms - - * Bans/restrictions which cannot be justified in such terms
Public Health	* Acceptable restrictions affecting tobacco, alcohol, food and pharmaceuticals (for discussion)	[For discussion]
Consumer Protection	* Bans on deceptive or misleading claims * Limitations on activities which may impose undue influence, e.g. discounts, promotional gifts, concessionary offers, competitions, prize draws * Provisions promoting market transparency * Provisions imposing particular requirements for financial services	- * Unjustified bans on sales promotions * Bans on comparative advertising - * Unjustified bans on advertising by professionals * Other restrictions which impede fair competition
Protection of Intellectual Property Rights		* Bans or restrictions which go beyond what is necessary for legitimate protection of intellectual property rights
Professional Ethics	* Libel/slander rules	* Excessive restrictions on denigration of competitors
Protection of National Treasures/Dissemination of Culture	-	* Language protection provisions
Pluralism	* Justifiable media restrictions * Justifiable sponsorship restrictions	* Unjustifiable media restrictions * Unjustifiable sponsorship restrictions

Towards a single market in advertising?

Christophe Pecnard
Partner
&
Dimitri Delesalle
Solicitor
Thomas & Associés

In November 1992, the Commission took the decision to prepare a Green Paper, with the aim of undertaking a '*global review of the policy direction to be followed in the field of commercial communications*' - which, in the terminology of the Commission, covers all forms of advertising, direct marketing, sponsorship, sales promotion and public relations which are aimed at promoting products and services (product packaging is however excluded).

As such, commercial communications play a large economic role in the modern economies of the European Union (EU), not only in terms of products but also in terms of jobs. In fact, they generated in 1993 a turnover of ECU 75 billion and employed some 250,000 people. These services, which are an important part of the commercial strategy of any company or organisation, play a significant role in strengthening the single market.

However, numerous studies and surveys had given the Commission the impression that, in the commercial communications field, the opportunities of the single market were not being fully exploited due to differences in regulations between the Member States of the EU.

In adapting, on 8 May, its Green Paper on commercial communications[1] the Commission wished to identify what it saw as '*the actions which needed to be taken in order to create a real single market*' in this area. The Commission is at the present moment undertaking an enormous consultation of all interested parties[2].

The starting point of the review initiated by the Commission is thus the observation that there exists a patchwork of national regulations in the advertising field within the EU, from which arise various barriers (see I).

Further, the limits of harmonisation by legislation and case law (see II) have led the Commission to suggest technical solutions to facilitate the establishment of a genuine single market for commercial communications (see III).

I. A patchwork of national regulations

Nowadays, companies wishing to launch cross-border advertising campaigns in the EU are confronted by a true patchwork of regulations and by restrictions resulting from differences between the various applicable national regulations.

This situation has been highlighted by the results of two surveys conducted on behalf of the Commission aimed at finding out the opinions of those concerned. These surveys show that among the major difficulties at cross-border level, all those questioned operating in the commercial communications area, whether they were service providers (for example, advertising agencies), users (advertisers) or media, put regulatory difficulties just behind cultural barriers. All providers of commercial communication services testified that offering effective commercial communication services on a large scale costs less in the USA than in Europe.

At present, the very large number of cross-border commercial communications operations surveyed usually limit themselves to a few countries and seldom cover the whole of the EU. As a result of regulatory differences between the Member States, 20% of those companies using some commercial communications declared they adapted their marketing/advertising strategies to each Member State; 14% decide on their marketing strategy centrally but develop it locally, whereas 12% manage their commercial communications separately in each country[3].

For many small companies, the unavoidable costs of feasibility studies of legal questions and of adapting their campaigns to the requirements of the dif-

[1]COM(96) 192 final.

[2]See: "Bruxelles s'attaque au chantier de la publicité en Europe": Christophe Pecnard - Les Echos, 31 May/1 June 1996; "*Vers l'instauration d'un marché intérieur des communications commerciales*?" by Christophe Pecnard and Dimitri Delesalle, L'observateur de Bruxelles n.18.

[3]International BMBR Survey for the Commission, *Commercial Communications*, December 1995, n.2.

ferent target countries stop all attempts at cross-border campaigns.

The Green Paper points out that, within the EU, the actual regulatory environment for commercial communications is based on different national legal traditions. As a consequence, there is a large range of national measures of differing character and severity. Each Member State is aiming to achieve a certain number of objectives which are sometimes based on approaches '*which are not totally coherent (or which even contradict) those adapted by other countries*'.

Such a situation leads inevitably to differences between national regulations which, according to the Commission, appear to be greater and greater between certain Member States. In this case, as soon as a commercial communications service crosses a border, it is confronted by a new legal system which can, on occasions, appear quite the opposite to the one in its country of origin.

Any comparison of the main differences shows how, from one Member State to another, measures can range from a total ban, to limited bans or no bans at all.

For example, whilst waiting for the adoption of the directive allowing comparative advertising in the whole of the EU, numerous users of commercial communications complained of not being able to use comparative advertising in certain Member States (such as Germany, Belgium, Luxembourg, Italy, Austria), which forced them to create completely new campaigns for those countries and therefore prevented them from creating pan-european comparative advertisements.

The regulations relating to price advertising (reductions, slashed prices, etc.) provide another example of these differences. The majority of respondents to the surveys believed that the regulatory measures are so different that in reality they prevent all forms of cross-border campaigns based on this technique. A certain number of specific examples were quoted, especially the very detailed and very different regulations on trading stamps and on price reductions in Greece, Portugal, Spain and Italy, and the effective ban on campaigns like 'three for the price of two' in those countries with a very low price threshold for free gifts, such as Germany and Denmark.

We can also cite those measures relating to '*intrusive advertising*' (tele-marketing, mailshots). The regulations relating to unsolicited tele-marketing vary in intensity from a lack of measures (Spain) to a total ban (for example, in Germany tele-marketing is not allowed even if people are previously given notice in writing), to limited bans (for example, in Denmark this form of direct selling is only allowed for books, subscriptions to newspapers or magazines and insurance policies; resulting orders are however not legally restricted). As far as direct advertising by mailshot is concerned, it seems that the Netherlands (with a self-disciplinary code) and Italy impose the most restrictive measures. According to respondents, such differences represent obstacles to the efficiency of cross-border direct marketing services.

The example of advertising aimed at children also illustrates the regulatory differences between different Member States of the EU and the consequent difficulties. Two Member States stand out in particular with regard to the restrictiveness of their legislation relating to advertising aimed at children. Even though Sweden traditionally has a legal system opposed to censorship, it forbids TV commercials which target children under 12. Furthermore, all individuals playing an important role in TV programmes which target mainly children under 12 are not allowed to take part in commercials. Finally, it is forbidden to have any commercials during advertisement breaks preceding or

From one Member State to another, measures can range from a total ban, to limited bans or no bans at all.

Legal changes are so numerous, it is very difficult for business to know precisely all relevant national legislation.

immediately following a programme targeting mainly children under 12. As far as Greece is concerned, it forbids TV commercials for toys between 7am and 10pm.

The Green Paper provides numerous examples of regulatory differences, and it is noticeable that they nowadays cover most of the commercial communication sectors and affect all advertisers, service providers and media active in this area. Moreover, this situation is constantly evolving. In the area of commercial communications, legal changes are so numerous, it is very difficult for business to know precisely all relevant national legislation. This shows how hard it is for companies trying to carry out any comparative survey. The Commission considers that such regulatory differences will become even greater as the Information Society develops, bringing with it new forms of commercial communications and increased cross-border commercial communications.

Faced with such a situation, the EU seems to have a major role to play in limiting these differences and offering business greater legal certainty in decision making. The second survey showed that 51% of companies questioned which had used commercial communications favoured an approach based on a minimum common regulatory standard. 8% favoured pan-European regulations. Self-regulation was spontaneously mentioned by advertisers (although only 3% of companies questioned thought that the Commission should trust 'effective self-regulation').

However, if certain tools exist which would allow such harmonisation at the European level, the study shows the limits that still remain.

II. The current tools of harmonisation and the limits

Confronted with this regulatory patchwork, the Community authorities are trying to harmonise, at the EU level, the rules applying to commercial communications.

This harmonisation is not only being driven by the Community legislator, by adopting texts of Community secondary legislation (A), but also by the European Court, on the basis of the principles of free trade and of the free provision of services (B). The study of this harmonisation shows that there is still a lot to be done and that barriers remain numerous.

A. Harmonisation by secondary legislation

In aiming at establishing a commercial communication Internal Market, the Community legislator has already harmonised or is trying to harmonise a certain number of rules.

Two major types of regulations can be identified: horizontal regulations (1), and vertical regulations (2).

1. Horizontal regulations

These are regulations relating to advertising in general - to the tools and techniques used in advertising - and are not linked to a specific product or service.

● Even though it is not directly linked to advertising, we can first of all look at the Community legislation on brands which can play a major role in cross-border advertising campaigns. National brand regulations have been harmonised by the Council Directive 89/104/EEC of 21 December 1988 which brought closer together the legislation of the Member States on brands[4]. The Regulation (EC) n. 40/94 dated 20 December 1993[5] and its applying Regulation (EC) n.2868/95 dated 13 December 1995[6] have put in place the 'Community brand'. It is also important to mention Council Regulation (EC) n. 3295/94 of 22 December 1994 determining the

[4]JOCE n. L40 of 11 February 1989

[5]JOCE n. L11 of 14 January 1994

[6]JOCE n. 303 of 15 December 1995

[7]JOCE n. L341 of 30 December 1994

measures banning the widespread practice, export, re-export as well as the placing under injunction of counterfeited and pirated goods.[7]

More directly linked to advertising are the following directives:

- Council Directive 84/450/EEC of 10 September 1984 relating to the harmonisation of legal, regulatory and administrative measures of the Member States against misleading advertising[8]. This Directive aims to harmonise national measures to protect consumers and people in a commercial, industrial, craft or professional activity, as well as the general public interest against misleading advertising and its unfair consequences. This text puts in place a minimum standard for misleading advertising and requires the establishment in each Member State of a watchdog. The text gives the Member States the option to adopt stricter measures, i.e. increased protection against misleading advertising[9].

In 1991, the Commission proposed a Directive to the European Parliament and the Council concerning comparative advertising which modified the Directive 84/450/EEC on misleading advertising[10], a proposition which was modified in 1994[11]. This text aims at allowing, in certain conditions (Art. 3, and following), comparative advertising at the Community level, and at harmonising the application in view of the establishment of the Internal Market as well as the need to improve consumers' information and stimulate competition. Given the comprehensive scope of the harmonisation envisaged, the Member States would not in principle be allowed, in the area of comparative advertising, to maintain or adopt more restrictive measures. In its current form the proposition would, for example, oblige France to amend its current legislation, in particular by repealing measures requiring the prior notification of the competitor targeted by the comparison.

The EU Council, which had reached a political agreement on the text in November 1995, adopted a common position on 19 March 1996. This text will now be subject to a second reading by the European Parliament, within the framework of the codecision procedure.

- The '*TVWF - television without frontiers*' Council Directive 89/552/EEC of 3 October 1989, on the coordination of certain legislative, regulatory and administrative measures of Member States relating to the provision of televisual broadcast activities[12]. This Directive aims to ensure '*the passage from national markets to a common market for the production and distribution of programmes and the creation of the conditions for fair competition.*'

The Directive contains measures on television advertising and sponsorship (Chapter IV). Certain measures deal in particular with advertising for certain products (tobacco, alcohol, medicines and medical treatments) or the protection of minors (Article 16).

For the time being, each Member State has to apply to those broadcasters under its jurisdiction the rules of the Directive, notably those concerning advertising (Article 3, para. 2; '*the principle of country of origin control*'), though they remain free to impose on broadcasters under their jurisdiction stricter or more detailed rules, in those areas targeted by the Directive. The other Member States are obliged to accept the reception on their territory of broadcasts and are not allowed to block their retransmission by cable or satellite for reasons relating to an area covered by the Directive, such as advertising (Article 2, para. 2). They can, however, suspend, temporarily and under the control of the Commission, the re-transmission of broadcasts originating from other Member States, if the protection of their minors is compromised.

[8]JOCE n.L250 of 19 September 1984

[9]Henry Lesguillons "Publicité et marché commun", RDAI special n. 1986 "La publicité et l'Europe", p.39

[10]JOCE n. C180 of 11 July 1991

[11]JOCE n. C136 of 19 May 1994

[12]JOCE n. L298 of 17 October 1989

[13]JOCE n. C185 of 19 July 1995

It is true that this Directive requires Member States to ban misleading advertising, but it does not specify when advertising is misleading.

The text of the Directive provided for a review of its measures five years after their application: the Commission thus presented in 1995 a first draft proposal modifying Directive 89/552/EEC[13]. The stakes of this revision are considerable and of course go beyond issues relating to advertising. On 14 February 1996, the European Parliament, during its first reading of the Commission proposal, put forward highly significant amendments to the text. It wished, for example, to reinforce the requirement that a majority of programmes be European in origin (broadcast quotas), to include new audio visual services (e.g. video on demand) within the scope of the Directive, and to modify the criteria used to define the competent Member State (an extension of the country of destination criterion).

Following these amendments, the Commission proposed on 7 May a new draft, without, however, including the important amendments relating to new services, nor those relating to the strengthening of quotas. As far as the criteria defining the competent Member State were concerned, the Commission considered that it was important to maintain the principle of country of origin, whilst at the same time setting out several criteria to fall within the competence of Member States.

The Council, which had already reached in November 1995 a political agreement not to alter the more controversial elements of the 1989 text (especially those dealing with quotas), reached a new agreement on 11 June, notably by deciding to keep the status quo on quotas, by following the Commission line on the competence of the country of origin, and by excluding new services from the scope of the Directive. The Parliament now has three months to complete its second reading of the text.

Besides this TVWF Directive, there also exists, at the level of the Council of Europe, the *'European convention on cross-border television'*, signed in Strasbourg on 5 May 1989. This convention, which came into force in France in 1995[14], also includes a certain number of measures dealing with advertising (Chapter III) and sponsorship (Chapter IV). The framework put in place by this convention is very similar to that of the TVWF Directive.

These two Directives, directly dealing with advertising, mark the beginning of the creation of a common framework. Nonetheless, the Directive on misleading advertising is proving to be a failure[15]. It is true that this Directive requires Member States to ban misleading advertising, but it does not specify when advertising is misleading. Differences in interpretation between Member States can, therefore, once again, complicate the launch of a cross-border advertising campaign.

- Finally, the Commission proposed in 1992 a draft Directive dealing with the long-distance negotiation of contracts[16], which aims to harmonise consumer protection measures in order to allow the development of cross-border long-distance selling techniques. This draft nevertheless allows Member States to apply stricter measures in the interest of consumer protection. On 27 February 1996, the Council, judging unacceptable the amendments proposed by the European Parliament to its common position on 13 December during its second reading, decided to call on the conciliation committee, under article 189 B of the European Union Treaty, in the framework of the codecision procedure.

Lastly, one has to mention the recent Directive on personal data[17], which will allow the free circulation of such data, essential for the effective functioning of a European direct marketing sector, on the basis of a common set of rules protecting the private lives of individuals.

2. Vertical regulations

These regulations deal with specific prod-

[14]Ruling n. 94-542 of 28 June 1994, JORF 30 June 1994; decree n. 95-438 of 14 April 1995, JORF 23 April 1995

[15]Peter Schotthöfer "Regulation of Marketing in Europe": *Commercial Communications*, December 1995, p.3

[16]Council Directive proposal about consumers' protection in the area of long-distance negotiation of contracts (JOCE n. C156 of 23 June 1992)

[17]European Parliament and Council Directive 95/46/EC of 24 October 1995, relating to the protection of individuals concerning personal data protection and the free circulation of those data (JOCE n. L281 of 23 November 1995)

ucts or services. Amongst these are:

- Council Directive 92/28/EEC of 31 March 1992, relating to the advertising of medicines for human use[18], harmonises this sector by banning the advertising of prescription pharmaceutical products, and for those containing tranquillizers or narcotics. Member States are allowed to ban all advertising of pharmaceutical products eligible for refunds by social security bodies. The advertising of 'over the counter' pharmaceutical products is restricted to those products which have been authorised to be placed on the market. The advertising of prescription pharmaceutical products is restricted to media aimed at the medical profession, whilst 'over the counter pharmaceutical products' can be advertised in all media, but subject to strict conditions.

Article 14 of the TVWF Directive provides for common rules in all Member States in the field of television advertising of pharmaceutical products.

- In the field of advertising of food products, there is Council Directive 79/112/EEC of 18 December 1978, concerning the harmonisation of Member State legislation dealing with the labelling and presentation of food products aimed at the consumer, as well as their advertising[19]. However, the scope for harmonisation is limited, since Article 15 of this directive states that its provisions only apply to national measures dealing with labelling and presentation, and not, despite its title, to measures regulating commercial communications.

Directive 91/321/EEC of 14 May 1991 relating to baby food, lays down the minimum standards to be adopted by Member States in order to regulate the advertising of this type of product[20].

As for the TVWF Directive, Article 15 harmonised the rules relating to the advertising of alcoholic drinks.

- The Commission has proposed a draft Council Directive relating to the harmonisation of legislative, regulatory and administrative measures of Member States concerned with the advertising of tobacco products[21]. The Commission put forward a modified draft on 30 April 1992[22]. This text aims to ban all direct and indirect tobacco advertising. However, several Member States (including Germany, Denmark, Greece, the United Kingdom and the Netherlands) have been blocking for several years the adoption of a common position by the Council.
- There are also measures relating to advertising to be found in the Directives dealing with the provision of financial and insurance services[23]. Very recently, the Commission has adopted a Green Paper[24], which aims to identify the needs and concerns of consumers in the field of financial services (banking, insurance, dealing in securities), especially when those services are sold at a distance.

Despite the adoption of these EU texts aimed at harmonisation, the commercial communication sector is still a long way from a single market. In fact, most of these measures are disconnected, harmonising only certain areas of commercial communications. Moreover, for the most part, they only lay down minimum rules, thus leaving to Member States the scope to adopt stricter measures (e.g. the 1984 Directive on misleading advertising).

Up until now, given the absence of harmonisation (or at best incomplete harmonisation), it has been the European Court of Justice which has played a leading role in the progressive creation of a common framework in the area of commercial communications.

B. Harmonisation by case law

The principle of the free circulation of goods has been, at least until 1993, the one used in case law to combat barriers to the establishment of a single market in the advertising sector. The limits of this line of

[18]JOCE n. L113 of 30 April 1992

[19]JOCE n. L33 of 8 February 1979, modified several times.

[20]JOCE n. L175 of 4 July 1991

[21]JOCE n. C167 of 27 June 1991

[22]JOCE n. C129 of 21 May 1992

[23]Council Directive 85/611/EEC of 20 December 1985, relating to certain undertakings for collective investment in transferable securities (UCITS) (JOCE n. L375 of 31 December 1985); second Council Directive 89/646/EEC of 15 December 1989 concerning access to credit institutions and its practice (JOCE n. L386 of 30 December 1989); Council Directive 93/22/EEC of 10 May 1993 concerning investment services in securities (JOCE n. L141 of 11 June 1993). In insurance, Council Directive 92/49/EEC of 18 June 1992 relating to direct insurance except life insurance (third directive '*non-life insurance*') (JOCE n. L228 of 11 August 1992) and Council Directive 92/96/EEC of 10 November 1992 relating to direct life insurance (third directive '*life insurance*') (JOCE n. L360 of 9 Dcember 1992).

[24]Green Paper '*Services financiers: répondre aux attentes des consommateurs* ' (COM(96)209).

approach, exposed by the recent development of the Court's case law, could give a renewed impetus to the principle of the free provision of services, undoubtedly a tool better adapted to tackle existing barriers in the field of advertising. Such at least is one of the messages that the Green Paper tries to put across.

1. The free circulation of goods

Up until the '*Keck and Mithouard*' judgement of 24 November 1993[25], the case law of the European Court of Justice of the European Communities (ECJ), in the field of the free circulation of goods (Articles 30 and following in the EC Treaty), played a leading role in the progressive creation of a common framework for advertising and sales promotion.

Article 30 of the EC Treaty, in fact, bans quantitative restrictions on imports as well as all '*measures with an equivalent effect*'. Since the '*Dassonville*' judgement of 11 July 1974[26], the ECJ has, on various occasions, pronounced that national discriminatory measures, but also equally non-discriminatory measures (i.e. those applied equally to national and to imported products), could constitute a measure equivalent to a quantitative restriction, if such measures '*were capable of hindering, directly or indirectly, actually or potentially, intra-Community trade*'[27].

In this way, the ECJ, recognising the existence of an indirect economic link between commercial communication services and the sale of goods, came to examine, in the name of the free circulation of goods (Articles 30 and following of the EC Treaty), non-discriminatory national measures which limited or banned certain forms of advertising or certain types of sales promotion.

The ECJ in fact consistently took the view in its case law[28] that national legislation which restricts or bans certain forms of advertising or certain means of sales promotion may, '*although it does not directly affect imports, be such as to restrict their volume because it affects marketing opportunities for the imported products. The possibility cannot be ruled out that to compel a producer either to adopt advertising or sales promotion schemes which differ from one Member State to another or to discontinue a scheme which he considers to be particularly effective may constitute an obstacle to imports even if the legislation in question applies to domestic and imported products without distinction.*'

The restriction or banning of advertising could thus constitute a measure having equivalent effect in the sense of Article 30 of the Treaty, since it could restrict the importation of products from a Member State.

The national measure in question could only escape being classified as a 'measure having equivalent effect' if it met an overriding objective (e.g. the protection of consumers, or fair dealing in commercial transactions). Even then it was necessary to establish whether the measure was appropriate to the objective specified. This involved assessing whether the measure could achieve its objective and, also, checking the measure did not go beyond what was needed to achieve it. In other words, it was necessary to assess whether less restrictive measures could not achieve the same result ('the proportionality criteria').

If it failed to meet an overriding objective and was not proportionate, the national measure in question could escape prohibition under Article 30, if it could be justified under one of the narrow criteria listed in Article 36 of the Treaty (e.g. public morality or health grounds) and was proportionate to the end sought.

If this was not the case, the national legislator could, at the request of the Court, be forced to overturn the measure, at least to the extent to which it applied to the

[25]ECJ "*Keck & Mithouard*" of 24 November 1993, Case C-267 and C-268/91, Volume 1993 p. 6097

[26]ECJ "*Dassonville*" of 11 July 1974, Case 8/74, Volume 1974, p.837.

[27]ECJ "*Rewe Zentral*" (i.e. "*Cassis de Dijon*") of 20 February 1979, Case 120/78, Volume 1979 p.649; for comment on this case, see A. Mattera "*L'article 30 du Traité CEE, la jurisprudence "Cassis de Dijon" et le principe de reconnaissance mutuelle*" Revue du Marché Unique Européen, 4/1992 p.13).

[28]see especially ECJ "*Oosthock's Uitgeversmaatschappij B.V.*" of 15 December 1982, Case 286/81, Volume 1982 p. 4575; ECJC "*Buet*" of 16 May 1989, Case 382/87, Volume 1989 p.1235; ECJC "*GB-INNO-BM*" of 7 March 1990, Volume 1990 p.667; ECJ "*Aragonesa de Publicitad Exterior et Publivia*" of 25 July 1991, Volume 1991 p.4151; ECJ "*Yves Rocher*" of 18 May 1993, Volume 1993 p. 2361.

nationals of other Member States. As far as its own nationals are concerned, the national legislator would retain all its powers[29], and would thus continue to submit them to the measure in question, even though this could lead to '*reverse discrimination*'.

Thus, even though the process could be a long one, the ECJ contributed in its own way to the harmonisation of rules relating to advertising and sales promotion. This case law based on Article 30 constituted progress towards '*Euro marketing*'[30]. Within the framework defined by the case law, firms could adhere to regulations applying to its advertising campaign in its home Member State, and pursue the same advertising campaign in neighbouring countries, even if these had stricter rules in force.

Nonetheless, in November 1993 the Court thought it necessary to restate its jurisprudence. It had noted that businesses were increasingly invoking Article 30 of the Treaty to challenge all sorts of measures they judged as limiting their commercial freedom, even if these measures did not target products from other Member States.

In ruling on the compatibility of French regulations banning the sale of goods at a loss with Article 30 of the EC Treaty (ECJ: '*Keck and Mithouard*' of 24 November 1993[31]), the Court introduced a distinction (criticised by some commentators[32]) between two categories of national measures. On the one hand were those measures which applied directly to goods themselves, and which remained subject to the principle of the free trade in goods; on the other, were those measures which limited or banned what the ruling called '*certain sales methods*' and which were, in principle, excluded.

Indeed, according to the Court, '*in the absence of harmonisation legislation, measures of equivalent effect prohibited by Article 30 include obstacles to the free movement of goods where they are the consequence of applying rules that lay down requirements to be met by such goods (such as requirements as to the designation, form, size, weight, composition, presentation, labelling, packaging) to goods from other Member States where they are lawfully manufactured and marketed, even if those rules apply without distinction to all products unless their application can be justified by a public interest objective taking precedence over the free movement of goods' (paragraph 15)*.

On the other hand, '*the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgement provided that those provisions apply to all affected traders operating within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.' (paragraph 16)*.

Thus, as a generalisation, national measures which are indiscriminately applied to both national and imported products, and which restrict commercial activity (who can sell products, how, where and when), are in principle now exempt - providing, as the Court emphasised, that these measures are truly non-discriminatory in the way they are actually applied by Member States.

Turning in particular to restrictions imposed by national legislation in the field of advertising, these now appear as if they could be considered exempt for the most part, on the grounds that they fall under the area of sales methods, which can no longer be tested against Article 30. Thus the Court has ruled as sales methods national regulations ban-

[29]ECJ "*Driancourt/Cognet*" of 23 October 1986, Case 355/85, Volume 1986 p.3238.

[30]Harry Duintjer Tebbens "*Les conflits de lois en matière de publicité déloyale à l'épreuve du droit communautaire*" Rev.Crit. Dr. Intern. Privé, July/September 1994, p.451

[31]see note 25

[32]see for example A. Mattera, "*De l'arrêt "Dassonville" à l'arrêt "Keck": l'obscure clarté d'une jurisprudence riche en principes novateurs et en contradictions*", Revue du Marché Unique Européen, 1/1994 p.117.

ning the advertising of certain economic activities or sectors [33].

One nonetheless has to be cautious since sometimes certain national measures relating to advertising do not benefit from the '*immunity*' associated with the notion of sales methods. In fact, when these measures cause an '*extrinsic manipulation*'[34] of the product (changes to the packaging, presentation, labelling, packing), they are subject all the same to Article 30. For example, national measures which relate to advertising on the packaging of products being promoted are open to coming under the notion of sales methods [35].

Thus, even if certain regulations concerning advertising continue to be examined under Article 30, a large number of them have been exempted by the Keck ruling from the scope of the principle of the free trade in goods. The Court has abandoned the previous leading role it played in the area of 'harmonising' the rules relating to advertising.

2. The free provision of services

As the Commission has emphasised in its Green Paper, commercial communications without doubt come under internal market law and, in particular, under those provisions relating to the freedom to provide services (Articles 59 and following of the EC Treaty).

Indeed, commercial communication activities involve the provision of various different services by different service providers (e.g. advertising agencies). The Court has already had the opportunity to confirm on several occasions that advertising constitutes a service[36]. As soon as this service is of a "cross-border" nature, and is provided against remuneration, then it benefits fully from the provisions of the chapter on the freedom to provide services.

This principle of freedom to provide services guarantees that a Member State cannot restrict the services coming from another Member State, except when these restrictions respond to particular conditions. Failing that, only the law of the Member State, where the provider is based, applies (Country of Origin principle).

As the Court's case law has evolved, the scope of the principle of the freedom to provide services has grown wider[37]. In the beginning, this principle was simply interpreted as a ban on discrimination against service providers originating from other Member States. It now covers all possible permutations, where either the provider, the recipient, or just the service itself crosses an intra-Community border[38].

The Court, with the evolution of its case law, has also sanctioned an extension of Article 59 to non-discriminatory national measures (applied indiscriminately). This evolution of Article 59, from a ban on discrimination to a rule which also targeted non-discriminatory restrictions, has emerged since 1981 through a series of rulings. With three important rulings on 25 July 1991[39], the Court of Justice fully applied in the field of the free provision of services, similar case law principles to those which have been applied since the '*Cassis de Dijon*' ruling[40].

Discriminatory measures are only compatible with Community law if they come under an explicit exemption, such as Article 56 of the Treaty (public order, health and security), which cannot be used to justify economic objectives. Moreover, these measures have to respect the principle of proportionality.

However, Article 59 is not limited to restricting national discriminatory measures. In fact, as the Court emphasised, in the absence of any harmonisation of measures relating to services, or something similar, obstacles to the free provision of services can arise from the application of

[33]ECJ '*Ruth Hünermund e.a. c/ Landesapothekerkammer Baden-Württemberg*' of 15 December 1993, Case 292/92, Volume 1993 p.6787; ECJ '*Société d'importation Leclerc-Siplec c/TF1 Publicité SA et M6 Publicité*' of 9 February 1995, Case 412/93, Volume 1995 p.179

[34]Christophe Pecnard and Christophe Henin '*Keck et Mithouard, deux ans après: le nouvel emballage de la libre circulation des marchandises*', RDAI n.3 1996.

[35]ECJ '*Mars*' of 6 July 1995, Case 470/93, Volume 1995 p.1923; ECJ '*Verband Sozialer Wettbewerb c/ Cliniques Laboratoires e.a.*' of 2 February 1994, case 315/92, Volume 1994 p.342. In those two rulings, the Court has allowed companies to use the same packaging for the distribution of their products in the whole of the EU, and in a more global way, uniform packaging, with uniform presentation and identical labelling.

[36]ECJ '*Procureur du Roi c/Marc JVC Debauve et autres*' of 18 March 1980, Case 52/79, Volume 1980 p.833

[37]see note 30

[38]ECJ '*Bond van Adverteerders c/ Etat néerlandais*' of 26 April 1988, Case 352/85, Volume 1988 p.2085

[39]ECJ of 25 July 1991 '*Saeger/ Dennemeyer*', Case 76/90, Volume 1991 p 4221; '*Gouda*', Case 288/89; Volume 1991 p.4007; '*Commission c/ Pays-Bas*', Case 353/89, Volume 1991 p.4069.

[40]ECJ '*Rewe Zentral*', of 20 February 1979, Case 120/78, Volume 1979, p.649.

national regulations, even if they affect all those within a national territory, to service providers based on the territory of another Member State, who already have to satisfy the regulatory requirements of that Member State. Such indiscriminately applied national measures are thus open to being examined under the scope of Article 59.

However, these measures can be declared compatible with Article 59 if they can be justified by '*urgent public interest needs*', equivalent to the urgent need exemption in the context of the free trade of goods[41]. It is the Court which has progressively in its case law drawn up a non-exhaustive list of these 'urgent public interest needs'. Amongst these, for instance, are the protection of pluralism, of consumers, and language policy.

The measure concerned, though, must not impose requirements which the service provider has already met by respecting the rules imposed in his country of origin (mutual recognition).

In addition, the regulation must be proportionate to the stated objectives.

An important issue currently presents itself: whether the principles put forward by the case law Keck & Mithouard (see above) be extended to the free provision of services. For certain authors[42], by its decision '*Alpine Investments BV*' of 10 May 1995 (Case 384/93, Volume 1995, p. 1141), the Court extended, implicitly but without question, the Keck case law to the free provision of services. For others[43], on the other hand, the Court condemned all attempts to extend the Keck case law. The Commission is very cautious. In its Green Paper, the Commission seems to consider that up until now the Court has not applied this case law to the free provision of services but that it '*is not excluded that the Commission extends to Article 59 the same logic it held during the Keck case*'. It added '*for the time being, it is impossible to say in general terms what the exact consequences of this extension would be: in fact, it would depend very much on the type of services*'.

Moreover, it has to be said that a simple transposition of the concepts elaborated by the Court in the Keck and Mithouard ruling to help bring the principle contained in Article 59 into operation is not very easy to conceive in practice.

In any event, Articles 59 and following of the Treaty can make an important contribution to the progressive creation of a common framework for commercial communications. However, as the Commission already pointed out in 1985 in its White Paper on the completion of the Internal Market, '*progress in the area of the free provision of services from one Member State to the other have been much slower than that made in the area the free circulation of goods*' because '*companies and individuals have not yet succeeded in taking full advantage of these opportunities*'.

If we analyse the rulings of the Court, it is essentially on the basis of Article 30, relating to the free circulation of goods, that national legislation on commercial communications has been tackled. The Keck ruling has put a brake on such an approach

If we analyse the rulings of the Court, it is essentially on the basis of Article 30 (and following), relating to the free circulation of goods that national legislation on commercial communications has been tackled[44]. The Keck ruling has put a brake on such an approach.

However, commercial communications must not only be seen as '*simple methods of selling*', but also as real services in their own right. Companies and individuals have at their disposal Article 59, which could be an efficient tool for harmo-

[41]see J.G. Huglo's comments in the Gazette du Palais, 10 - 12 December 1995, p.18.

[42]Daniel Fasquelle's comments, Bulletin Joly, Market exchange and financial products, July-August 1995, p.297.

[43]Laurence Idot's comments, Revue Europe, July 1995, n.264.

[44]It is allowed to question oneself on the position that the Commission would have had if the "Leclerc-Siplec vs TF1 Publicité and M6 Publicité" appeal on the compatibility of the ban in France for the distribution of advertising on television (see note 33) had been based on Article 59 instead of Article 30.

nising the rules for commercial communications if it were more often used. Such is one of the messages that the Commission is trying to get through to advertising professionals with its Green Paper.

III. The new prospects opened up by the Green Paper

The Commission has concentrated on the importance of the principle of the free provision of services.

Faced with EU secondary legislation in this still fragmented sector and the Court of Justice tendency to categorise, in most of its rulings, advertising as a *'sales method'* incapable of affecting the free circulation of goods, the Commission has concentrated on the importance of the principle of the free provision of services.

In fact, as has already been pointed out, commercial communication services come under Internal Market legislation and, especially, under the measures on the free provision of services (Articles 59 and following of the EU Treaty). Unfortunately, the Commission surveys have showed that the opportunities the Internal Market offers to all those concerned with commercial communications could not always be fully exploited because of different regulations between Member States.

However, the creation of a real Internal Market in this field would allow the providers of commercial communication services (e.g. advertising agencies) to extend their activities beyond national borders. The users (advertisers) could then benefit from the efficiency gains realised and get a better quality service at a more moderate price. Moreover, they could reduce their costs on three other expenditure items (legal research, marketing, distribution). The media would benefit as well by being able to increase advertising revenues. Finally, consumers could benefit, in a less fragmented market, from a greater choice of products and services and more competitive prices.

In order to achieve this, the Commission has thought it necessary to analyse in detail the potential regulatory barriers to the establishment of this market. According to the preliminary study, the Green Paper highlights three categories of potential barriers to cross-border commercial communication services:

- *regulatory bans*: certain Member States forbid some types or contents of specific commercial communications which are allowed in other Member States (e.g. measures forbidding use of foreign languages, regulations forbidding use of certain media by specific categories of advertisers).
- *horizontal regulatory limitations*: certain Member States have decided to impose strict limits to certain general forms of commercial communications (e.g. regulations limiting advertising targeting children or those limiting the possibilities of buying cross-border spaces).
- *specific regulatory limitations*: certain member States impose strict limits on commercial communications relating to certain sectors or products/services (e.g. regulations limiting advertising of alcoholic drinks, regulations limiting advertising for certain professions).

The preliminary analysis of the regulations show that, in practice, the potential obstacles to the establishment of the Internal Market are caused by existing non-discriminatory measures, and not by discriminatory measures based on nationality. Insofar as those measures create obstacles to the exchange of commercial communication services between Member States, their compatibility with Internal Market legislation, and especially with the fundamental principle of the free provision of services, depends essentially on the definition of the objectives to be met by those measures and on the proportionality of the presumed restrictions. As noted by the Commission, given that the safeguard of public interest objectives (*'urgent*

public interest needs', e.g. consumers' protection, public health protection) represents the principal goal of these measures, it is the proportionality of the measures which needs to be examined.

According to the case law of the EU Court of Justice, the proportionality criterion requires, first of all, verification of the appropriate nature of the national restrictive measure, given the objective sought and, secondly, verification that the national restrictive measure does not go beyond what is necessary to the achievement of this objective.

Until now, the Court's case law has not provided precise tools for assessing the proportionality of national measures. It is because of this that the Commission suggests in its Green Paper a methodology for improving the assessment of the proportionality of those national measures which could cause problems at the community level. The Commission also intends to apply this methodology to its own proposals so that they are consistent with other policies and proportional to the problems to be solved.

Based on the Court's case law and on a reliable economic analysis of the functioning of commercial communications, this methodology provides for a case by case assessment rather than for an automatic and compulsory system of assessment. The examination of the national measure would comprise two steps:

1. The first consists of identifying the principal features of the measure in the light of five predetermined assessment criteria so as to give an overall view of its effects on the market, and especially on the activities it seeks to regulate.

The first assessment criterion consists in determining the potential 'chain reaction' that the measure (A) can set off. This is essentially an analysis of the potential reactions of the market to a measure. In the area of commercial communications, the relevant market forces are concentrated on three interrelated groups of economic operators (users, providers and media). Together, they represent what the Commission calls the '*commercial communications chain*'.

Each group will intervene either directly or indirectly in all commercial communication activities. The assessment must therefore cover systematically the relationships between these groups. Assessment of the reaction along this chain (the '*chain reaction*') consists of two parts: first, identification of the key group that the measure targets and, secondly, identification of the most likely reactions, within the commercial communication chain, towards an existing or proposed measure.

The second assessment criterion consists in examining the objectives of the measure (B). This requires defining its main objective while also taking into account all other objectives indirectly implied by it.

The third assessment criterion consists in checking whether the measure is relevant to the objective sought (C). The features, definitions, distinctions, criteria, etc. used to determine the content of the proposed measure must be relevant to its objective.

Until now, the Court's case law has not provided precise tools for assessing the proportionality of national measures.

The fourth criterion entails checking whether the measure has an effect on objectives other than those sought (D). The proposed measure might in fact conflict with some other objective being pursued in the public interest or with some other EU objective.

Finally, the fifth criterion seeks to check the efficiency of the measure (E). It checks whether the specific character of the measure and the degree of restriction it imposes will enable the objective to be fulfilled.

2. The second step takes the main features of the national measure or EU proposal, as identified by the five assessment criteria, to evaluate its proportionality and coherence.

In setting up this common test of proportionality specific to the area of commer-

The analysis of the situation set out in the Green Paper makes it clear that much remains to be done before an Internal Market exists in commercial communications.

cial communications, the Commission wants to provide Member States with means of determining case by case, and with more uniformity, whether the national regulation concerned is in proportion to the objective sought. The Commission thereby hopes that Member States will themselves then withdraw some of their regulations if they do not comply with this test of proportionality ('*national deregulation*').

If a Member State fails to act, the Commission could then start proceedings against it. Such a test can also provide effective help to future plaintiffs, needing to assess the national regulations presenting problems.

Implementation of this 'investigation' procedure could then lead to the revoking of national measures which are shown to be incompatible with EU law. Where, on the other hand the national measure concerned is found to be proportionate, the Commission could then, if need be, propose a harmonisation text at EU level if no appropriate legislation exists in the other Member States.

In addition to this recommended assessment procedure, the Commission would like to see better coordination and information at European level in the area of commercial communication.

To achieve this, the Commission suggests the setting up of a committee presided over by the Commission itself and composed of Member State representatives responsible for examining problems arising in this sector, and especially of ensuring that a productive dialogue takes place with and between the Member States. This Committee will help to keep new initiatives in line and to limit, where possible, the number of cases where action has to be taken because of infringement of the Treaty.

The Commission proposes as well to create, within its own administration, a central information point responsible for answering particular questions about its policies regarding commercial communications. This would also have a coordinating role in this area.

Thus, the Commission presents in this Green Paper both an account of the current situation in the area of commercial communications as well as a working method for tackling the vast amount of work to be done to establish an Internal Market in commercial communications.

The Commission now wishes to engage in wide consultation and all interested parties have until 31 December 1996 to make known their views on the analysis and the proposals put forward in this Green Paper.

The working method proposed by the Commission will perhaps be criticised for being somewhat 'technocratic'. As regards the effectiveness of the method, it may be questioned whether Member States will cooperate actively to ensure its implementation.

However, the professionals (advertisers, agencies and media) should welcome the fact that the Commission has decided to tackle the advertising sector in this way. The analysis of the situation set out in the Green Paper makes it clear that much remains to be done before an Internal Market exists in commercial communications.

It should also be noticed that, on a practical level, a conventional approach lies behind the words used to describe the assessment procedure recommended by the Commission (the proportionality test). And above all, the professionals should be aware of the active role that they could be called upon to play in this huge task. The Green Paper recalls some principles and thereby offers food for thought for those who might feel disadvantaged in their activities by national regulations which breach the principle of the free provision of services. Those concerned know that they have an important ally in the Commission.

The Green Paper - missed opportunity or realistic way forward?

Jean Bergevin
Fonctionnaire
DG XV
The European Commission

At last the debate on the Commission's role in the field of commercial communications has earnestly begun following the publication of the Green Paper. This newsletter can now serve as a vehicle to air that debate and allow you, the interested party, to take your position in full knowledge of the facts and the differing views that abound. You will find articles both in favour and against the initiative in this issue. Our editor has welcomed both and we hope that both pro and anti-camps will now come forward with their positions following these two distinctive lead contributions by Clifford Chance and Thomas et Associés.

Has the Green paper limited the Commission's objectives and competences?

These two lead contributions start from differing perspectives: The first considers the proposals in terms of their usefulness in building a new pan-European regulatory framework. The second considers the appropriateness of the proposals of the Green Paper for meeting the Commission's objective of safeguarding Internal Market law and thus assessing regulatory restrictions to cross-border trade. Which of these two objectives should the Commission have chosen?

In point of fact no such choice exists. The Treaty limits the competences of the Commission. The Green Paper does not have an 'abstract agenda' as Clifford Chance suggest but rather limits its objectives to those set out in the Treaty, viz. that of the Internal Market and the other Community objectives which are set out in detail in the text.

This is a fundamentally important point for our readers to be aware of. The paper by Clifford Chance wrongly suggests that the Commission has the same law-making powers as a Member State. It suggests that the Commission can impose a new European 'benchmark' based on a new albeit rather vague, regulatory objective, viz.:

'To ensure that regulatory restrictions and enforcement practice which impact on Commercial Communications are as consistent as possible across the Internal Market, while respecting protections and safeguards which are considered acceptable and appropriate to achieve defined general interest objectives'.

This is simply incorrect.

The Commission's competence is defined as safeguarding existing Community law as enshrined in the Treaty through ensuring that this law is effectively applied. The Commission is not, as the Clifford Chance article suggests, a law-making or destroying body. It has no power and nor does the European Court of Justice to assess or judge whether national regulations are 'justified or disproportionate by reference to stated "general interest" objectives'. Instead as the guardian of the European Treaty it must assess whether the application of a host country's measure to a cross-border service already regulated in the home country is proportionate in view of the general interest objective pursued by the host country's trade restricting measure.

In other words, it can question, and the European Court can judge, whether the application of two sets of regulations to the same service is justified. Only when such restrictions are proportional can a harmonisation initiative be justified and then such a Commission proposal has to be agreed by the Council of Ministers before it is transposed into national law. In any event the Commission cannot assess or judge either the quality or the need for a national law for its own sake, nor the national systems used to enforce that law.

Given these points, the alternative proposals suggested by Mr. Thomas are not feasible and indeed would com-

In any event the Commission cannot assess or judge either the quality or the need for a national law for its own sake, nor the national systems used to enforce that law.

pletely contravene the principle of subsidiarity. In contrast, the contribution by Messrs. Pecnard and Delesalle hits the nail on the head by focusing on proportionality of the application of host country rules to services already regulated in the home country.

Are the proposals not 'strong' enough to resolve the problem(s)?

Is the 'technocratic' proportionality assessment simply adding to bureaucracy?

Both articles, in different terms, suggest that the Commission's proposed proportionality methodology is somewhat technocratic albeit in different terms with the Clifford Chance article being far more critical.

It is somewhat ironic that lawyers accuse the Commission of being technocratic when it sets out the legal principles provide by the Court of Justice! Four of the five criteria are taken straight from case-law! However, it is more than likely that Thomas et Associés' slight concern reflects Mr. Thomas's attack on the proposed 'chain reaction' assessment criterion that features in our proposed methodology. As an economist and, more significantly, in view of the many presentations that I have given to various audiences in recent weeks, one can only smile when one sees the reaction to the market assessment by professional lawyers.

The chain reaction is considered both 'achievable and helpful' by business interests because it is based on what they apply on a day to day basis

To quote Mr. Thomas (in his full text) on the criterion and the analytical work that it relies upon 'it is doubtful whether the "chain reaction" analysis (i.e. analysis of the separate effects on users, suppliers and carriers) would be realistic, achievable or helpful'. And 'The accompanying Working Document (on which the proposals are based) contains a lengthy, convoluted and largely irrelevant economic analysis. Yet there is no more than a general categorised (and questionable) tabulation of different national measures. There is no detailed description or analysis of the detailed provisions which underlie the very broad summaries set out in the Regulatory Tables'.

In addition, Mr. Thomas suggests that the economic analysis is flawed due to dubious data. These criticisms are worthy of three simple responses.

First, to appreciate the proportionality of a measure (applied to an incoming service) which seeks to meet its policy objective by influencing *market behaviour*, it is difficult to understand why a methodology seeking to structurally present how that same market operates would not be 'realistic, achievable or helpful'. We believe it is essential and so do many early respondents.

The working document sets out the Commission's views on how this market operates based on relevant economic and business literature. The descriptive statistics provided are there to explain the economic significance of the sector but the[illegible] do not relate to the structural ana[illegible] the linkages between the various p[illegible] Their apparent inaccuracy (which re[illegible] the appalling data shortages in this [illegible] do not reflect on the structural anal[illegible]

Secondly the regulatory tables a[illegible], as mentioned in the Green Paper, a summary of two years work by Professor Schricker of the Max Planck Institute. They are based on 15 country reports, a comparative summary of which is available from the Commission and which numerous law firms have asked for.

Thirdly, it is interesting to note that, contrary to the views of the lawyers, the chain reaction is considered both 'achievable and helpful' by business interests because it is based on what they apply on a day to day basis i.e. branding strategies associated with their relevant products and services. Likewise, the chain reaction allows the Commission to account for *all*

the influences exerted on final consumers and not rely on a simplistic view that advertising is somehow isolated from the rest of the marketing-mix, viz. price, distribution and product/service design strategies. Thus a restriction on advertising is shown to lead to business reactions that will have other effects on consumers. In other words, the 'chain reaction' analysis allows for more effective account to be taken of the *true* effect on consumers of restrictions on cross-border services. It may be complicated for lawyers but it is far from unrealistic to both businesses and consumers.

In summary, it is precisely because the Commission recognised that the proportionality assessment methodology following the jurisprudence of the European Court of Justice was not easy to apply that it proposed the 'chain reaction'. This, we believe facilitates and will improve this assessment which is at the foundation of any infringement decision or harmonisation proposal in this field.

Is the Committee bound to failure?

The Clifford Chance article suggests that the closed nature of the committee '(where national interests will be promoted, but where many relevant interests will be excluded) can only frustrate efforts to make any real progress'.

Three points need to be stressed here. Through the proposed network which seeks to ensure transparency through ensuring that information on policy developments are sent to as many interested parties as possible, the Committee's agenda as well as findings will be made more public than if the Committee sat in a public hearing format.

Furthermore, the proposed approach is easier in organisational terms to arrange and should allow for more meetings and thus progress. Finally, since it is proposed that issues will be considered on the basis of the common proportionality assessment methodology, the scope for promotion of national interests is likely to be far less than is the case when proposals are negotiated in Council of Ministers meetings without any pre-agreed framework.

Priorities as to which problems should be addressed will be set according to the views given in responses to the Green Paper

Of course, all this will depend on the degree to which interested parties get involved in the 'network'. The success of this newsletter which represents the initiating element of this network suggests that interested parties are prepared to take on this long but necessary task. As the article of Messrs. Pecnard and Delesalle suggests, the Commission is prepared to be an ally to interested parties but without them supporting this approach it will be doomed to failure.

Did we start at the wrong-end?

Notwithstanding the fact that the Commission neither seeks to judge national laws, (it can only question the application of national laws to services and goods which are already regulated in another Member State) nor has the powers to establish new policy objectives not found in the Treaty, it could of course have decided to simply assume that all the identified barriers were justified (i.e. proportional) and thus gone ahead and harmonised those laws which it thought were the most problematic. Instead of choosing this 'top-down approach' suggested by Clifford Chance, it has selected the 'bottom-up approach'.

As a consequence of that choice:

1) Priorities as to which problems should be addressed will be set according to the views of interested parties as given in their responses to the Green Paper.

2) A thorough examination of whether

these identified trade restrictions are proportional will be undertaken with full consultation of the Member States and interested parties before harmonisation is considered.
3) Only those areas where restrictions are agreed to be proportional will be subject to proposals for harmonisation.

What the Internal Market principles can do is question the application of different restrictions but they certainly cannot and should not question the regulatory systems of Member States. This is truly an issue of subsidiarity.

We believe that this approach will allow for an effective cross-border regulatory framework for commercial communications in the Community to be established rapidly. We also believe it is likely to be more successful than a confrontational and broad harmonisation initiative that is likely to require many years of negotiation and risks being too broad and thus less than effective for both consumers and businesses.

Should we not rely on self-regulation?

The problems we are faced with are where Member States refuse to allow the free circulation of already regulated services emanating from other Member States into their territories. Effective national self-regulatory codes applied in the same manner give rise to exactly the same problem. Thus, self-regulation should be recognised as part of the existing problem.

However, it can therefore also provide part of the solution. In those Member States where an effective self-regulatory system complements (or indeed completes) underlying regulatory measures, the organisations applying these codes, should, as we are asking the Member States, consider whether they could live with mutual recognition. If they cannot 'trust' each others codes sufficiently to do this then they should be negotiating through the EASA as to which applications of codes to cross-border services are not proportional and thus where modifications or harmonisation of codes is required. That is the challenge that self-regulatory bodies face.

As to the notion that self-regulation should in some manner 'substitute' law, this again reflects a 'top-down' approach imposing a system that the regulatory culture and tradition of other Member States have not opted for. Whereas it is recognised that self-regulation can be a very useful complement and facilitate the application of framework law, one should nevertheless recognise that national regulatory systems and their differing levels of reliance on self-regulation are embedded in the culture and history of a Member State. What the Internal Market principles can do is question the application of different restrictions but they certainly cannot and should not question the regulatory systems of Member States. This is truly an issue of subsidiarity.

We hope that this article will further incite you to send the Commission your position in this key debate. Given the fact that we are still receiving requests for the Green Paper and that the European Parliament is only beginning to prepare its opinion on the Green Paper we have decided to extend our deadline for responses to the end March.

If you want to air your views and support or criticise the Commission's proposals in public then do not hesitate to send your positions to our editor. He tells me it all helps readership and the more of you that join this policy network we are constructing the better for all!

Advertising and the European Union

Ken Collins MEP,
Chairman,
European Parliament's Committee on the Environment, Public Health and Consumer Protection

The Treaty of Rome which was adopted in 1957, introduced the concept of the free movement of goods, services, persons and capital. However, progress towards this goal was fraught with difficulty and, as a consequence, rather slow. Indeed, it gradually became apparent that without the demonstration of a huge show of political will, the idea of free movement was unlikely to become a reality.

In 1985 therefore the Commission published a White Paper called 'Completing the Internal Market' which specified some 300 measures which the report's author, European Commissioner, Lord Cockfield, believed would have to be introduced before the Internal Market could be considered complete. The target date for its completion was 1992.

However, despite the adoption of an impressive number of measures from the late 1980s to the early 1990s, the Internal Market is still far from complete. The case of commercial communications in general and advertising in particular is a case in point. The Community has never attempted to produce any kind of overall framework in which to place the legislation in this field although rules are in place relating to a series of specific types of advertising and specific product categories.

As the Green Paper points out, there is already legislation relating to misleading advertising, foodstuffs, financial services, medicinal products, data protection and television broadcasts. In addition, legislation on comparative advertising is under discussion. It would be far more sensible if these various pieces of legislation were grouped into an overall policy framework possibly reinforced by some particular rules for certain products.

In this article, I want to focus on why the EU plays a central role in devising a policy for commercial communications. I then want to examine in greater detail what the European Parliament's role in all of this will be, before raising a number of preliminary questions relating to the green paper itself.

The EU's added-value

At a glance it may be assumed that linguistic and cultural barriers largely prevent, for example, cross-border advertising, direct mail or sales promotions. Yet Commission surveys demonstrate that there is cross-border advertising, there are pan-European agencies and multinational companies selling European branded products (see previous editions of *Commercial Communications* for detailed survey analysis).

The fact that commercial communication *is* a cross-border activity is one reason why regulation at EU rather than national level is desirable. The growth of new technology and methods of communication is likely to accentuate the cross-border trend still further. Furthermore, since the purpose of commercial communication is primarily to promote the sale of goods, it is clearly an area which falls under internal market rules. Third, from the point of view of consumer protection, there is little point encouraging consumers to buy goods in a country other than the one in which they are resident if their subsequent rights to guarantees and justice are undermined as a result. This means that EU rather than national rules will be more effective.

Any future legislation in this area is likely to fall under Internal Market rules which means that policy will be brought forward under Article 100a of the Treaty on European Union. This in turn, has implications for how advertisers and users should attempt to influence the debate because 100a legislation is agreed by codecision-making.

This is not the place to launch into a detailed explanation of the institutional

Furthermore, since the purpose of commercial communication is primarily to promote the sale of goods, it is clearly an area which falls under internal market rules

theory of EU decision-making. Suffice it to say that codecision-making involves the Council of Ministers and the European Parliament (EP) taking a joint decision on draft legislation and if no final agreement can be reached, it is the EP rather than the Council which has the power of veto.

This is significant for two reasons. It means that the debate will be accessible since it will take place largely in the open EP at European level. As representatives of industries and consumers alike, MEPs have a particular responsibility to ensure that all points of view are aired and that the final outcome is clear, offering adequate consumer protection without being too burdensome for industry.

However, the EP is more than a debating society where all the different points of view can be raised and then filed away neatly in the archives. The EP also bears a legislative responsibility and it is particularly appropriate therefore for MEPs to be involved at an early stage in the debate. Of course, it is impossible for any one MEP or indeed the EP as a whole to form a firm view until legislative proposals arising from this communication have been transmitted officially to the EP. That said, even at this stage a number of preliminary points may be raised in connection with the communication.

The question of tobacco advertising has nothing to do with freedom of speech or the right to trade freely in a free market

In the main these concern firstly, the composition of the proposed consultative committee and second, the question of the relationship between suppliers of commercial communications and their clients.

As far as the composition of the Committee is concerned, it is vital that a sufficiently wide group of interests participate so that a representative view of policy can be formulated. It is all too easy for these types of committee to be dominated by one particular view. In addition, without a conscious effort to publicise the work of the Committee it is a possibility that the aim of the Commission to ensure that its approach is transparent will amount to very little.

As for the relationship between public relations companies and their clients, this should be explicitly defined. For example, ever since the 1979 direct elections to the EP, the relationship between some public relations firms and their tobacco company clients has been the subject of intense debate. The question of tobacco advertising has nothing to do with freedom of speech or the right to trade freely in a free market. It is primarily a public health issue and as new forms of commercial communication become available it is more, not less important to examine this relationship between client and agency. This is all the more important since some agencies specifically do not work with tobacco companies, thus reinforcing the argument that tobacco is not a product like any other.

As long ago as 1991, I and other MEPs, realising the potential impact of unregulated advertising on consumer protection called on the Commission to produce a green paper on advertising. This was followed in 1992 by a public hearing in the EP's Committee on the Environment, Public Health and Consumer Protection on 'Consumers, Advertising and the Internal Market'. Now, in 1996, the Commission has finally published a Green Paper on commercial communications. This is of course, wider in scope than advertising alone. It also covers direct marketing, sponsorship, sales promotion and public relations promoting products and services. The research which was conducted prior to the public of the Green Paper demonstrates a clear need for EU-wide action. Let us hope that it is not another five years before this action sees the light of day.