

# 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

## Alcohol advertising The need for European regulation

Dr. Michel Craplet, Medical Director, National Association for the Prevention of Alcoholism

European Commission Delegation  
Library  
2300 M Street, NW  
Washington, DC 20015  
October 1997  
Issue 9

### IN THIS ISSUE

The need for a European legislative framework covering advertising in favour of alcohol nowadays seems indispensable. Some national legislation, like the 'Evin Law' in France, has had a disruptive effect in the field of sports, causing, for instance, the cancellation of the retransmission of certain international football matches: this law will make it impossible for the next Football World Cup to be sponsored by a brewer.

This need has been foreseen by bodies which have long since observed the way products and images of alcohol cross borders, due to the internationalisation of life styles - particularly those of the younger generations - and via the development of multinationals. In addition to technical arguments, some non-governmental organisations such as the French 'Association Nationale de Prévention de l'Alcoolisme' and the European association 'Eurocare', have adopted political and ethical positions, arguing that the EU can no longer content itself with economic objectives, but that it must become a humane community where the collective interest has priority over particular economic interests. This collective interest is based on the fact that alcohol is not a product like any other: as a harmful product causing addiction, its use must be controlled by the public authorities.

#### A law that cannot be ignored

'Evin Law endorsed by Brussels' was the headline of *CB News* magazine: 'The complaints lodged with Brussels by several alcohol producers against the Evin Law will not be taken up. The European Commission has, in fact, concluded that the ban on the sponsorship of sporting events by alcoholic beverage producers should not be judged incompatible with Community law. Counting on an eventual decision that the measure imposed by the Evin Law be deemed disproportionate to the objectives targeted also seems out of the question: the European Commission has considered in this instance that the protection of consumers' health should prevail over the freedom of the provision of services'.

Those who fought it from the very beginning have thus accepted the Evin Law. It has survived several ministerial reshuffles. The new Ministers for Health, Youth and Sports of the latest French government have clearly announced that they will defend it.

It is, in other words, here to stay; it is a simple law, easy to apply and one which has caused no problems in French courts. Of those advertising campaigns submitted to judges for review, no subsequent judgement mentioned the impossibility of using it, or its lack of clarity in contrast to previous laws. The text seems fairly difficult to distort, it limits the boundaries and describes the acceptable content of messages and images. However, the text allows for information on the products to be given, and it can even stimulate the creativity of admen by forcing them to forget traditional images and the easy use of seductive language. Some recent advertising campaigns are indeed very well done. However, the law has ultimately modified the language of advertising,

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CI-AA-97-009-EN-C

CS6: X11/145

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

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Kate Maitland Smith, *Managing Editor*  
Diane Luquiser, *Consumer Affairs 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

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which has lost its seductive character.

### A significant law difficult to assess

The Evin Law has not yet been assessed, and it is probably impossible to do so: its effect has been swamped by the general trend towards the reduced consumption of alcohol, a powerful and long running trend which renders difficult the effect of the preventative measures being observed.

### The quantitative effect

It is difficult to assess the role of individual factors in the availability of alcohol, such as price, standard of living, number of sales outlets and advertising, especially as the role of the factors varies over time.

Some genuine scientific studies<sup>2</sup> have shown the effect of advertising on consumption. However, it is true that when this effect has been established, it is weak. This is the reason why alcohol producers and admen can boldly argue that advertising has no influence on overall consumption, that most advertisements are brand advertising and are therefore, by definition, competitive. However, the impact of total bans is what has mostly been studied, and there are few examples of partial bans having been considered; in addition, their impact has not been assessed according to age group and socio-economic class. It is clear that young people, who 'consume' more advertising and appreciate it more than adults, are therefore more influenced by it.

The second problem is the link between the consumption of the overall population and pathology. This has often been debated since the Ledermann studies in the 1950s.

- For some, the number of medical/social problems caused by alcohol is linked to average consumption. Therefore, the average population bears the collective responsibility of its own health and well-being, including that of those who exceed the average.

- Others argue that the link does not exist and that extreme consumption is not linked to supply. This position is defended by legal arguments: why limit the advertising of a legally available product?

The effect of advertising on sales and consumption being surely weak, and perhaps not measurable, the regulation of advertising can only form part of an overall strategy of prevention, whose effect on younger generations would not be felt for several decades.

### The symbolic effect

These quantitative considerations have little importance compared to the qualitative and symbolic effect. Advertising is used to strengthen preconceived ideas about alcohol consumption. These ideas have not been forced on potential consumers. They are instead enshrined in our cultural background and admen only use pre-existing, conscious and unconscious images. Whereas the effect on health or masculinity is not any more used in the western world, having been banned by most codes of practice, alcohol consumption is still very often associated with personal and social success. The harshness of the Evin Law was the only way to change this basic, easy and seductive language.

The law has been efficient in correcting excesses in the form and the content of advertising messages; it is essential for the implementation of an overall and coherent preventative effort.

### A law which can be applied in Europe

We are not suggesting that the 'Evin Law' be transposed directly in Europe; it can, though, be used as a model.

Some have asked for even stricter legislation forbidding all sorts of advertising. Confronted by various national circumstances and the opening up of the European Union to new countries, we would rather propose minimal measures acceptable by all.

Their aim is to protect the younger generations. This is not to make them scape-goats, as some adults have done - allowing themselves to consume alcohol to their heart's content, whilst at the same time denouncing the spread of alcohol amongst the young. These measures will in fact be of help to the

younger generation in their adult life.

In order to limit the influence of advertising on the young, it is important to:

- control forms of communications (advertising, public relations, sponsorship, patronage...) use of sporting and cultural international events.
- forbid all advertisements shown on television.

There are, of course, the problems posed by new IT-based communications ( the Internet) where the assertion of liberalism (some would call 'laisser-fairism') would not favour such restrictions.

Regarding national events and media limited to one country, we suggested giving Member States the freedom to regulate local advertising (billposting, radio, cinema, direct mail...). In these fields, cultural characteristics play an important role, and prevention must take into account such cultural aspects in order to be efficient and accepted.

Despite their reputation, specialists on prevention do not wish to regulate peoples' lives and do not wish to treat them solely as consumers, unlike present day producers whose only wish is to impose consumption levels: paradoxically they are the new 'health experts'. On the contrary, the philosophy of the associations promoting prevention is to give citizens back their freedom of choice regarding products, consumption modes and rituals, which are often transformed into real ties limiting freedom.

**Commercial Communications has tried without success to establish a source from the magazine CB News for the conclusions published in the article of March 1997.**

<sup>1</sup> CB News, 24 - 30 March 1997, n°473.

<sup>2</sup> Saffer H., *Journal of health Economics*, 1991 ; 10 :p.65-79

**Dr Michel Craplet**  
 Médecin délégué  
 Association Nationale de  
 Prévention de l'Alcoolisme  
 20, rue Saint Fiacre  
 75002 PARIS  
 France  
 Tel: (+33) 01.42.55.51.04  
 Fax: (+33) 01.45.08.17.02

## Editorial

**W**e have raised over the last few issues a number of the concerns felt by consumer groups in relation to the commercial communications Green Paper. Some of the most significant of these are those concerns expressed about advertising directed at children. This issue moves the discussion on still further with a number of contributions on the subject. Some of these draw upon a recent ruling of the European Court of Justice in the *De Agostini* case.

Elsewhere, we publish an account of a major research project into television advertising and children which was conducted earlier this year in Denmark. Apart from anything else, the importance of this work is that it was conducted in a relatively 'immature' commercial television market where television advertising is a comparatively new phenomenon. Much of the other work on the subject has in the past originated from the USA and the UK, both of which are very mature commercial television markets.

There will be much more to follow in future editions of *Commercial Communications* on this subject, but we also wish to draw attention in this issue to the question of alcohol advertising. To frame the debate, we publish two contributions which outline the aims and achievements of the Evin law in France and raise the question as to whether it should be taken as a model for harmonisation across the Union.

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# The Evin Law in France

## Barrier to commercial communications in the Internal Market

Armand Hennon  
Representative  
Entreprise & Prévention

France adopted on 10 January 1991 a new law on commercial communications relating to alcohol.

This law, known under the name of the Evin Law (*Loi Evin*), was adopted to promote public health, the fight against alcoholism and to protect the young.

Presently, it constitutes one of the most restrictive and controversial measures of its type within the EU. Indeed, its provisions aim to regulate all forms of promotion or direct or indirect advertising of alcoholic drinks, the contents of commercial communications, the media authorised to carry such communications, as well as the sponsorship and patronage of events, advertising at point of sale and direct marketing.

This law - both recently introduced and with the potential to become a benchmark for the rest of Europe - thus covers the whole of the commercial communications sector as defined in the Green Paper of the European Commission, as it relates to alcoholic drinks.

The association 'Entreprise & Prévention', which brings together in France seventeen major firms active in the alcoholic drinks market, has as its aims participation in the fight against excessive alcohol consumption and the performance of a consultative role with the authorities. It is also well placed to analyse the national and European consequences of the Evin Law, in the light of the Green Paper on commercial communications in the internal market.

### The barriers to the free provision of services created by the Evin Law

If one considers that the success of the Internal Market for products is based, to a large extent, on the freedom to provide cross-border communication services, then the Evin Law notably introduces several effective barriers within the European Union.

### The principle of a ban with authorised exceptions and the impossibility of transcribing the 'Television Without Frontiers' Directive.

The Evin Law, which comes under criminal law, is based on a surprising reversal of general legal principles. Indeed, with respect to the advertising of alcohol, the Law does not list restrictions, but instead a limited number of exceptions to a general ban, preventing any possible harmonisation with article 15 of Directive 89/552 ('Television Without Frontiers'), which sets out the rules relating to the advertising of alcohol on television.

The total ban on television advertising already constitutes in this context an obstacle unique to France.

In addition, the wording of article L 18 of the Evin Law, which defines in detail what is allowed by way of content and not what is banned, makes impossible any commercial communication strategy at the level of the European internal market, not only in terms of media, but also in terms of content.

### Discrimination resulting from cancelling the retransmission of sporting events.

The European Commission decided in July 1996 to serve on France a 'reasoned opinion', following the cancellation in March 1995 of the televised retransmission of sporting events, which took place outside France but in which appeared advertising of alcohol.

The ban on such television advertising in France, and the tolerance abroad of such advertising in the context of sports, was the reason why these cancellations - decreed by the administrative body 'Conseil Supérieur de l'Audiovisuel' (CSA) - took place.

The concern felt by organisers of sporting events about possible losses of revenue derived from television rights is now leading to discrimination by European sporting federations and organisers

of competitions.

Thus sometimes French products are banned from stadiums, whilst foreign products are allowed, and at other times spirits have been banned whilst drinks with lower alcohol content have been allowed.

These discriminatory practices persist even though they have no legal basis and represent in reality barriers to the provision of services within the European Union which have resulted from the Evin Law.

#### **The absence of legal certainty**

Differences in interpretation of the Evin Law in France show the extreme difficulty of regulating the contents of commercial communications.

On 11 March 1991, in response to an initiative taken by *Entreprise & Prévention* and only a few weeks after the publication in the Official Journal of the Evin Law of 10 January 1991, the majority of firms operating in the alcoholic drinks sector adopted a series of 'professional guidelines', aimed at a common and responsible application of the Law, and approved by the BVP ('Bureau de Vérification de la Publicité', or Board of Advertising Control), a self-regulatory body recognised by the authorities.

The firms concerned were anxious to avoid both the risk of an overly restrictive interpretation, leading to a *de facto* ban, which was not the intention of the law, and that of an excessively loose interpretation, which would have betrayed the aim of the legislator, whilst also exposing firms to heavy criminal sanctions.

The issue as to how the types of messages which could still be carried in advertising could be visually expressed has been the subject of more than twenty court rulings since 1991, often contradictory. But the most recent case law is especially restrictive when it comes to interpreting the limits fixed by the Law, nullifying the guidelines of the BVP.

These rulings in practice only allow the image of a bottle against a neutral

background, contrary to the wishes of the legislator as expressed during the parliamentary debates of 1990. By making any differentiation in terms of publicity impossible, the rulings effectively impose a ban on advertising.

For the firms concerned, which are usually anxious to respect the spirit of the Law, any decision taken in the area of communication thus constitutes, more than ever before, significant risk - the more so since the criminal sanctions which can be incurred in cases of a repeat offence can amount to a total ban for five years of the sale of the product concerned!

#### **A ban on all promotion or indirect advertising**

The extension of restrictive measures by the Evin Law to all products which could be identified with an alcoholic drink (by its emblem, name or any other distinctive symbol), constitutes a new barrier to trade.

Indeed, because of this provision, an existing brand which tried to diversify would find itself deprived of communication channels in France. Professionals see this as a serious attack on property and on the ability to develop an essential part of a firm's capital, namely its brand.

#### **An assessment of the Evin Law in the light of the criteria proposed in the Green Paper**

The methodology proposed by the Green Paper seems excellent, in that its five assessment criteria allow an analysis, whatever the motivation behind national legislation, as to whether the restrictive measure in question is efficient, proportionate to the aim specified and its effect on other objectives.

##### **1 What is the 'chain reaction' triggered by the Evin Law?**

##### **The users: an advantage for bottom of the range products.**

In a highly competitive market such as alcoholic drinks, advertising is an essential element in maintaining and developing

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*The Evin Law has as its objective the prevention of alcoholism in France and, as a subset of this, it aims to limit excessive consumption by the young.*

market share, an indispensable tool for launching new products, and a means of supporting quality products against low-price products.

Thus the application of the Law of 10 January 1991 led to an immediate reduction in recognition scores for the majority of campaigns. Today, the number of campaigns has fallen and their recognition scores have recovered to a level equivalent to that of 1990 only at the price of a substantial increase in advertising investment.

This reduction in the efficiency of advertising has created an imbalance in the market. Indeed, high quality brands, no longer able to promote their distinctiveness through sponsorship or advertising, have seen competition increase from low price, bottom of the range brands and the 'own label' brands of distributors.

To take only one example, luxury beers, a common product in large and medium sized supermarket retailers, have seen the share of market for 'own label' and 'low-price brands' grow from 31% in 1990 to 41% in 1995. Also worth noting with the market for beer has been the development of a new category of product which, without advertising until 1996, has experienced tremendous success: that of low price beers with high alcohol content, drunk above all by consumers seeking inebriation.

One can thus question the usefulness of a law which, by limiting advertising, risks stimulating consumption - a trend already under way - by putting downward pressure on prices, in contradiction to the aims of the authorities and to the detriment of quality products.

#### **Advertising agencies and the media: a loss of revenue**

As far as spending on advertising alcoholic drinks is concerned, advertising and communication agencies have seen a fall in their revenues of 70 million francs between 1990 and 1994 (equivalent to more than 1% of the total revenue of these agencies).

The Evin Law has in addition compounded the situation faced by the media.

'L'Association des Agences-Conseil en Communication' (AACC, the French advertising agency association) has estimated their loss of revenue to be in the order of 900 million francs over four years, of which 600 million was due solely to alcoholic drinks.

The press has been the most affected by the reduction in advertising budgets for alcohol, with annual loss in revenues estimated as between 80 and 130 million francs, depending on the year in question. As for the advertising of alcohol in cinemas, which represented 17.6% of this medium's advertising revenue, this is now completely banned.

#### **2 What are the objectives of the Evin Law ?**

The Evin Law has as its objective the prevention of alcoholism in France and, as a subset of this, it aims to limit excessive consumption by the young (given that this type of regulation has no effect on those already addicted to alcohol).

It thus aims to prevent the abuse of alcohol, not to discourage all consumption, emphasised by the Minister for Health Claude Evin, when he presented his proposal to the French Parliament ('In the case of alcohol, only abuse is dangerous', he stated to the National Assembly).

However, the target group is not clearly defined in the legislation (is it all those under 16 years of age? Under 18?); nor is the objective (a reduction in excessive consumption? Of the incidence of drunkenness? Of the accident record of the group concerned?).

#### **3 Does the measure relate to its objective?**

The relationship between advertising and consumption has been the subject of numerous debates in Europe and in the world whenever proposals aimed at banning or reducing the advertising of certain products have appeared.

As far as alcohol is concerned, comparing trends in consumption and advertising budgets in major European countries allows one to conclude that this link is not proven.

As far as the Evin Law in particular is concerned, and its aim of combating excessive consumption, it is even more difficult to identify a significant causal link between the level of advertising spending in a country and the level of excess consumption of its population. Nobody has in fact tried to do so, even during the debate on the Evin Law in France, which was driven above all by moral rather than technical arguments; the restrictions on commercial communications were presented to the French parliamentarians as a 'duty', in the face of the curse of alcoholism in France and its eventual negative effects, such as the price paid by public health.

#### **4 Has the measure other objectives?**

In the context of its ban on sponsorship and its near total ban on patronage, the Evin Law directly impacts the development of sport and culture in France.

Indeed, producers of alcoholic drinks traditionally provided significant support to numerous cultural events. The disengagement of firms speeded up in 1993 with the publication of a decree on the provision of patronage. Together with the continued reduction in State support, this further weakened the cultural sector.

A number of events, unable to find new sponsors have stopped and, even more telling, numerous events in France which received patronage have now relocated to other countries, bringing significant harm to France's cultural economy.

The situation is the same with sport, with a massive disengagement by alcoholic drink producers and several cases of sporting competitions relocating.

The Evin Law thus today poses the problem of the relocation of communication services outside France, and tomorrow threatens the relocation of these services outside the European Union (e.g. major sporting events, Internet sites, satellite television channels etc.)

#### **5 Is the Evin Law efficient?**

The main facts which have marked the period since the introduction of the law of

10 January 1991, which was meant to herald an extensive policy on public health, of which the regulation of advertising was but a first step, reveal a double failure.

a. The excessive consumption of alcohol amongst the young, which had fallen during the preceding period, has increased since 1991 (particularly in incidents of drunkenness).

b. Contrary to the aims announced during the parliamentary debate, the policy applied by the French Minister for Health against alcoholism has been limited to applying measures regulating advertising.

Compared to the years 1984-90, the resources made available for research and the fight against alcoholism have been weakened, both in terms of their management and of the human and financial support they have been allocated. At the same time, tax revenues on alcohol made a significant contribution to the state's health insurance fund, without any being directed towards prevention.

These results contradict the correlation between advertising and consumption or abuse. They support those in favour of a modern approach to public health, based on targeted programmes dealing with well defined risks, as opposed to spectacular and all-encompassing measures which usually mask an absence of policy and resources.

It seems clear that the Evin Law, as far as the assessment criteria proposed by the Green Paper are concerned, does not meet the requirements of proportionality and coherence demanded by the Commission.

Notwithstanding this law and its difficulties in application, producers of alcoholic drinks have committed themselves in France to putting in place a system of self-regulation, similar to those applied in numerous other European countries.

Professional self-discipline in fact seems today to be the best way of respecting the needs of public health whilst at the same time protecting the coherence and the objectives of the Internal Market.

***Contrary to the aims announced during the parliamentary debate, the policy applied by the French Minister for Health against alcoholism has been limited to applying measures regulating advertising.***

# Digital television services in Europe

Toby Syfret  
Research Consultant  
*Commercial  
Communications*

The single undisputed forecast about digital television is that it will happen. It is only the getting there that appears so full of technological, service-related, regulatory and other challenges. In short, digital TV offers fertile ground for conferences, and the recent five day double conference organised by *IIR* in Frankfurt exemplifies the important role that conferences can play in clarifying and crystallizing issues in a complex and often confusing subject. This report covers the opening two day conference on the launching of digital television in Europe.

According to figures presented by Roger Stanyard (DTT Consulting), 22 digital packages were extant in different parts of the world in August 1997. They reached an estimated 7.36 million subscribers, of which the three US systems accounted for 5.38 million or 73% of the total. By contrast, the European sector numbers nine digital packages and a mere 1.04 million subscribers, with only the French projects, Canal Satellite Numérique (550,000 est.) and Télévision Par Satellite (200,000 est.) exceeding 100,000.

Although digital services may also be delivered terrestrially, via cable or over the telephone wire, the current list of 22 digital packages all employ satellites for Direct to Home (DTH) delivery. Reflecting this prominence, several speakers specifically addressed issues of satellite capacity and market potential. The general prognosis for satellite delivered digital services appears favourable. Thus, SES forecasts quoted by Barclay Dutton (Vision Consultancy) project the current European market of 26 million analogue and one million digital DTH homes giving way to 35 million digital homes and just 10 million analogue homes in 2006.

Still open to question is how the remaining two hundred million

European TV homes (c80% penetration) will get their digital television services, as several speakers drew attention to the drawbacks associated with cable and terrestrial distribution in much of Europe.

More fundamental than this is the question of what digital packages offer the public. The answer now is very little more than what the analogue packages already offer. This is even the case in the USA, where Martin Lafferty (Telquest, Inc.) presented a mixed picture of niche market developments (e.g. Primestar being aimed at non-cabled rural communities) and efforts directed at competing head on with cable over pricing and quality of service. No one saw NVOD (Near Video On Demand) or PPV (Pay Per View) as major drivers of development.

And yet, many papers also discussed the Internet and the vast potential of digital interactive services. Indeed, they exposed a sharp dichotomy between the growth of broadcast-led services coming from traditional television companies moving into digital distribution and the growth of PC-based applications.

Today, the two paths of development are kept apart by differences in technology, standards, user populations, functions, service structures and goals.

Nevertheless, the general view is that they will converge. Jean-Yves Burgot (SAT) described how the television and PC-based functions could be integrated through interfacing, whilst Tony Wechselberger (Hyundai/TV/COM) mapped out the functions that 'intelligent' set-top boxes ought one day to perform. However, he also drew attention to the passive mode in which most viewers enjoy their TV and argued that the break-through in consumer uptake would probably come from something like the incorporation of a facility for DVD (Digital Video Disk) recording. Then,

maybe, the set-top box would become a real smash hit product of consumer electronics, instead of being just the vehicle for getting digital signals into the home that was stressed by Rick Smith (Pace Micro Technology).

But it will take a few years to get there, during which interval, said Robert Rusch (Engineering Consultants), digital TV is set to undergo a quantum leap of 10,000-15,000-fold increase in speed and 100-fold increase in capacity. His point was underlined by Gordon Drury (NDS) in a paper which championed the cause of MPEG formats as a European standard. He noted how MPEG is continuing to develop coding algorithms that enable the transmission of broadcast quality pictures at lower and lower bit rates. The latest MPEG-4 algorithm being developed has set a target of around 50-100 Kbits for broadcast-like qualities; at which point the suggestion is that video distribution via the Internet becomes a real possibility.

If the claim about current rates of progress are true, a big bang could occur in digital TV inside the next ten years and what will then emerge as digital TV may have little in common with the digital packages of today. In the meantime, broadcasters have to decide whether to invest now or wait. Two speakers, Oskar Prinz von Preussen (Discovery Germany) and Simon Bazalgeite (Music Choice Europe), outlined the perspective of the digital service provider. For this group, the next few years promise to be tough, educative and uncertain.

For further details of this conference contact:

Vanessa Sangwin

*IIR*

Tel: +44 (0)171 915 5110

Fax: +44 (0)171 915 5001

# Some considerations in response to BEUC

**B**EUUC's contribution to the June edition of *Commercial Communications* made very interesting reading, and I agree with some of its key points.

I am at one with BEUC on the proposed proportionality committee; it must be open to all outside interests. The WFA thinks it should be a committee of Member State representatives, simply because it would be very difficult to find a suitable means of representing all industry points of view from across Europe. I imagine consumer organisations may have similar difficulties in representing a single 'European' consumer perspective. However, we should know the committee's membership; we should know what is on the agenda; the minutes should be published; and it should accept input from all outside interests, including industry and consumers, and listen to expert advice.

Both BEUC and the WFA agree that access to effective redress across borders is simply inadequate. It is not just a serious problem for individuals; companies, large and small, have severe difficulties. In the interests of everyone, Member States should have made much further progress on this matter. Not only do the Member States seem unwilling to address the issues and live up to the consequences of being part of the European Union, but also the Commission is very patchy on enforcement. There is an obvious problem about lack of resources, but at the same time the Commission can be only too susceptible to political pressure. This is no way to run the Union.

In the commercial communication sector, we have established the means to deal with cross-border complaints under the self-regulatory system. The European Advertising Standards Alliance (EASA) has been set up to ensure that the self-regulatory system works across Europe. It is free and simple to use for those who want to

complain about e.g. advertising coming from another country. You simply contact your own national self-regulatory body, which forwards your complaint to EASA, which ensures that the self-regulatory body in the home country examines the complaint and gives a proper response to the complainant.

BEUC and I have a common concern over the advent of the information society. In this context, we do need to ensure that commercial communication (as distinct from the rest of the content) in the new media is 'legal, decent, honest and truthful'. BEUC will doubtless be reassured to know that the International Chamber of Commerce is developing a code of conduct.

I also agree that the Green Paper should cover packaging. Packaging is clearly part of commercial communication, and we would have preferred it to have been considered as part of the Green Paper. We hope that the Commission will cover it in due course.

***I also agree that the Green Paper should cover packaging. Packaging is clearly part of commercial communication, and we would have preferred it to have been considered as part of the Green Paper. We hope that the Commission will cover it in due course.***

I begin to part company with BEUC when they question the basis of the Green Paper. I can understand why they do so. The precise legal position applying to various kinds of commercial communication, and/or the services which create the commercial communication, and whether and/or under what conditions it can cross borders, is not always clear. The fact that this is so, does not invalidate the Green Paper. It means that we shall have to see how the case law in the Court of Justice develops.

**Malcolm Earnshaw  
President  
World Federation of  
Advertisers  
(W.F.A.)**

I do not agree for a further reason. We live in a European Union that has set as one of its central aims the creation of a single market, in order that everyone in the EU can benefit from the choice, the jobs and the prosperity that a single market should bring. A prerequisite for goods and services to cross borders successfully is that people in the receiving countries should know that the goods and services are available and that they therefore have the opportunity to buy them in their own country. This means commercial communication.

It seems reasonable to start, as the Commission proposes, by looking at the national regulation (and self-regulation) to see that it is compatible with the Treaty which, after all, takes precedence over national law in matters relating to the Single Market.

If a national rule has a demonstrably discriminatory effect against those operating from outside that Member State, presumably BEUC would agree that this is against the law. Equally, if a national rule can be shown to be disproportionate to its objective, presumably BEUC would agree that this too is against the law.

***Some of this national regulation, whilst perhaps flying a banner of consumer protection, or justifying itself as a 'free competition' measure, is protectionist in effect.***

None of us should be afraid of the consequences of accepting that national legislation in this field should be both proportionate and non-discriminatory. It does not stop national governments making rules and regulations to suit the culture, taste and preferences of its own people; it will not always work in favour of what some parts of industry may see to be in their short-term interests; it will not always favour what consumer organisations think is in the interests of consumers. In the long term, however, if we apply a clear set

of criteria, without fear or favour and as consistently and objectively as possible, it will be in the best interests of both.

BEUC thinks there should be 'a balance between home and host country control'. I believe that the principle of country of origin must be rigorously applied. Without it, there can be no single market and a key pillar of the European Union simply crumbles to dust. The 'host country' safeguards its position through the protections provided in the Treaty e.g. as set out in Articles 36 and 56.

Finally, BEUC believes that the Green Paper does not take sufficient account of the interests of consumers. Here again I part company with BEUC. The consumer interest is a constant theme of the Green Paper. The reason that the Green Paper exists is to suggest a rational framework to look at national regulation in this field. Much of this national regulation is directed at ensuring a level playing field between competitors and addressing certain aspects of consumer protection. Both objectives, properly applied, are very clearly in consumers' interests. However, it does not always work. For example, some of this national regulation, whilst perhaps flying a banner of consumer protection, or justifying itself as a 'free competition' measure, is protectionist in effect. As BEUC would agree, protectionism is not good for consumers, or indeed industry. Clearly, it is wrong that such measures should be permitted to continue.

I would have thought that BEUC would welcome the opportunity to examine all national regulation in this field and bring the light of day to bear on some of it. We are bound to find some obscure rules which are in nobody's interests; equally we may well find some really good regulation that we should all consider. We certainly will not all get what we want, but the interests of consumers and industry are not so far apart as some would have us believe.

# Lottery Advertising - beyond the borders of the Internal Market

In *Commercial Communications* of June 1997 I read a fascinating article by Mr Ray Bates, President of the Association Européenne des Loteries et Lots d'Etats (AELLE). It is clear that in this article emphasis is laid on 'government lotteries' and that the many commercial competitions organised by companies and other organisations in various Member States have been left undiscussed.

That there is some relationship between lotteries approved and organised by government and the promotional competitions organised by the business sector is obvious. After all, it is conceivable that government lotteries look upon those being organised by the business sector to promote their goods and services with some dismay, for several Member States argue that the monopoly position of government lotteries can thereby be harmed.

Apart from the question whether this argument is verifiable and quantifiable, it is also argued that government lotteries finance important social objectives, whereas the promotional competitions of the business sector do not. In the Netherlands there are considerable efforts being made to protect the national government lotteries to the disadvantage of the government lotteries of other Member States.

Although Mr Bates correctly argues that in theory it is possible that at European level some state control on lotteries and competitions in general is exercised, it may be questioned whether the main argument in favour of this - possible addiction - is a sound one. If, indeed, this would be a sound argument for government lotteries, it still is questionable whether the same argument goes for commercial competitions of companies. Just recently, the Dutch authorities have 'legalised' the possibility of sweepstakes, because the Minister of Justice stated that in these kind of 'free' commercial competitions the element of addiction is lacking.

There is also the question as to whether, for competition reasons, state control is justified at the European level. The new Community anti-trust legislation, in my opinion, stands in the way of such a notion. Firstly, the Member States have to consider whether there is any reason for granting government lotteries a privileged position vis-à-vis the commercial competitions of the business sector. There is much in favour of the view that such an exceptional position is not justified, because of the principles of the free movement of goods and services in Europe. Moreover, the argument that the profit of government lotteries is used for societal 'sensible' purposes can also be put forward for competitions of the business sector, for they create jobs, provide tax advantages and playing enjoyment for many residents of the Member States.

***The new Community anti-trust legislation, in my opinion, stands in the way of such a notion. Firstly, the Member States have to consider whether there is any reason for granting government lotteries a privileged position vis-à-vis the commercial competitions of the business sector.***

As the article of Mr Bates acknowledges, lotteries are a special form of economic activity and this applies to commercial competitions of the business sector to an even greater extent. The argument that Member States should not acknowledge each other's government lotteries, because such a lottery would not serve the social purposes of each Member State seems to be indefensible in view of the free movement of goods and services in the European Union. On the contrary, the possibility for the residents of the various Member States to buy tickets from all 'legal' lotteries in other Member States seems to be more in line with the principle of free movement.

**G. Ribbink  
Lawyer  
Geerling Advocaten**

The selling of these tickets through new media such as, for example, telemarketing also seems to be appropriate to help develop such free movement of goods and services. Surely there can be agreement that the common objective of Member State government lotteries and commercial competitions can remain: they both meet, in a pleasant and harmless way, the residents of the Member States' 'natural' desire to gamble, with the additional advantage of revenues being used for 'good' causes, such as sports, culture, recreation and employment.

For this reason, even in the calvinistic Netherlands, there are unlimited opportunities to meet this need for entertainment and 'moderate' desire to gamble through all kinds of legal lotteries, casinos included.

Therefore I agree with the conclusion of Mr Bates' article: his view is that by virtue of the subsidiarity principle the most obvious form of regulation is to leave it to the Member States. I do not, however, agree with his wish to create some kind of prohibition to advertise these lotteries freely, not to mention the commercial competitions I have referred to.

***Surely there can be agreement that the common objective of Member State government lotteries and commercial competitions can remain: they both meet, in a pleasant and harmless way, the residents of the Member States' 'natural' desire to gamble, with the additional advantage of revenues being used for 'good' causes, such as sports, culture, recreation and employment.***

After all, if a product, such as a lottery and a commercial competition, is legal, there must exist complete freedom to advertise this legal product. Article 10 of the European Convention for the Protection of Human Rights and Fundamen-

tal Freedoms grants the 'classical' freedom of speech to freedom of expression in the form of commercial communications.

Mr Bates also considers self-regulation a reasonable alternative: for this reason there now exists a so-called Sweepstakes Code of the Dutch Advertising Standards Organisation, to which even the Dutch government has given its 'blessing'. In this code it has been stipulated that for such a commercial competition no money may be asked for, although, against the background of Community law, this seems to me to conflict with competition law, as government lotteries derive an unfair advantage as against commercial competitions.

In brief, I do understand the background of this very readable article of Mr Bates and simply wish to point out the possible conflict with Community law as to the monopoly position of government lotteries. I do subscribe to his wish to solve this issue through the application of the subsidiarity principle, i.e., not at European level but by Member States. I am all for self-regulation in this field, but I would also be in favour of equal treatment of government lotteries and commercial competitions under private law.

I think it essential to acknowledge that commercial competitions help develop important social interests, namely employment, the economy, the *homo ludens* need for playing, and that they do so without the risk of addiction, which is the main argument Member States put forward to justify restrictions on lotteries in their legislation.

# Four models of how advertising works

The way we use advertising now is very different from the way we used advertising 25 years ago, but conventional research is based on the thinking of those times, not of today. It is not surprising therefore that research can be out of tune with advertising.

Conventional advertising research, particularly recall and persuasion shift systems, are very fond of making judgements but do not *explain* very much about how advertising is working or not working.

Seven years ago, therefore, I set out to develop an understanding of how advertising works and what came out of this was a new approach to advertising research. This approach, which my company calls the FRAMEWORK approach, is based on two fundamental principles.

The first is quite simply that different advertising works in different ways at different times for different brands. This, as I like to say is a truism, which therefore has the benefit of being true! Unfortunately conventional advertising research ignores this truth, and uses the same methods and measures and judgement criteria, regardless of how the advertising might be used.

Since advertising works in different ways, research must measure *all* the ways it might work, not an arbitrary few, if it is to explain the effects of a campaign. The first step was therefore to find out what *are* the different ways that advertising works. In a study I reported on in the 1991 MRS (Market Research Society) Conference, I identified four models or frameworks of how advertising works which I go through in some detail below.

But there is a second important principle, and again it is not something I invented: brand response is ultimately more important than ad response. By this I mean quite simply that, in the final analysis, it doesn't matter whether people remember your ad, or like it or find it amusing or radi-

cally different if it does not somehow build the relationship between the target market and the brand. For that is the business of marketing and advertising - building brand relationships - and measuring it is the business of advertising research.

I have called the four models of how advertising works the Sales Response, Persuasion, Involvement and Salience Models. Before considering each in turn, it is important to be clear as to what a model is. Because there is no scientific process in advertising that guarantees that if you do A response B will result, a model of advertising is no more (and no less) than a set of assumptions about the best thing to do or try or show to get people to respond in a certain way that will enhance their brand relationship.

And it is with the brand relationship we should begin, because it is a remarkable instance of how far out of touch with each other advertising and research had become, that whilst advertisers had spent the last 25 years trying to build brand relationships, conventional research did not measure them! It measured other, wholly unhelpful, things like brand image and brand awareness, but not the brand relationship. The measure we created for relationships is *commitment*. You are more or less committed to your relationship with your partner, friends, employer and *brands*.

Working in advertising or marketing is fairly simple, because there are only three strategies for all campaigns. We use our commitment measure to segment the target market into five categories. Let me illustrate strategies using one of our client brands, adidas. adidas have some consumers who always buy their shoes from the adidas range and would never consider any other brand - they are committed and the strategy is to keep them committed. At the other end of the spectrum 5 years ago for adidas was a large number of young boys who would never wear adidas because

**Mike Hall**  
Managing Director  
Hall & Partners

*Unfortunately conventional advertising research ignores this truth, and uses the same methods and measures and judgement criteria, regardless of how the advertising might be used.*

***This is not advertising that argues that your brand works better, but advertising that makes your brand mean more.***

that's what their dads wore, which was very uncool. The strategy here is to convert the 'rejectors'. In the middle are people who are quite happy to buy adidas, but equally if not more happy to buy Nike, Reebok, Puma etc. These are most people for most brands and the job of marketing and advertising is to somehow enhance a weak 'considerer' to build a stronger relationship with the brand.

To do this, an advertiser develops a model for using advertising. Of course, they don't say 'I know, I'll use the Hall & Partners Involvement model to solve this for me', but *implicitly* everyone has always used these models, and all that I've really done is to make advertisers' assumptions explicit. Let me take you through the theory of each model or framework.

### **The four models**

I'll begin with the Persuasion model because that's where advertising theory began in the 1930s. Unfortunately, for too many marketing people that's also where their thinking stopped. It does sometimes apply today, but only sometimes. The models, invariably known by initials like AIDA, ACCA and DAGMAR are step-by-step models, whereby Step One leads to Step Two and so on. For example, ACCA model states that the first step is to get 'Awareness', so you must tell people the brand name in the first 5 seconds of the commercial, then you tell people what is different about your brand, so they must 'Comprehend' the message, and because you say your brand is the only brand with magic ingredient X, they are 'Convinced' that this is better than other brands, so they take 'Action' to switch brands and sales rise as a result!

I do not wish to give the impression that Persuasion advertising is 'wrong'. I wish rather to suggest that it's not always right and that some of the thinking in the 1960s was very simplistic. Equally, in those

days there were fewer brands, most of which had Unique Selling Propositions or USP's, and the job of advertising was to communicate these more frequently. However, if you consider adidas in 1992 - even though its shoes *were* unique, the typical 14 year old boy couldn't care less - he wasn't interested in what adidas had to say, so a Persuasion strategy was inappropriate.

If it were, it would be because you believe that what's going to make people buy your floor cleaner, for example, is their belief that it works better than other brands. The brand response you want is for them to hold strong beliefs about these superior benefits and the ad response you want is for them to get the message. In this way conventional advertising research relies on communication and image measures. But how else can you use advertising if, as with adidas, you feel that Persuasion advertising isn't right for you?

The Involvement model is different - it assumes that what makes you more committed is that you identify with certain values that lie in the brand not the product (values such as sophistication, adventure, fun, contemporaneity, joie de vivre) and the way they get to these values is by putting them in the advertising. The hypothesis is that the more deeply you *get into* any advertising, the more you will *take out* of it about the brand.

As the late Charles Channon once said, this is not advertising that argues that your brand *works better*, but advertising that makes your brand *mean more*.

This is used a lot for alcoholic drinks, cars and cigarettes, but also nowadays for financial institutions, fast food and instant coffee - classic added value advertising.

If you are advertising like this you assume the main dynamic driving brand commitment is brand involvement, so you must measure it and see if the advertising is bringing people closer to the brand and if this makes them consider it more, or

keeps them committed. And the key ad response you want to know is how involved people get, not *primarily* what they can remember about what it 'said'.

Five years ago, adidas decided they would not use this route. 14 year olds had no warm close-feeling values towards the brand that adidas could build on. Other brands like car tyres had similar difficulties - the car you drive says something about you, the tyres on its wheels do not suggest you are a chic, extrovert, urban fun-lover in quite the same way.

This brings me to the Saliency model, which assumes you can build a relationship not by working better or meaning more, but simply by standing out, by being more dynamic, so that people sense you are going somewhere and take more notice of and interest in you as a result. This is what Saliency means. It is not just awareness (which is simply a measure of presence) but standing out. The assumption is that if your advertising stands out as very different, it will make your brand stand out above the others.

This is, of course, what adidas did and dramatically changed the fortunes of their brand across Europe. It is what Pirelli did with Carl Lewis in the tyre market, what Tango does in the UK.

This again has implications for research, because if that is what is assumed needs to happen, research must simply measure whether it does. In doing so it can achieve its aim, which is to explain, as fully as it is possible for research to explain, how advertising is working and how this is affecting brand relationships.

There is a final model of course, the Sales Response framework which I have mentioned less because it relates more to short term promotional effects than longer term brand building - shopping coupons, trying sample packets, looking out for specials offers.

Again there is a desired brand re-

sponse - in this case behavioural - and an intended ad response of registering the ad as worthwhile.

Let me conclude about these models by making two things very clear. All ads stimulate all these responses to some extent. All brands have functional attributes, personality and salience as underlying brand dynamics. But any given piece of advertising actually will stimulate one primary ad response and one driving brand dynamic. The second point is that if we are to explain what the main dynamic is and how it works, we must measure *all* these responses, not just one or two of them, as conventional research has done in the past and unfortunately continues in some instances to do so.

I have concentrated on the theory. It has further research implications however, such as an expanded and rather different set of brand responses, not the sterile batteries of brand image statements that bore respondents as much as they do me.

It also raises questions about the value of conventional measures and the too great importance that is attached to them.

Ad awareness for example tells you nothing about how the ad works, let alone about its effects on the brand and is a poor measure of advertising when used alone. Spontaneous brand awareness is probably the most misleading measure ever invented by research and yet it is still asked of practically all brands in all advertising research surveys.

The benefit of this set of four models of how advertising works is that it gives a discipline not just for designing a survey, but for placing the appropriate importance on any given measure in interpreting the results. Advertising does not have to perform outstandingly well on every dimension for it to be working, it only has to work in one way. Research, however, has to measure all of them, if we are to understand how the advertising is working.

***Spontaneous brand awareness is probably the most misleading measure ever invented by research and yet it is still asked of practically all brands in all advertising research surveys.***

# The Court of Justice and the 'Television without Frontiers' Directive

9 July 1997 Judgment of the Court of Justice in Joined Cases :  
**Konsumentombudsmannen v De Agostini (Svenska) Förlag AB (C-34/95)**  
**Konsumentombudsmannen v TV-Shop i Sverige AB (C-35/95 and C-36/95)**

A Member State may penalize an advertiser on account of misleading advertising coming from another Member State but may not do so simply on the ground that the advertising is directed at children.

## Facts

Broadcasters established in the United Kingdom and in Sweden broadcast programmes via satellite to Denmark, Sweden and Norway. In those programmes they have broadcast various forms of advertising prohibited by the Swedish Marketing Practices Law.

*Case C-34/95* concerned advertising for a children's magazine on dinosaurs which is published in a series by the company De Agostini. Each issue contains a part of a model dinosaur which can be completed once all the issues in the series have been purchased. The Consumer Ombudsman has applied to the Marknadsdomstol (Market Court) for an order prohibiting marketing of the magazine or requiring De Agostini to indicate the number of magazines needed to complete the model. He has also asked the Marknadsdomstol to prohibit the making of any misleading statements.

*Cases C-35/95 and C-36/95* concerned respectively *Body de Lite* skin-care products and *Astonish* detergents which were marketed in television spots and which customers could order by telephone. The Consumer Ombudsman asked the Marknadsdomstol in effect to prohibit TV-Shop from broadcasting misleading advertising.

Faced with those questions the Marknadsdomstol therefore asked the Court of Justice whether Article 30 (prohibiting quantitative restrictions on imports) or Article 59 (providing for free

movement of services) of the EC Treaty or Directive 89/552/EEC (the 'television without frontiers' directive) allow a Member State:

- a. to prohibit television advertising broadcast from another Member State;
- b. to prohibit television advertising designed to attract the attention of children less than 12 years of age (in the specific case of Case C-34/95).

## Swedish Law

The Swedish Marketing Practices Law authorizes the Marknadsdomstol to prohibit advertising or any act which is contrary to good commercial practice or otherwise unfair towards consumers or other traders. The Court may also order a trader to provide in his advertising relevant information to the consumer. The Swedish Broadcasting Law provides that advertising must not be designed to attract the attention of children.

## Assessment of the Court

### A) Misleading advertising broadcast from another Member State

1. **Directive 89/552/EEC** is designed to coordinate the rules of the Member States on television broadcasting and eliminate obstacles to freedom of broadcasting resulting from disparities existing between the provisions of each Member State. It provides that broadcasts from a Member State intended for reception in another Member State must comply with the legislation of the originating Member State. The receiving Member State may not impose restrictions on grounds relating to the field coordinated by the Directive.

The Directive lays down certain princi-

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ples concerning advertising and its contents. It undertakes partial coordination which does not automatically exclude application of rules other than those specifically concerning broadcasting of programmes. Nothing therefore precludes a national rule protecting consumers, provided that it does not involve any secondary control. There is in fact another Community Directive, 84/450/EEC, which makes the Member States responsible for controlling misleading advertising in the interests of consumers and the public in general. **The receiving Member State may not therefore be deprived of the possibility of taking measures against an advertiser in relation to such advertising, provided that those measures do not prevent the retransmission, as such, in its territory of television broadcasts coming from another Member State.**

2. According to the case-law of the Court, prohibitions of television advertising concern in principle **the selling arrangements for a product**. It reiterates that national rules which restrict or prohibit certain selling arrangements **are not covered by Article 30 of the Treaty** if they apply to all traders and affect in the same manner, in law and in fact, the marketing of domestic products and foreign products.

If, however, the national court were to find that the prohibition affects foreign products more seriously and is therefore caught by Article 30 of the Treaty, it would have to determine whether the prohibition is necessary to satisfy overriding requirements of general public importance or one of the aims mentioned in Article 36. In this regard, the Court refers to its case-law according to which **fair trading and consumer protection are overriding requirements of general public importance which may justify obstacles to the free movement of goods.**

3. It is well established that advertising broadcast for payment by a television

broadcaster established in one Member State for an advertiser established in another Member State constitutes a **provision of a service** within the meaning of **Article 59 of the Treaty**. Consequently, where there are no harmonizing rules applicable in this field, the domestic rules in question involve a restriction on the freedom to provide services. The national court must therefore determine whether those provisions are necessary to satisfy overriding requirements of general public importance, whether they are proportionate for that purpose and whether less restrictive means could be used. Reference is made here to the case-law of the Court according to which **fair trading and consumer protection are overriding requirements of general public importance which may justify obstacles to the freedom to provide services.**

#### **B) Advertising directed at children**

The Directive does not preclude a domestic provision which lays down stricter rules for television broadcasters established in the territory of the same Member State. This consideration cannot apply to television broadcasters established in other Member States.

The Directive contains a complete set of provisions on the protection of minors in relation to television programmes in general and television advertising in particular. **The receiving State** may continue to apply its rules having the general purpose of protecting consumers and minors but it **may not stop retransmission of a broadcast coming from another Member State or apply provisions having the specific purpose of controlling the content of television advertising directed at minors**. This would add a secondary control to the control which the broadcasting State must exercise under the Directive.

# Children's advertising, consumer protection and the country of origin principle

**Lionel Stanbrook**  
Director  
The Advertising  
Association

The Green Paper on commercial communications highlighted the wide variation of commercial communications regulations seeking to protect minors. It also stressed the importance of country of origin control for effective protection of general public and consumer interests. The European Parliament in its resolution of 15<sup>th</sup> July 1997 emphatically agreed with the latter but wanted more consideration of the former.

As regards specific regulations in relation to children, some Member States have implemented bans with various degrees of severity. The most wide-ranging is to be found in Sweden, where TV advertising and sponsorship of programmes aimed at children below the age of 12 are prohibited. In Greece, the advertising of toys on television is banned between 7.00 a.m. and 10.00 p.m. In Germany and Denmark the bans are limited to certain forms of toys. Other Member States rely on advertising content, timing and copy restrictions.

*It also suggests, as the European Parliament has agreed, that more effective management of the country of origin principle could improve the protection of general public interest objectives, including the protection of minors and other 'vulnerable' consumers in a market increasingly open to cross-border commercial communication services.*

In addition to these rules there are others for the commercial communication services of 'sensitive' products which invoke either directly or indirectly the need to protect children. For example, the national bans on commercial communications of tobacco are claimed to protect public health in general but, in particular,

they also refer to the need to reduce initiation to the product by minors. Indeed, this assumption is also reflected by the TV tobacco advertising ban adopted in 1989 under the original 'Television Without Frontiers' (TVWF) Directive, indicating concerns about TV's easy accessibility to children.

Tobacco is not the only product to be treated in this way. It is argued elsewhere in this issue that the same type of ban should be imposed on TV alcohol advertising for the same reason. Similarly, public health interest groups stress that sponsorship of sports events should be restricted because they are attended, and watched on television, by minors. It would seem that commercial communication regulation is destined to be framed only by the presumed standards of the child's perspective.

In its resolution, the Parliament criticised the Commission for not giving sufficient attention to the protection of minors. It called on the Commission to come forward with a more detailed assessment of the effects of commercial communications on children. Although the Commission's Communication is only likely to be adopted later this year, it is undeniable that its proposals must ensure that the issue of commercial communications to children is urgently addressed with the Member States. Recent jurisprudence from the European Court of Justice confirms that the proposed commercial communications committee should focus on the question of proportionality. It also suggests, as the European Parliament has agreed, that more effective management of the country of origin principle could improve the protection of general public interest objectives, including the protection of minors and other 'vulnerable' consumers in a market increasingly open to

cross-border commercial communication services.

The European Court of Justice has begun to make judgements on a number of infringement and prejudicial cases that are being placed before it on the issue of restrictions on children's advertising. One such ruling was given in July this year.

The judgement concerned the compatibility with European law of two injunctions by the Swedish consumer ombudsman seeking to restrain De Agostini (Svenska) Förlag (referred to as De Agostini, a company marketing a partwork on dinosaurs aimed at children with a sales promotion (plastic dinosaur)) and TV Shop i Sverige AB (referred to as 'TV Shop', a teleshopping channel based in Sweden, which was marketing skin care products and detergents). Both companies were buying media time on a channel based in the United Kingdom and broadcasting into Sweden (TV3).

For De Agostini, the consumer ombudsman wished to take action against the company for breaching the Swedish ban on TV advertising to children (enshrined in Article 11(1) of the Radiolag). For TV Shop, the ombudsman sought action given that the company was accused of making misleading claims regarding the properties of the products it was promoting.

The Swedish Market Court (the Marknadsdostol) requested the European Court of Justice to give a preliminary ruling on the following questions:

'Are Article 30 or Article 59 of the Treaty or Directive 89/552/EEC (Television Without Frontiers Directive) of 3 October 1989 to be interpreted as:

(a) preventing a Member State from taking action against television advertisements which an advertiser had broadcast

from another Member State;

(b) precluding application of Article 11(1) of the Radiolag prohibiting advertisements directed at children?'

***The Court recognised that the TVWF directive had co-ordinated the area of TV advertising to children in order to allow for the free movement of TV broadcasts. As a consequence, it ruled that the Directive had to be interpreted as precluding the application to TV broadcasts from other Member States of the Swedish children's TV advertising ban.***

The Court recognised that the TVWF Directive had co-ordinated the area of TV advertising to children in order to allow for the free movement of TV broadcasts. As a consequence, it ruled that the Directive had to be interpreted as precluding the application to TV broadcasts from other Member States of the Swedish children's TV advertising ban. In other words the country of origin (i.e. where the broadcaster is established, which in this case was the UK) was responsible for the regulation of TV advertising to children on TV3.

On the other hand, the Court also judged that nothing prevented the Swedish authorities from taking action against an advertiser who had breached their children's advertising ban or misleading advertising law in an advertisement that he had had transmitted by a broadcaster in another Member State, as long as that action did not prevent the re-transmission in its territory of the TV broadcasts coming from that other Member State.

In conformity with previous jurisprudence the Court reiterated that any such action would, given that it would restrict

the free movement of goods and services, have to be compatible with the application of both Articles 30 and 59 of the EC Treaty.

With respect to the free movement of goods (Article 30) the Court recognised that the ban on advertising could affect the free movement of the products advertised. It then referred to the *Keck-Mithouard* jurisprudence and ruled that a Member State could apply such restrictions if they were shown to affect in the same way, 'in law and in fact', the marketing of domestic products and of those from other Member States; were necessary for meeting overriding requirements of general public importance or one of the aims laid down in Article 36 of the EC Treaty; were proportionate for that purpose and that those aims could not be met by less restrictive measures. The Court stressed that an outright ban could well lead to a discrimination 'in fact' and could thus be incompatible with Article 30. To quote the judgement:

'... it cannot be excluded that an outright ban, applying in one Member State, of a type of promotion for a product which is lawfully sold there might have a greater impact on products from other Member States.'

***Given that the protection of minors and consumers are obviously recognised as valid general interest objectives (consumer protection is such an objective), one can conclude that the Court, in this judgement, endorses the high priority ascribed by the Green Paper to assessing proportionality.***

With respect to Article 59, the Court made no reference to the *Keck-Mithouard* jurisprudence suggesting that this remained applicable only to the free move-

ment of goods. It repeated its case-law which was explained in the Green Paper, namely that restrictions to cross-border advertising contracts between the advertisers and non-domestic broadcasters could be imposed if they: 'were necessary for meeting overriding requirements of general importance or of one of the aims stated in Article 56 of the EC Treaty, whether they are proportionate for that purpose and whether those aims or overriding requirements could be met by measures less restrictive of intra-Community trade'.

Given that the protection of minors and consumers are obviously recognised as valid general interest objectives (consumer protection is such an objective), one can conclude that the Court, in this judgement, endorses the high priority ascribed by the Green Paper to assessing proportionality. The compatibility with Community law of the Swedish authorities' application of their ban on children's advertising and their misleading advertising provisions to cross-border advertising contracts (in this case media sales contracts) will depend crucially on whether it is judged that these restrictions are proportionate. This is why the proportionality assessment methodology that the Green Paper proposes is a valid tool with which Member States can objectively discuss how commercial communications to children should be regulated in a Europe characterised by an increasing amount of cross-border TV and internet based services.

Those who are still unconvinced by the usefulness of country of origin control, may also wish to consider the implication of this judgement as regards the regulation of misleading advertising. Unlike the TVWF directive that had a country of origin control clause within it, the misleading advertising directive has no such clause. Significantly, the Court in

the TV Shop case noted that the TVWF directive could not be applied so as to remove the authority of the misleading advertising directive in the field of television advertising. It recognised that the essential element of the misleading advertising directive was to ensure that all Member States banned misleading advertising.

Two key issues arise from this. First, in spite of the harmonising directive, there remains a wide divergence of national regulatory views as to what 'misleading' means. TV3 is regulated by the UK regulator (ITC). The ITC bans misleading TV advertising and has provisions to ensure that broadcasters do not transmit such advertising. Yet the Swedish action demonstrates that what is not seen as misleading in the UK may be considered to be misleading in Sweden. In Germany, no sure definition exists: the matter is often defined for the purpose of court action by market research.

Secondly, had TV Shop, as a teleshopping programme service supplier (assuming that its teleshopping programmes had been judged to be misleading in Sweden) not had any establishment in Sweden, then the directive would not have obliged its home Member State to take action against it despite the Swedish concerns.

From an Internal Market perspective, these facts reveal that when a country of origin clause is not included in directives, Member States do not in fact lose the right to prevent such services from crossing their borders (subject to such restrictions being compatible with Articles 30 and 59). As a consequence, those Member States with high levels of consumer protection can adopt such texts despite the fact that they believe that other Member States have insufficient levels of consumer protection. Such texts are therefore inefficient in terms of the Internal Market, since they

do not facilitate and might even obstruct free movement.

From a consumer protection perspective, they can also be argued to be inefficient for three reasons. The first, as noted above, is that they do not force the Member States to agree to sufficiently high lev-

***TV3 is regulated by the UK regulator (ITC). The ITC bans misleading TV advertising and has provisions to ensure that broadcasters do not transmit such advertising. Yet the Swedish action demonstrates that what is not seen as misleading in the UK may be considered to be misleading in Sweden. In Germany, no sure definition exists: the matter is often defined for the purpose of court action by market research.***

els of protection at the Community level to allow for free movement. Secondly, through their reliance on host country control, they ensure that effective and rapid redress in cross-border cases only occurs when one of the service providers' business operations is established and therefore sanctionable in the host country. Thirdly, they delay the instigation of effective cross-border redress systems which would allow consumers to have faster and cheaper access to justice and whose absence often explains the little trust that consumers currently place in the Internal Market.

# European Court of Justice - Consumer protection and television advertising

**Paul McGarry**  
Lawyer  
European Consumer  
Information Centre  
Ireland

The most recent judgement of the European Court<sup>1</sup> to look at the area of advertising may have profound implications for EU Consumer Policy, and has provoked some comment as to how it will affect the approach to consumer protection in the area of advertising throughout the EU. The case examines Swedish measures which regulate television advertising directed at children, misleading advertising, and the way in which these interact with EC law on television broadcasting and freedom of movement.

## Background

The cases concerned attempts by the Swedish Consumer Ombudsman to take enforcement measures under Swedish law on the protection of minors and misleading advertising against broadcasters based in the UK and Sweden.

Case C-35/95 concerned advertising by a Swedish company for a children's partwork about dinosaurs. Swedish consumer protection rules<sup>2</sup> provide that advertising is not permitted if it is aimed at children under the age of 12. The Consumer Ombudsman sought to have the advertising removed, or to require that certain additional information be provided in the advertisement.

Joined cases C-35/95 and C-36/95 concerned an action taken under Swedish law by the Consumer Ombudsman in respect of a television shopping channel; in particular in relation to certain statements made in advertisement spots for skin care products and detergents. The Swedish Marketing Practices Law allows the Market Court to prohibit advertising which is unfair or misleading to consumers.<sup>3</sup>

Two questions were referred to the court by the Swedish Market Court under Article 177 of the Treaty and they can be summarised as follows:

1. What is the effect of the law of consumer protection in the country of destination on the principle of country of origin control, and
2. Should the national provision banning advertising directed at children be upheld in light of the 'Television Without Frontiers Directive'?

## The Decision

The Court of Justice conducted an enquiry into the nature of the Directives on misleading advertising and television broadcasting and the manner in which they interact with the provisions on free movement of goods (Article 30 of the Treaty) and the freedom to provide services (Article 59).

The Court analysed the Television Broadcasting Directive<sup>4</sup> literally and noted that the predominant aims of the Directive are to ensure the freedom to provide television services and to eliminate disparities between national laws which govern television broadcasting services. The Court referred to recital 17 of the preamble to the Directive to support its view that the Directive is specifically confined to the harmonisation of television broadcasting rules (notably the freedom of reception and a prohibition of measures which impede retransmission) and is therefore without prejudice to existing or future Community rules in other areas, such as competition or consumer policy.

The Directive lays down certain rules governing the content of television advertising such as prohibitions on the advertising of tobacco and cigarettes; conditions for advertising to minors; restrictions on alcohol advertising and so on. This, the Court notes, is merely a partial regulation of advertising and marketing practice on television.

It follows that although the Directive may have the effect of prohibiting Mem-

<sup>1</sup> Joined cases C-34/95, C-35/95, and C-36/95; Konsumentombudsmannen KO v De Agostini (Svenska) Forlag AB; Konsumentbudsmanen v TV Shop i Sverige AB. Judgement of the Court delivered on 9th July 1997.

<sup>2</sup> Article 11 of the Radiolag (1966/755)

<sup>3</sup> Article 2 of the Marketing Practices Act (1975/1418)

<sup>4</sup> Council Directive 89/552/EEC of 3 October 1989 on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L298/23). Colloquially this directive is known as the 'Television Without Frontiers Directive'.

ber States from impeding retransmission on their territory of broadcasts from other Member States on grounds relating to television advertising and sponsorship, it cannot have the effect of excluding completely and automatically the application of rules other than those specifically relating to the broadcasting and distribution of programmes.

While this may seem complicated at first sight, what the Court is saying is that State rules which preclude the reception or retransmission in its own territory may be permissible providing that they are for other purposes and do not involve a secondary control of broadcasts by the receiving Member States. Thus the application by a Member State of rules which have the general aim of consumer protection and which are designed to regulate advertising and marketing do not fall within the scheme of measures which are prohibited by the Directive.

What the Court sought to do was to distinguish between the type of measure which Sweden had put in place, which is a consumer protection law and which governs and imposes restrictions and possible financial penalties on advertisers generally, and a measure which has the specific and sole aim and purpose of restricting the reception or retransmission of TV broadcasts.

Those opposing the actions of the Consumer Ombudsman argued that this interpretation by the Court would undermine the purpose and aim of the principle of country of origin control. Even a restriction which relates solely to advertising has some impact on television broadcasting, they argued.

In response the Court stated that this argument implied that Directive 84/450/EEC<sup>5</sup> on Misleading Advertising might be robbed of its effect insofar as it related to television advertising. This would therefore be in contravention of the express

provisions of another Community measure, something which is not possible under EC Law.<sup>6</sup> Thus the Court found that the Broadcasting Directive cannot be interpreted so as to prevent the taking of action by a Member State against advertisements which come from another Member State.

### The Treaty Provisions

On the more general question of whether the Member State might be in breach of Treaty provisions (viz. Articles 30 and 59), the Court accepted that the decision of the Court in *Leclerc-Siplec*<sup>7</sup> means that legislation covering television advertising in a particular sector is also concerned with selling arrangements for products from that sector. The Court also relied on the decision in the *Keck-Mithouard* cases<sup>8</sup> to the effect that national measures prohibiting or restricting certain selling arrangements are not covered by Article 30 (the free movement of goods principle) so long as they:

- apply to all traders operating within the national territory, and
- affect in the same manner the marketing of domestic products and those from other Member States.

***The application by a Member State of rules which have the general aim of consumer protection and which are designed to regulate advertising and marketing do not fall within the scheme of measures which are prohibited by the Directive.***

Since the operation of the Swedish prohibition affected all national as well as EU advertisers, it would only remain to consider whether it has a different effect on marketing or promotion as between national and other-EU products. Since this

<sup>5</sup> Council Directive 84/450/EEC of 10 September 1984 on the approximation of laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ 1984 L250/17).

<sup>6</sup> At para. 37. See also EFTA Court cases E-8/94 and E-9/94, *Forbrukerombudet v Mattel Scandinavia and Lego Norge*, EFTA Repts 01/94, 113, paras 54-58.

<sup>7</sup> C-412/93 [1995] 1 ECR 179

<sup>8</sup> Para 40; see Cases C-267/91 and C-268/91 [1993] 1 ECR 6097.

is a matter of fact for the Swedish Market Court (from whom the reference was made) to decide, it was not the subject of a definitive pronouncement by the Court of Justice.

Interestingly however, the Court went on to remind the national court that even if the Swedish prohibition did fall foul of Article 30, the national court must also make certain that the prohibition was not justified in accordance with Article 36 of the Treaty - which provides that measures may be justified on the grounds that they are necessary to satisfy overriding requirements of public importance providing that they are proportionate to that purpose, and that they are the least restrictive measures available for that purpose<sup>9</sup>. At Par. 46, the Court points out that fair trading and the protection of consumers generally fall into the category of 'overriding requirements of general public importance' in Article 30, although it is again left to the national Court to determine whether the prohibition in this case is proportionate to the aim or not capable of being achieved by less-restrictive means.

The Court took a similar line in looking at the effect of the Treaty provisions on the freedom to provide services (Article 59), and stated that the Member State is not precluded from taking measures

on the freedom to provide services enshrined in the Treaty may result from the application of additional rules in the country of destination to persons who are already subject to different rules in another Member State.<sup>10</sup> This is for the national Court to decide before it can move on to an assessment of whether the measure may be justified.

### Conflict of Laws

The Court also looked at the question of the conflict between the domestic law prohibiting advertising which is designed to attract the attention of children under 12 in Sweden and the principle of Community Law expressed in the 'Television Without Frontiers Directive'. The Court notes that Article 3(1) of the Directive provides that Member States are not precluded from applying more strict rules for television broadcasters established in their own territory.

The Court also alluded to the fact that the Directive already contains a set of provisions which provide for the protection of minors and as to what is permitted in the realm of television advertising (Articles 16-22). It is for the country of origin to ensure that these provisions are complied with. This does not prevent the country of destination from applying measures which have as their aim the protection of consumers or minors in general, provided this does not amount to a prevention of retransmission of TV broadcasts as such.

Crucially however, the Court found that under the terms of the Directive, the country of destination is not permitted to apply provisions which are designed to control the content of television advertising with regard to minors, since this is now covered by the Directive and applied in a harmonised fashion in line with the principle of country of origin. To do so, the court held, would amount to a sec-

<sup>9</sup> Para. 45.

<sup>10</sup> Para. 51

<sup>11</sup> See para. 61.

***Crucially, however, the Court found that under the terms of the Directive, the country of destination is not permitted to apply provisions which are designed to control the content of television advertising with regard to minors.***

against television advertisers provided that they comply with Articles 59 and 56 (similar to Article 36, but applies to services) of the Treaty.

The Court did note that since the rules covering the provision of this service have not been harmonised, then the restriction

ondary control in this area.<sup>11</sup>

Applying this, the Court ruled that the Directive precludes the operation of a measure which provides that advertisement content on television must not be designed to attract the attention of children under 12 years of age insofar as that measure is applied to broadcasts from other Member States. Therefore, the Court has effectively ruled that Article 11 of the Swedish Radiolag was precluded by virtue of the fact that it infringed the principles of the 'Television Without Frontiers Directive', at least with regard to its operation in the case of the *De Agostini* advertisement, since that advertisement came from abroad.

### Summary

In its judgement, the Court effectively ruled that the Television Without Frontiers Directive does not exclude the application of rules other than those specifically concerning the broadcasting and distribution of programmes (e.g. national rules on consumer protection). National rules will apply provided they do not represent a secondary control of broadcasting which stands in addition to the control carried out by the host Member State. The fact that the Directive provides a set of rules to govern TV advertising directed at minors precludes the operation of additional rules in this specific field by Member States.

The Court also found that the Misleading Advertising Directive, and other consumer protection measures, can be used to ground measures taken by a Member State against an advertiser even in relation to TV advertising broadcast from another Member State, provided that such measures do not as such prevent the retransmission in its territory of a TV broadcast coming from that Member State.

More crucially perhaps for consumer lawyers, is the restatement by the Court of

the principle that the protection of consumers is an overriding requirement in the public interest, which may under certain circumstances justify obstacles to the free movement of goods or restrictions on the freedom to provide services, and the extension of this principle to the area of advertising and television broadcasts.

This decision leaves open the question as to how far a Member State may go before crossing the thin line between a measure which infringes the basic prin-

***The Court also found that the Misleading Advertising Directive, and other consumer protection measures, can be used to ground measures taken by a Member State against an advertiser even in relation to TV advertising broadcast from another Member State.***

ciples of freedom to transmit, to promote goods, and to provide services (as required by the 'Television Without Frontiers Directive' and enshrined in the Treaties respectively), and a measure which is necessary for the protection of consumers. In so doing it seems to me that the Court has somewhat restricted the operation of the 'Television Without Frontiers Directive' in the sense that its advertising provisions conflict with the requirement to attain a high standard of consumer protection (in some cases to a standard higher than the protection provided in EC Directives).

# Advertising and children

## The effects in schools and on children's diet

Diane Luquiser  
Consumer Affairs  
Editor  
*Commercial  
Communications*

### The influence in schools

Advertising extends everywhere, can be found everywhere. It targets all, every social class, every age group and reaches them everywhere. Even at school. And schools are often obliged to seek additional sources of funds. The following question therefore arises: are advertising and school incompatible? Not necessarily, because it can support educational activities in schools by means of the financial support it brings. In any case, certain ethical standards must be respected. And, moreover, the advertising message must be considered differently, according to whether it is children, teachers or headmasters/mistresses who are targeted.

This is the reason why DG XXIV (Consumer Policy) put out to tender a survey on commercial activities in schools, at primary and secondary levels (the most targeted age groups)<sup>1</sup>; the deadline was mid July 1997. The objective is to analyse and assess the impact of advertising and marketing on schools (by different forms of marketing, target groups and categories of sponsors), to draw up an inventory and to carry out an analysis of both legislative and voluntary national regulations, and finally to propose suggestions to 'allow the Commission to judge whether a proposal on a European Code of Good Practice would lead to an improvement of the current situation'.

Will a European Code of Good Practice result from this study? It is going to take approximately a year to have a rough idea, since it will depend on the results themselves. However, it is certainly the case that it is not necessarily the 'jungle' in all Member States. Certain industries have published their own rules. Thus, at an international level, the International Chamber of Commerce (ICC) has set up an international Code of Good Practice relating to advertising which provides both a regulatory framework and regulatory procedures, which have been adopted in several

countries. The objective of the ICC Code is to promote high ethical standards in marketing. It addresses the issue of children and advertising with both general and specific provisions. An article in these provisions says that advertising must not exploit the natural gullibility or the lack of experience of children and must not distort their sense of loyalty. Nor must anything harm their psychological development. On the other hand, certain countries hardly publish any rules whereas others, like Sweden, have completely banned all commercial activities directly targeting children. European regulations usually result from these differences.

### The influence on eating habits

It is not the first time that DG XXIV has taken part in the financing of a study on the influence of advertising on young consumers. There is, in fact, already a report named 'A spoonful of sugar'<sup>2</sup> published in 1996 and carried out by Consumers International which dealt with food advertising targeted at children.

This report went far beyond the framework of the European Union as it was carried out in collaboration with UNICEF, the UK Health Education Authority, the Swedish Consumer Agency and the UK Network Foundation. The conclusion is that there is a lack of European legislation in this area. Indeed, no reference to children is made in any regulation. Moreover, there is no study on the long-term impact of advertising on children. However, eating habits of children were noted, specifically a demand for products which were usually not part of the eating habits of the region or city they lived in. It is not the introduction of foreign habits as such which is the issue, but the introduction of *bad* habits, such as those currently adopted by children in Southern Europe, which has had the reputation up to now of having very healthy dietary standards. According to DG XXIV, this shows the evident influence of advertising.

<sup>1</sup> Call to Tender No. XXIV/97/A1/06 of the European Commission

<sup>2</sup> 'A spoonful of sugar', Consumers International, November 1996

# Responsible advertising

## Perceptions of television advertising and unnecessary regulation

The question of advertising directed at children, and particularly television advertising, is a very relevant issue for all of us. It is an issue that we in Europe, and especially in Scandinavia, have been debating very intensively over the last couple of years.

I want to focus on some of the experiences we have had in Denmark while working on the issue in co-operation with a number of parties we in the toy industry would normally regard as our competitors and with whom we normally only meet to settle disputes. However, I believe our experience demonstrates there is an alternative and this approach has already been named 'the Danish model'.

Since 1994 the EU has revised the so-called 'Broadcasting Directive' (Television Without Frontiers), regulating, among other things, advertising to children. This process of revision was followed closely by TIE and by our affiliates in Brussels. It soon became very clear to us that our Brussels initiatives needed to be complemented by local, national, action if we were to communicate effectively our points of view.

During the summer of '95 the major toy companies in Denmark - Mattel Scandinavia, Hasbro Nordic and the LEGO Group, therefore decided to co-operate to follow and make our voices heard in the ongoing debate in Brussels. We also decided to have a platform ready for the escalation of the debate in Denmark.

At first, our strategy was to raise the profile of the issue as little as possible. It was felt that, if we did not do this, we would merely create a situation where we were always either merely defensive or demonstrating a wilful lack of understanding or sensitivity when confronted with criticism of our advertising towards children. This 'low-profile' attitude had worked previously because advertising to children was never an issue in Denmark.

Therefore, our first initiatives were to

focus on our contacts with Danish MEPs and relevant members of the Danish parliament, the minister of Cultural Affairs and the relevant civil servants.

This was done in a very reactive way and was very low profile. No attempt was made to make any contact, for example, with the press on the matter.

However, during the Christmas of '95 things started to change.

During December, there was a renewed and intensified focus in the public debate on what some politicians and consumer organisations saw as a much too intensive bombardment of television advertising towards children. Questions were raised in Denmark and for the first time TV advertising was under scrutiny. There were those who advocated a ban on all television advertising to children.

This new situation forced us to reconsider our strategy. We discussed whether we should maintain our approach or whether it should be changed. Perhaps we needed to be more pro-active and seek to explain and support our opinions with more and clear positions supported with hard evidence, rather than merely defending ourselves.

After a long period of consideration, during which the attitude tended to be 'let's wait and see', it was decided to change our strategy 180 degrees in the spring of '96.

However, the new strategy was not only pro-active in approaching who ever could be interested in this subject with our arguments and facts, but involved a new dimension. We wanted to involve our former opponents and to start to work together with them instead of working against them. The strategy was to give the old adage 'if you can't beat them, join them' a completely new dimension.

A number of actions were initiated both as a group and as individual companies. These were all orchestrated to build up to what we hoped could be a climax -

**Tau Steffensen**  
European Marketing  
Manager  
Lego Systems A/S

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*Such research material as was drawn upon dated back to the time before commercial television stations were introduced to the Danish media world.*

the first open public hearing in Denmark about children and advertising which we from the LEGO Group arranged at our headquarters in Denmark.

When planning this public hearing, it was decided to make sure that all viewpoints were put forward and that representatives from all parties, even those most critical in the public debate, should be invited to present their arguments.

This initiative and the fact that we wanted to invite all parties to the debate came as a big surprise to politicians and organisations with whom we normally were only communicating in writing. I remember clearly the surprise they all had when I visited them and asked if they would like to participate in this debate.

In the end, we ended up with a panel consisting of:

- one member of the Danish Parliament that had been advocating a total ban;
- one Danish member of the European parliament that was positive to advertising to children;
- the chairman of the Danish Consumer Council - representing an organisation that, at that time, was the most negative critic of TV advertising;
- a representative from a Danish commercial television station;
- two of the most important Danish researchers within children and media;
- and finally two industry representatives.

What then of the result of this hearing?

Overall the result of the hearing was very positive and established a constructive dialogue between all parties. Already, during the hearing, you could see a clear tendency towards a softening of some of the most critical opinions and it was evident to all of us that the different parties were drawing closer to each other.

Based on the success we had with this arrangement we decided to continue our co-operative strategy and the next project

was to fill in one of the biggest gaps we had identified - the lack of up-to-date Danish research material in this field.

In the dialogue we had had so far, and as one of the clear conclusions to have emerged from the public hearing, it was acknowledged that the arguments and the different positions were based on unquestioned prejudice. Such research material as was drawn upon dated back to the time before commercial television stations were introduced to the Danish media world.

One option was to draw upon the large amount of international research that already exist on this topic, especially from the US and UK. In fact, we did try that very early in the process.

However, we soon realised that the politicians and consumer organisations were very reluctant to use international or even other Scandinavian findings as an indication to how Danish children and adults were looking at TV advertising for children. We were often confronted with the argument that Danish children and parents are somewhat different and special.

There was a number of considerations that we had to take into account before launching the new Danish research:

**1** Firstly, our group was expanded by companies reflecting other areas of the 'Children Industry' like Kellogg's and Mars, as well as organisations like the Danish advertising associations. It was obvious that these new players had some different attitudes and policies towards this 'pro-active' strategy. We felt it was very important for the sake of the project that this issue was not argued by the toy industry alone, but that all parties with an interest in advertising to children should work together.

**2** Secondly, it was clear from the beginning that if the companies were to put a substantial amount of money and effort behind the initiative it was of paramount importance that any analysis should stand as an entirely independent and thor-

oughly professional research study. It should not be possible to dismiss the analysis as merely a statement from clearly commercial interests.

3 The timing for the conducting of such research was very crucial. It should not be possible to dismiss the analysis and the findings because the study had been carried out during a less intensive period of advertising activity.

4 Finally, the results of the research could obviously not be guaranteed in advance. The companies involved therefore had to consider what they would do if the analysis showed that the companies were compromised in their claims and that there were problems in advertising to children when the advertisers observed the existing Danish legislation.

But in the end we all felt that our faith in the matter was strong. Furthermore, we concluded that if the analysis would come to a critical conclusion in connection with specific details it would be better, perhaps particularly from a public relations perspective, to correct them voluntarily than to be forced to do so by legislation.

So we finally decided to make the biggest ever study in Denmark into children and TV advertising to be carried out in November/December '96.

The task was given to the most respected research company in Denmark. At the same time it was decided to take on contract the leading Danish researcher. Her previous studies in this field had often been quoted by organisations and politicians who were critical of advertising. In public, she had often stated that updated research material such as we were proposing was needed.

From the beginning it was a major concern for all of us that the parties which were critical should be involved in the preparation of the study. A number of meetings were held with representatives from the Danish consumer council, the

Danish consumer ombudsman, the national consumer agency and with the Ministry of Culture, in order to ensure that their viewpoints, their specific concerns and suggestions were integrated into the study.

This very open dialogue was much appreciated but, again, it also came as a surprise that companies were daring enough to take up this issue voluntarily. For our part, it gave us an opportunity to explain our attitudes and viewpoints in the developing process in a more informal way.

The final study was available at the end of February '97, and released at a press conference held in Copenhagen in the beginning of March, where the analysis was presented to a large number of interested parties. On the same day, a copy was forwarded to all members of the Danish Parliament standing committee for cultural affairs as well as relevant Danish members of the European Parliament.

What has then been achieved through this new strategy and the analysis as such? First of all the overall reaction has been extremely positive and the general headlines in the press was; 'Children have no problems with understanding television advertising'. At the same time, the Danish consumer Council officially announced that the present Danish system and regulation were fully acceptable and that they saw no reason for changing the present *status quo*.

It is our clear impression, that the proactive approach with the public hearing, the involvement of all parties in the conducting of the analysis, and the ongoing dialogue have contributed to convince many a politician and consumer organisation that they would gain nothing from focusing on this issue in the public debate.

In a longer perspective, we have succeeded in not only opening a door to cooperation, but in reality we are playing the same game and pursuing the same objectives - to have free, but responsible, advertising.

***From the beginning it was a major concern for all of us that the parties which were critical should be involved in the preparation of the study.***

# Television advertising directed at children

**Lene Hansen**  
**Director**  
**GfK Danmark**

**L**et there be no doubt that advertising directed at children works. The manufacturers know it, the parents know it and the children acknowledge it.

From the study it is difficult to identify any real problems with television advertising as, in general, the attitude is relaxed. The children are used to television advertisements, they interpret them correctly in general and get - except in a few cases - an immediate positive experience of the product. In addition, in some cases television commercials can be a positive help in making a 'want' list.

There is also a very relaxed attitude towards children's television habits in general. As long as they do not let their activities be controlled by the television and as long as they do not react physically to what they are watching (by getting violent or scared), apparently the parents have no problems with children watching television. If the children do react physically the parents interfere, turn off the television or make sure that the children do not watch the programmes in question.

<sup>1</sup> The children are recruited from the Copenhagen area and it was ensured that they could watch both TV 2 and TV3. This in practice means they can watch a wide range of other channels as well. These children are, therefore, to be considered as 'satellite children', with a somewhat larger consumption of television than the country average. The 2-4 hours of watching television include watching videos.

***The children are used to television advertisements, they interpret them correctly in general and get - except in a few cases - an immediate positive experience of the product.***

This broadly liberal outlook also affects the attitudes to television advertising directed to children. As long as parents do not feel that the children's demands get out of hand, they do not see a problem with this influence. They reason that the children - if they do not react physically (do not get violent, scared or start to pester) - are not harmed by it.

In relation to the above it is important to keep in mind that the attitude towards television habits in general, and television advertising specifically, is not especially

positive in the population as a whole. One might have expected, therefore, the parents to have expressed a less relaxed attitude than was the case.

Watching television is generally regarded as a 'low status' occupation (unlike, for example, an interest in cinema and literature). 'When there is no pressing requirement' to do something more 'significant' one can always watch television! Popular references to the television, 'dummekasse' and 'flimmeren' (Danish slang for the television, which means 'the idiot box/the box'), speak for themselves.

As for television commercials, some general prejudices are also apparent. When discussing them in depth, however, they turn out to be prejudices as opposed to real attitudes and perceptions which emerge when talking about one's own children.

## **Children watch relatively a lot of television**

Children watch a lot of television - between 2-4 hours a day<sup>1</sup> - according to the parents. They watch quite a lot in the morning, in the afternoon, and early evening before they go to bed around 8-9 p.m. Television is watched more at the weekends in general. This pattern of viewing is partly because of morning television and partly because the family is gathered in front of the television in the evening (Friday and Saturday evenings). Television is generally watched more in winter than in the summer.

The children watch a wide variety of programmes such as cartoons, nature programmes, old Danish movies, family entertainment shows, series about and for youth (such as, for example, 'Baywatch' and 'Beverly Hills' where viewing is particularly high amongst girls). They also watch 'action' programmes like, for example, 'Station 2' (a police documentary series) or 'Liv eller død' (Rescue 911) These last are popu-

lar primarily with boys from 8-9 years old.

Children below 8-9 years typically watch the children's programmes. When they get older there are other programmes that are more interesting. The time when children's programmes become too 'childish' apparently depends on whether the children have older sisters and brothers or not. If there are older sisters or brothers the younger child is more disposed to skip the children's programmes faster. An only child will let himself be controlled by his own wishes and needs a little longer.

When the children are about 9-10 years old the parents begin to 'loosen their grip' over them in relation to their television habits. At this point, the children get their own television set in their room and begin to stay home alone. It should be noted though, that younger children also often watch television alone (maybe together with sisters and brothers), except when they are watching family entertainment shows and maybe cartoons at weekends which their father also wants to watch. If the children are going to see a scary movie the parents usually watch too.

### **Parents are generally not negatively disposed towards advertising**

Parents are in the main not negatively disposed towards television commercials to children. They have grown accustomed to them as part of the media landscape and the children develop an increasingly critical attitude as they grow older. On the other hand it is also acknowledged that commercials create a sense of 'need', that they 'cheat the children', and that the children get 'tired of them' when the same commercials appear again and again.

When television advertising was a new phenomenon, parental criticism was much greater than it is today. Now parents consider the sheer volume of commercials

to children has made the children almost immune. With advertising pressure so intense, the children are simply not capable of demanding everything. Equally, because of the number of commercials, the parents are able to better explain how it is not possible to buy everything one might see. In the early days, when advertising pressure was not that great, the children's wishes were more focused and, according to mothers, that created a few more problems.

***Whilst mothers do not believe they have any problems with children demanding something they have seen on television, fathers tend to believe that the children are relatively insistent.***

In relation to this, a difference between the experience of the mothers and fathers can be identified. Whilst mothers do not believe they have any problems with children demanding something they have seen on television, fathers tend to believe that the children are relatively insistent. This difference in perception may reflect how mothers normally waive all such demands and children gradually learn that. Fathers, on the other hand, do not get nearly as many requests from the children. It is possible they say 'yes' a little more often and lay themselves open for further demands in the future.

There was also a difference between the mothers of the oldest children and the mothers of the youngest children. The latter are more irritated by the children's wishes and have more discussions with the children about a possible purchase. The mothers of the older children benefit from their children's understanding of advertising and what they might reasonably expect to get from their mother.

The reference to 'cheating' is mainly directed at the products' performance in

the commercial and its actual performance. The children are generally very good, though, at interpreting the commercials and recognising something is not correct. It should be noted that the youngest children are less good at interpreting correctly the product's actual features than the older children and the parents. Apart from any thing else, clearly the younger children do not have such a large range of experience to draw on as those older. Both parents and children express annoyance when seeing the same commercials again and again.

### **Children themselves are also critical of commercials**

The older the children get the more critical they are of the things they see in television commercials. The children develop their reference frame all the time (larger knowledge of the ways commercials seek to influence, the products'/product categories' features etc.) This is an important qualification to consider beside any expressed perception and attitude to any particular commercial; the older they become the more knowing they get in general.

The children are good generally at distinguishing between television programmes and television commercials. Among other things, they define the difference by observing that advertising is 'quicker', that there are a 'lot following each other', and that 'they encourage us to buy something'.

Among the 5-6 year old girls and 6-7 year old boys some confusion can be found about the distinction between programmes and commercials. The problem with distinguishing between programmes and commercials is apparently biggest when it is a commercial break as opposed to a commercial block.

Children often see the commercials as 'a pause' that can be used in many ways; to go to the bathroom, take a drink, zap to other channels and, in the event of zapping, to leave the programme altogether

if it was not that interesting.

There is a difference in the perception of a commercial block that is shown after a programme and a commercial break that is shown during a programme.

Both children and adults express irritation at commercials breaking in during a programme, which they regard as disruptive. The children under the age of 8-9 do not react in this way, whilst it is common in the three oldest age groups of children.

However, if a commercial block comes after the programme, the participants do not get nearly as annoyed. Still, it is a pause and it is clear that both children and adults react physically on this signal (the exception seems to be the 5-6 year old girls). It seems people stretch themselves, shift their focus away from the television etc. Attention apparently is less than that afforded to a break. In other words, commercials in a block seem less irritating than the same commercials in a break. However, attention is diminished more if commercials appear in a block than if they appear in a break.

### **Parameters that are important for the perception of, and attitude to, the commercials.**

The perception of, and attitude to, a certain commercial are based on the interaction between certain parameters outlined below. Here it is not meant to suggest that the children are only capable of understanding a commercial if all the parameters are optimal. In some commercials one of the parameters can have more weight than in another, where a different parameter is the major emphasis of the commercial.

At the outset it is important to recognise that:

- *children* in general are *very detailed*, remember extremely well and are thus completely capable of understanding even complex sequences of events.
- *adults* are *less concerned with detail* and see things as a whole to a greater ex-

***The children are good generally at distinguishing between television programmes and television commercials.***

tent. As a consequence adults often believe children are not capable of recording and remembering details either.

● *children's development is happening extremely quickly.* What can be very popular in one age group can for another be of no importance. It is very difficult to prepare a commercial that is directed to both a 5-year-old and an 11-year-old, although there are a few examples of this succeeding.

### **Understanding the story is very important to the youngest children**

In order to make the younger children up to about 10 years old relate to a commercial and remember it, they need to refer to a story/a dialogue. Also, it is important that they can understand this story if they are to establish any identification<sup>2</sup> with the commercial.

'Special effects' are more important when the children are about 10 years old. The story may still be there for children of 10 years and over, but special effects also become a very important part of the commercial when the children reach this age. The commercial should readily arouse their curiosity, e.g. by being somewhat strange or mysterious. It is important though that the children still have a reference to the product itself, that there are some product details or a representation. The children are still detailed in their ability to perceive and still need a direct relation between the commercial and the product.

### **News creates attention**

It is common knowledge that news creates attention. Again it is important though that the consumer (both children and adults) can identify with the television commercial.

In the present study it also appears that barrier transcending story elements in a commercial create attention. This would

be a commercial that goes a little beyond the norms, seems provocative - often intentionally - and 'moves something' in the consumers, whether they are adults or children. The children, however, still feel the need for some form of identification with the television commercial.

Some commercials use ambiguities, subtleties etc. and the youngest children up to 8-9 years old cannot understand these. Smaller children do not generally understand irony and it also appears in the present study that the youngest children perceive what they see and hear and do not project anything else onto it. The older children can, though, see through these devices.

The 'identification' parameter is very important in order to make the children (as well as the adults) relate to a certain commercial. This identification can be created in several different ways; by the actors, their age, their looks and their roles in the commercial especially. It appears the actors do not need to be children themselves, but they can be puppets or other figures, animals or the like.

Equally, a particular story can encourage and involve children through identification.

Finally, there is the product itself that also needs to have the children's interest if they really are to relate to the commercial. In connection with the product it is important that the children get the opportunity to relate to it specifically, if only through some fragments in the commercial that focus on the product itself.

Since children are at very different stages of development when they are between 5 and 10 years old, it is clear that it is very difficult to affect all the children in this age group with parameters with which they can all identify in one and the same commercial.

It would also appear important to be aware that boys and girls identify with different things in any commercial. The boys

***It is very difficult to prepare a commercial that is directed to both a 5-year-old and an 11-year-old, although there are a few examples of this succeeding.***

<sup>2</sup> The identification concept should be very broadly understood and should not only be related to an individual's age and gender. Identification can also be related to the story in the commercial and the product itself.

*The younger children up to around 8-9 years are more disposed to believe what they see, while the older children have a much bigger reference frame and view things a little more realistically.*

are, as has already been suggested, more geared for action and excitement, while the girls to a greater extent are responsive to role-plays etc.

### **Credibility and acceptance of advertisements**

The general acceptance (or lack of acceptance) of a certain product group/company is very crucial for the acceptance of the specific commercial and the product advertised. This is so important that specific information in some cases is completely overlooked by virtue of the viewer's own preconceptions.

The reverse is also true: the merest glance at a certain commercial you maybe do not even like objectively, or do not notice really, is enough to have an effect, as the attitude to the company/product in question is already very positive.

In short: 'You have made your bed and you must lie in it'. It is not easy to 'forget' commercials seen earlier for a certain product/brand/company. It is not easy just to change style from one day to the next and immediately expect different levels of acceptance. This applies to both children and adults. If the children are not taken by a certain commercial, they will not think of the company/product category etc. either.

The experience of credibility is also dependent on how 'over-claims' and tricks are perceived in the commercial.

It appears that both children and adults to a certain extent 'discount something from' certain commercials themselves. 'It cannot do that much...', 'it cannot be right that...' etc. This way the commercial becomes immediately more trustworthy to them.

This phenomenon means a commercial can show a detail or a function that the recipients do not directly believe but which - later when they see the product itself - turns out to be correct. The experi-

ence of the product becomes more positive than expected even though, seen objectively, the commercial turned out to communicate correctly anyway.

Another example is how children rationally evaluate that something cannot be done or be right. They have been made aware of the possibility that it might be done or might be right and to a certain extent they are disappointed when it appears that this is not so. This is the case, even though they rationally knew it!

How much there is discounted from a certain commercial widely depends on the recipient's reference frame; the older they get the bigger the reference frame. The younger children up to around 8-9 years are more disposed to believe what they see, while the older children have a much bigger reference frame and view things a little more realistically.

It should be stressed, though, that all the children expected that product specific information (whether verbally or visually illustrated) is real. The problem mainly arises if the product itself does not live up to what has been presented about it.

On the other hand there are advertising elements that even the youngest children already *have* learned to 'discount': star dust, smoke, background pictures and the like. They do not expect to get *this* when buying the product in question.

### **Involvement with commercials**

The experience of credibility, whether positive or negative, is among other things a factor which determines how much you involve yourself in a commercial. A commercial can be a 'hate commercial'<sup>3</sup>, one about which everybody has an opinion and in which everyone gets so involved that it is possible to quote word-for-word, but which is clearly perceived as untrustworthy.

Interest for the product is very important for the level of involvement. The more interested you are in a certain product the

<sup>3</sup> A 'hate commercial' is a commercial which the children and/or adults refer to as a type of commercial which they believe is stupid or overselling.

more willing you are to involve yourself in a commercial for this product. However, it is possible to be interested in a product, but if the identification parameters are not fulfilled you will not remember and you will not be involved in the commercial.

It is also true that, in some cases, you may remember a commercial even if you are not interested in the product. In this case the commercial is described as being just somewhat unimportant.

### **Product expectations and 'immediate play value'**

The expectations you have of a certain product depend on several parameters. These are attitude, knowledge of the product/product category, the experience of the interaction between picture, sound and text in the commercial, and the experience of 'over-claims' (how much you have discounted already and whether you have any hope for something you know is not feasible or not right).

As for the relation between picture, sound and voice, the most accurate expectations are created if the three elements work together. However, if there are disparities in the impressions you receive from the three, initially it is the visual element to which you will assign most value. It is worth making the observation that a very strong sound track in a commercial can sometimes render this the most important element.

A particularly important finding in relation to raised expectations of a particular product is that certain commercials can give the impression that more is on offer than is actually the case.

This can be done, and regarded as acceptable, as long as there is 'immediate play value' in what is bought. For example, a number of products, each of which is sold separately, may be presented together, provided each individual product when purchased fully

meets its 'immediate play value' and does not depend upon another purchase.

The disappointment is clear if the children experience that there is not 'immediate play value' in the product and that extra elements are required before having any play value at all. Batteries for toys may be seen as an exception to this, as in time it has become accepted that batteries are not included.

### **Size and functionality**

The experience of the size is created from already known references. It can be a known product, a person, a child's hand or similar size references. It generally turns out to be difficult to reproduce the dimensions correctly in commercials. Often the participants are surprised by the fact that a certain product is either larger or smaller than expected, but apparently this has no crucial importance for their experience and acceptance of the product.

No differences between the different age groups or between adults and children can be discovered concerning the way they experience the size of a certain product. When it is about toys it is widely acknowledged as the 'children's world' and that they know more about it generally than the adults.

As for functionality, it is very important that what you show of a certain product is also correct in reality. In general, both children and adults are very surprised by this when they see the actual products (in some cases because they have already discounted something).

In several cases both groups are even confronted with functions that are very important for the children, but which they have not even seen (because it has not been shown) in the commercial.

Contents and quantity of a product is a dimension which on several occasions are misinterpreted from the commercials.

As for the soundtrack/voice-overs, it

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**The persuasion role is taken care of to a much greater extent by the child's 'advisers and peers' and this influence is especially felt at the point of purchase.**

should be noted that the probability of a correctly perceived message increases when using a choice of words that the children understand (not long, hard words or borrowed words).

In connection with the expectations of contents and quantity, it is not considered that important that one expected more than one really gets, as long as an immediate usage value can be experienced in what is delivered.

Then there is the level of completion of the shown products (primarily related to toys). Again the expectations are connected to the previous knowledge you have. Younger children are for some products disposed to 'forget' (and in some cases they do not know) that before they can play with the product they have to be assembled. Apparently this is partly because they do not have the skills to assemble the products themselves but need help from adults, and partly because they do not see any usage value in having to construct the product first. As the children get older they are more capable of assembling things themselves and in some cases they also see value in the experience.

The study suggested that it is possible in several of the television commercials for toys for assembly to be 'sold' a little more effectively than is done today. It can mainly be done by showing how the assembly task is a part of the benefit of the product. As the youngest children have difficulties in handling the assembly task themselves, it is also possible to 'sell' the time children and parents spend together by showing such a situation in the television commercial.

For the older children it is easier to handle the assembly themselves and, as a consequence the involvement of the parents is less important in this situation. But especially in relation to boys, it could be possible to use their natural interest in constructing/building/assembling/taking things to pieces and show something

more about these assembly tasks in the different commercials where they are essential to the product.

Finally, it should be noted that also the packaging design creates expectations of the products. Again it is the visual part that counts the most in relation to expectations.

### Closing comments

It should be noted that commercials directed to children only make a small part of the influence the children are under.

The children are also under the influence of:

- parents
  - sisters and brothers (older)
  - friends/girlfriends
  - the school - recreation centres
  - information technology (computer games - video)
  - television commercials directed to adults
  - television in general
  - catalogues, trade papers and direct mailings
  - shop exhibitions and shop activities
  - and a lot of other things in their surroundings and peer groups.
- The main contribution of the commercials in this range of influences is maybe more in the role as news communicator and interest preserver than in the role of being persuasive. The persuasion role is taken care of to a much greater extent by the child's 'advisers and peers' and this influence is especially felt at the point of purchase.

*The director responsible for the research at GfK Danmark was Lene Hansen. The external consultant to the project was a senior lecturer in education, Birgitte Tufte of The Royal Danish School of Educational Studies.*

GfK Danmark  
 Tel + 45 3393 1740  
 Fax + 45 3313 0740