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Text of oral questions put by Jessica Larive to Commissioner Monti

This questioning took part on the occasion of the adoption, by the European Parliament, of the report on the Commission's follow-up document to the Green Paper on commercial communications. The report was formally adopted on January, 14th, 1999. This is not an official translation.

Larive (ELDR), *rapporteur.* Mr President, we think that this report on cross-border commercial communications on behalf of the Committee on Economic and Monetary Affairs and Industrial Policy is another example of the Commission neglecting its duties. As guardian of the Treaties, it tends to have a fine disregard for Article 169 and the infringement procedure it describes. This is a serious and unacceptable shortcoming in a democracy. Citizens, businesses and organisations are often quite rightly infuriated. Their complaints are sometimes allowed to drag on for years, as with the French Evin Law and Greece's ban on the advertising of toys on television.

Nor am I very pleased that the answer by Mr Monti to the letter about this procedure sent by Mr Cox and myself only landed on my desk two minutes ago. I have not been able to read it - just the last sentence, which says *"I am nevertheless interested in the suggestions made by Mrs Larive in her draft report on commercial communications and will take them into consideration after they have been adopted by Parliament"*. I have not had time to read the rest of the letter, but I will hold him to this promise.

When describing his eight-point plan last Monday, President Santer promised the European Parliament more transparency and information. If he is to maintain or achieve credibility, the demands set out in our resolutions must be honoured. This will mean scrupulous and transparent application of the Article 169 procedure with time limits for decision-making and an obligation to apply the principle of proportionality to all existing and new complaints. Complainants should also be able to appeal against negative decisions.

The European Parliament also wants to see a register of complaints published on the Internet, together with full details of progress or otherwise - obviously providing the complainants give their approval. The European Parliament should receive information on a very regular basis - through, for example, its Legal Affairs Committee - and my proposal is that a working party be set up within the Legal Affairs Committee to keep a close eye on infringement procedures, and

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obviously not only in connection with commercial communications.

The Commission must not be allowed to go on having uncontrolled political decisions made behind closed doors take precedence over legal arguments without being accountable.

Commercial communications is a sensitive area. On the one hand, it must be possible to make full use of the free European market in this area too, and this is enormously important in this sector, which is expanding rapidly thanks to the new technologies and already directly employs over a million people. On the other hand, however, we obviously have great respect for national values and cultures, and for this reason, Mr Monti, we are very pleased with the proposals you have made for liberalising the European market for commercial communications too, first in the Green Paper and now in the follow-up communication.

We support the principle of proportionality that you propose. This will mean that, in each case, objective criteria can be applied to determine whether a national restrictive measure is justified in the light of common interests, or whether the same results in the field of public health or consumer policy, etc., could be achieved with less radical measures.

Unlike the Commission, however, we want all existing and new infringement procedures to be subjected to an examination of this kind - with clearly-defined time limits and not only as you wish, as otherwise we would find ourselves back in the situation I have just described.

We also join the committee of experts in supporting the Commission's proposals for a central contact point, a web site and a database. In this committee too, the watchwords must be transparency and accessibility - in other words, the agenda, the minutes and minority opinions must be made public.

As the Member of the Commission knows, we think it is very important that the committee should not be exclusively made up of national officials. Mr Monti, I know you have courage, but persuade your colleagues to introduce for the first time what one might call the 'European polder model', by which I mean involving, on an equal footing, one representative of officialdom, industry and consumer organisations per country. We must break officialdom's stranglehold.

Finally, the principles of mutual recognition and the country of origin must also be fundamental to commercial communications. Only if the justification of national restrictive measures is established in the way proposed can this principle be broken. The industry should then be given a chance to solve the problems through self-regulation and a European code of conduct. As far as I am concerned, they can make a start on this right away. Only as a last resort should harmonising legislation be used to supplement the ten or so directives currently applicable in this sector.

Mr Monti, *Member of the Commission* Mr President, ladies and gentlemen, first of all, I would like to thank Mrs Larive for her rich and detailed motion for a resolution on the Commission's communication, as well as for the interest she shows regarding our policies on commercial communication within the Internal Market. Thanks to

your commitment, Mrs Larive, the European Parliament has supported the Commission's proposals, listed in the Green Paper on commercial communications, thus allowing the Commission to realise this policy through the communication that we are discussing this evening.

I am delighted at the rapporteur's positive approach to our policy in this field, and am happy to accept her constructive criticism about later improvements that may be made. Besides her in-depth suggestions on the policy concerned, the honourable Member's resolution also makes several suggestions concerning the possibility of improving the infringement procedures referred to in Article 169. Since I happen to be responsible for both fields, I would like to give a brief, initial answer to the main suggestions made.

Let me begin with our internal policy concerning commercial communications. The suggestions concentrate on the need to strengthen the methodology in order to evaluate proportionality, guaranteeing, on one hand, that none of the proportionality criteria may be used as loopholes to keep protectionist obstacles intact, and, on the other, making application of the proportionality evaluation criteria mandatory for any infringement procedures in this field.

I must say that I agree with both proposals, and will attempt to guarantee that this tool will be used efficiently. As for the suggestions about greater transparency of the work of the group of experts, we are already preparing to make public the opinions of that group, as well as the agendas of the meetings. I am happy to be able to inform the honourable Member that the group's first opinion, addressing the regulation of discounting in Member States, should be adopted and made public in February. The names of the national representatives have also been published, and various Member States have set up working parties with relevant national bodies to keep them fully informed of discussions held by the group.

I hope that, as time goes on, all Member States will do the same, so that the relevant bodies will be kept fully informed and may contribute to the debate. The members of the group of experts also consider it would be useful for the organisations involved to be able to present their observations to the group, but that their permanent presence could be detrimental to the frank and constructive discussions that enable the group itself to respect the six-month deadline prescribed for its opinions.

Finally, since we expect to have an average of two opinions a year, we hope to be able to present them frequently to the Parliament, along with the replies that the Commission intends to give to these opinions in terms of initiatives. Thus, Mrs Larive, I consider that we will be able to follow up on most of the specific suggestions you have made concerning our commercial communication policies.

As for the innovative proposals of the resolution concerning the infringement procedures referred to in Article 169, I am particularly grateful for these proposals, and this contribution, because I would like to emphasise the importance I give to the problem of the infringement procedure. We have, in effect, tried — although perhaps not to the extent that Mr Mather would have wished, given his polite language — to streamline and accelerate them as well as to make some of the practices involved in the infringement procedure more transparent.

I agree with the rapporteur that this aspect is of fundamental importance, since the complaints lodged allow us to pinpoint the fields where problems still exist within the Internal Market. I admit that awareness of the complexity and slowness of the

infringement procedures, and thus of their cost, can sometimes dissuade operators active in the market from lodging a complaint. This means that the infringement procedures do not completely fulfil their important role of indicating obstacles, making it difficult to achieve our, and your, goal of a smoothly functioning Single Market.

More specifically, as far as the frequency and the times of the decisions are concerned, I have done all that was in my power to take advantage of every chance of complying with the deadlines, as suggested by the rapporteur.

In any case, the two proposals concerning a public register of complaints, and the possibilities of the petitioners to access the Commission's analysis before a decision is made, deserve to be examined in more detail. Only cases in which the petitioners have willingly given up the confidentiality associated with the procedure could be listed in the register.

As far as the second proposal is concerned, asking petitioners for their opinion on our analysis before the Members of the Commission make a decision is bound to cause further delay. I agree nonetheless that there are some positive, and even very positive, aspects to providing a petitioner with in-depth information about the reasons why his complaint has been filed away, for example.

I hope that my response has reassured you, at least somewhat, as to the Commission's intention to attach importance to this resolution, and I would like to close with a very brief observation on transparency. I care deeply about transparency, and, as you know, the so-called *scoreboard,* which is proving an essential tool in making community law in the Single Market more transparent by putting pressure on Member States to implement the rules of the Single Market more accurately. Let me remind you, in particular, that, as far as transparency within the infringement procedure is concerned, we made the decision in 1996 to inform the press of every decision concerning a reasoned opinion or the referral of a case to the Court of Justice, and have been applying it since then.

I must say that this very usefully increases peer pressure, inducing Member States to eliminate in a more timely manner most of the infringements which cause the procedure to be initiated.

Mrs Larive Thank you very much for your reply. You gave some reassuring answers on several subjects. But at the same time you disappointed me with answers on other subjects as well, especially concerning the composition of the Expert Group. I have two questions left which you did not answer at all. Will there be a possibility for appeal for the complainant when a decision goes against him? Are you willing to apply the terms (deadlines) called for in the resolution concerning infringement cases?

Mr Monti, Mrs Larive, as I stated in general and also referring to your last two comments in particular, I reserve the right to evaluate this in depth. As far as the first aspect is concerned, i.e. that of recourse, I believe it would be necessary to amend the treaty. Allow me to recall that, during the intergovernmental conference that led to the Treaty of Amsterdam, I personally, and the Commission as a whole, supported the proposal of some Member States to strengthen the powers, in order to accelerate the procedure being discussed.

As far as compliance with deadlines is concerned, I believe I have already stated that all our efforts are geared to ensuring this, something I would like to emphasise once again. You will have noticed that, in some cases, my hesitation to give an immediate positive response to some of the proposals you put forward stems precisely from the fact that they seem inherently good, but may to some extent prolong the procedure in question.

Work programme of the Expert Group on Commercial Communications 1999

Regulation of Discounts

i) Adoption of an opinion on mutual recognition an the regulation of cross-border discount services. Opinion to be published in the Newsletter on Commercial Communications and on the web site of the Contact point.
ii) Call for comment from interested parties, including consumer and business associations. Call for comment to be launched through the Newsletter and the web site. Probable date for launching call for comment: April 1999
iii) Presentation of a Communication addressed to the European Parliament and the Council.

The Regulation of Premiums

i) Presentation of working document and discussion on national regulations of premiums and free gifts. (Expert Group meetings scheduled for: 1 June 1999, 28 September 1999)
ii) Adoption of an opinion on mutual recognition and the regulation of cross-border services related to premiums and free gifts by end of year.

Prize competitions & contests

Presentation of working document and discussion on national regulations on prize competitions & contests. (Expert Group meetings scheduled for: 1 June 1999 and 28 September)

Advertising of Lotteries

Presentation of working document and discussion on national regulations on advertising of lotteries (Expert Group meeting scheduled for: 14 December1999).

Sponsorship

Presentation of working document and discussion on national regulations on sponsorship. (Expert Group meeting scheduled for (potentially) 14 December 1999, if not – first meeting in 2000.)

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Report of the European Parliament on the Commission's follow-up to the Green paper on commercial communications*

* The Report was formally adopted on 14 January 1999

By letter of 2 April 1998 the Commission forwarded its communication to the Council, the European Parliament and the Economic and Social Committee on the follow-up to the Green Paper on commercial communications in the Internal Market.

At the sitting of 11 May 1998 the President of Parliament announced that he had referred this report to the Committee on Economic and Monetary Affairs and Industrial Policy as the committee responsible and to the Committee on Legal Affairs and Citizens' Rights, to the Committee on the Environment, Public Health and Consumer Protection and to the Committee on Culture, Youth, Education and the Media for their opinions.

At its meeting of 23 April 1998 the Committee on Economic and Monetary Affairs and Industrial Policy appointed Mrs Jessica Larive rapporteur.

At the sitting of 15 May 1998 the President announced that this report would be drawn up according to the Hughes procedure by the Committee on Economic and Monetary Affairs and Industrial Policy in conjunction with the Committees asked for their opinions.

At its meetings of 3 September 1998, 13 October 1998, 24 November 1998 and 8 December 1998, it considered the Commission communication and the draft report.

At the last meeting it adopted the motion for a resolution by 37 votes, with 3 abstentions.

The following were present for the vote: von Wogau, chairman; Katiforis and Secchi, vice-chairmen; Larive, rapporteur; Areitio Toledo, Argyros (for de Brémond d'Ars), Arroni, Barton (for Caudron), Billingham, Camisón Asensio (for Christodoulou), Carlsson, Carrozzo, Ettl (for Glante), García Arias, García-Margallo y Marfil, Gasòliba I Böhm, Goedbloed (for Cox), Hendrick, Herman, Ilaskivi, Jarzembowski (for Langen), Kestelijn-Sierens, Konrad, de Lassus (for Castagnède), Lukas, Lulling, Thomas Mann (for Fourçans), Metten, Miller, Murphy, Pérez Royo, Rübig, Svensson, Theonas (for Ribeiro), Thyssen, Torres Marques, Trizza, Watson, Wibe and Wolf (for Hautala).

The opinion of the Committee on Legal Affairs and Citizens' Rights and the opinion of the Committee on Culture, Youth, Education and the Media follow this report. The Committee on the Environment, Public Health and Consumer Protection decided not to deliver an opinion.

The Committee on the Environment, Public Health and Consumer Protection decided on 25 May 1998 not to deliver an opinion despite the fact that it had been consulted under the Hughes Procedure.

The report was tabled on 15 December 1998.

The deadline for tabling amendments will be indicated in the draft agenda for the relevant part-session.

A motion for a Resolution

Resolution on the communication from the Commission to the Council, the European Parliament and the Economic and Social Committee on the follow-up to the Green paper on Commercial Communications in the Internal Market (COM(98)0121 - C4-0252/98)

The European Parliament,

- having regard to the communication from the Commission to the Council, the European Parliament and the Economic and Social Committee on the follow-up to the Green Paper on commercial communications in the Internal Market (COM(98)0121 - C4-0252/98)[1],
- having regard to Articles 30, 36, 56, 59, 85, and 128-130 of the EC Treaty,

(1) OJ C 167, 1.6.1998, p. 2.

- having regard to the Commission Green Paper on commercial communications in the Internal Market (COM(96)0192 - C4-0365/96) and its resolution of 15 July 1997[2],
- having regard to the Commission Green Paper on the protection of minors and human dignity in audio-visual and information services (COM(96)0483 - C4-0621/96) and its resolution of 24 October 1997[3],
- having regard to the Television without Frontiers Directive 89/552/EEC[4], the Misleading Advertising Directive 84/450/EEC[5], the Directive on Advertising for Medicinal Products for Human use 92/28/EEC[6], the Data Protection Directive 95/46/EC[7], the Directive on Labelling, Presentation and Advertising for Foodstuffs for Sale to the Ultimate Consumer 79/112/EEC[8], the Directive on Coordination of Laws, Regulations and Administrative Provisions relating to Direct Life Insurance 92/96/EEC[9] and the Commission recommendation on codes of practice for the protection of consumers in respect of contracts negotiated at a distance (distance selling) 92/295/EEC[10],
- having regard to its resolution of 24 April 1997 on the Commission Communication on illegal and harmful content on the Internet[11],
- having regard to its resolution of 20 February 1997 on the Commission Communication on Priorities for Consumer Policy 1996-1998[12],
- having regard to the cases dealt with by the European Court of Justice since 1973 in the field of commercial communications,
- having regard to the report of the Committee on Economic and Monetary Affairs and Industrial Policy and the opinions of the Committee on Legal Affairs and Citizens' Rights and the Committee on Culture, Youth, Education and the Media (A4-0503/98),

A. Whereas the European commercial communications sector employs more than 1 million people and is growing, especially thanks to the development of new communications technologies; whereas this sector is particularly important in terms of youth employment in Europe;

B. Whereas the Commission's Communication is a significant contribution to the development of a coherent policy towards commercial communication;

C. Whereas the Parliament particularly welcomes the purpose of the Communication, which is to apply Internal Market principles to commercial communication whilst safeguarding several public interest objectives, such as consumer protection, public health protection, the protection of intellectual and commercial property and the protection of privacy, which are covered in the Treaty;

D. Whereas it is of fundamental importance, with the aim to avoid renationalisation, that the principles of mutual recognition and country of origin, as the key principles of the Internal Market, are strictly applied to all cross-border commercial communications, in particular, in the context of electronic commerce;

E. Whereas in the Communication, a number of new instruments is launched with the aim of contributing to the realization of an Internal Market for commercial communications - : establishment of a Commercial Communications Expert Group; making available a single contact point and a website; establishment of a Commercial Communications Database; setting up a network of academic experts - whilst proposing a number of improvements to increase the transparency and efficiency of existing Community instruments, in particular, of the Article 169 procedure and the application of a proportionality assessment methodology;

F. Whereas it is not clear how some of the new instruments proposed in the

[2] OJ C 286, 22.9.1997, p. 6.

[3] OJ C 333, 10.11.97, p. 408 and 430.

[4] OJ L 298, 17.10.1989, p. 23.

[5] OJ L 250, 19.9.1984, p. 17.

[6] OJ L 113, 30.4.1992, p. 13.

[7] OJ L 281, 23.11.1995, p. 31.

[8] OJ L 33, 8.2.1979, p. 1.

[9] OJ L 360, 9.12.1992, p. 1.

[10] OJ L 156, 10.6.1992, p. 21.

[11] OJ C 150, 19.5.1997, p. 16 et 38.

[12] OJ C 85, 17.3.1997, p.133.

Communication will contribute to the core objective of the Communication, i.e. the establishment of the Internal Market for commercial communications, notably the functioning of the Commercial Communications Expert Group;

G. Whereas the proposed assessment methodology, which is intended to increase transparency and efficiency of existing procedures for dealing with infringements of the EC Treaty in the area of commercial communications, lacks 'teeth' to be effective in practice, in particular, as the Commission fails to make its application mandatory and work within strict time limits;

H. Whereas there is no case law to the effect that restricting cross-border commercial communications based on cultural (taste and decency) or social criteria falls within the concept of the general good;

I. Whereas the infringement procedure under Article 169 of the EC Treaty does not currently work in an efficient and satisfactory way, which hampers access to justice;

J. Whereas the Article 169 procedure is also increasingly becoming ineffective on whether or not to initiate, and effectively follow through, infringement procedures against Member States;

K. Whereas an important cause of the failure of the infringement procedure depends on the position taken by the Commission's Legal Service whose positive opinion in respect of the complaint is needed to pursue an infringement;

L. Whereas this lack of transparency makes the infringement procedure prone to political considerations rather than to a purely legal assessment of the merits; whereas this has led to a number of unacceptable delays in pursuing certain infringement cases in the area of commercial communications;

M. Whereas the obstacle of access to justice, for companies and citizens alike, undermines public confidence in the Internal Market as well as the credibility of the EU institutions;

N. Whereas this calls for increased possibilities for parliamentary scrutiny to make the Commission more accountable for its handling of pending and new infringement cases;

O. Whereas a number of significant improvements is still needed to realise the Commission's objective to establish an Internal Market for commercial communications. These improvements should serve to increase transparency and efficiency of existing Community procedures, as well as of the new instruments proposed by the Commission in its Communication;

1. Welcomes the Commission follow-up Communication, but is of the opinion that the actions proposed must be adjusted and made more specific on a number of points;

2. Stresses that cross-border commercial communications must be based on mutual recognition; emphasises that mutual recognition as the key principle of the Internal Market must be rigorously applied to all cross-border commercial communications within the EU and that non-application of the country of origin principle can only be justified if the restriction in question is proportionate and non-discriminatory;

3. Supports that whenever national sensitivities are too divergent for mutual recognition to apply, the issue should wherever possible be addressed by self-regulation; therefore asks the European Advertising and Standard Alliance (EASA) to establish and manage a database on self-regulatory codes;

4. Supports, in principle, the proposed proportionality assessment methodology, which for the first time provides for a consistent set of criteria against which the

compatibility of national and European regulatory measures with the EC Treaty can be assessed;

5. Notes the addition of a criterion to the methodology reflecting a recognition of cultural and social differences in the Member States but considers that this should not be used to justify existing or new restrictions on cross-border commercial communications, whereas Member States seeking to implement restrictions on the basis of cultural or social specificity must prove that it is a measure invoked in the general interest and that the measure is proportionate to its objective; stresses again that the risk of renationalisation must be prevented;

6. Stresses the need for mandatory application of the methodology;

7. Calls on the Commission to apply the methodology automatically to all pending and new infringement cases and not only 'where appropriate' as described in the Communication;

8. Calls on the Member States to subject any new measures in the commercial communications area to the proportionality assessment prior to adoption;

9. Calls on the Commission to discuss infringement cases at least every three months instead of every six;

10. Furthermore, asks the Commission to propose mandatory time limits with the aim of reaching a decision to refer cases brought under Article 169 to the European Court of Justice within 12 months as from the conclusion of the 'pre 169 phase' - in which the Commission must apply the methodology to assess whether a formal Article 169 infringement procedure will be initiated - which should be limited to six months after the date of registration of a complaint;

11. Stresses that, should the Commission fail to reach a decision within the time limits set for it in the various stages in the infringement procedure, a possibility should be provided that the case is referred to the Court of First Instance;

12. Calls on the Commission to make the complete legal arguments on specific cases known to the complainant and to provide for a possibility for the complainant to challenge this opinion before a final decision on whether to formally pursue a complaint is taken;

13. Suggests that a working group under the auspices of the EP-Legal Affairs Committee is established to closely monitor progress made at the Commission's infringement meetings and to give advisory opinions on certain cases;

14. Calls on the Commission to establish a register of complaints, accessible to interested parties and available from the Internet, which contains all registered complaints with the Commission - pending permission from the complainant - and all relevant information regarding progress made in the handling of those cases under the infringement procedure - reasons for admissibility etc. - ;

15. Insists on its earlier demand that the Expert Group should be representative of all interested parties and that this Group should have a tripartite character, i. e. consisting of representatives of Member States, industry and consumer organisations to ensure that industry and consumers could present effectively their positions on issues discussed within the proposed Expert Group;

16. Calls on the Commission to detail more specifically the functions and tasks of the Expert Group, to make sure that pending infringement cases will be discussed within the Expert Group, to guarantee independence and transparency on the debate in the Expert Group, in particular preparation and publication of the agenda, publication of the minutes and minority opinions, operation according to strict time limits;

17. Calls on the Commission to ensure

that the Expert Group will meet four times a year and report to the European Parliament every six months and that there will be a full review of the Group every three years;

18. Calls on the Commission to conduct studies on 'sponsoring at schools' and 'on children and TV-advertising'; to publish its results as soon as possible; to take the outcome of these studies into account during the next revision of the Television without Frontiers Directive;

19. Instructs its President to forward this resolution to the Commission, Council, National Parliaments of the Member States as well as industries and consumer organisations concerned.

Explanatory statement

Background on the Commission Green Paper on commercial communications (COM(96)0192)

The Commission survey exercise that was conducted prior to the drafting of the Green Paper concerning existing national laws on commercial communications had showed that commercial communications services affect a number of important public interest objectives, such as the protection of consumers, minors, public health or pluralism. Therefore, these services are subject to a variety of different national regulations, as Member States pursue different public interest objectives. The divergence of national regulations as well as the fact that cross-border commercial communications are developing lead to obstacles to the proper functioning of the Internal Market.

The definition of commercial communications that was used in the Green Paper was the following: 'All forms of communication seeking to promote either products, services or the image or organisation to final consumers and/or distributors'. This definition covers all forms of advertising, - direct marketing, sponsorship, sales promotions and public relations.

The analysis also showed that the compatibility of cross-border restrictions with EC law would depend on whether or not they met the principle of proportionality, i.e. if the measure is proportional to the pursued public interest objective. In order to review existing restrictions, a careful assessment of proportionality was therefore considered to be essential in this field. With the aim of establishing a high quality, appropriate and coherent European framework for commercial communications, the Commission proposed two key measures, the first one being the use of a **proportionality assessment methodology**. The use of this methodology would be a means of ensuring that evaluations are based on a complete overview of the effects of the measures concerned. According to case law, which the methodology would assist, the assessment of proportionality requires:

a) the verification of the appropriateness of the national restrictive measure *vis-à-vis* the pursued objective, i.e. it must be such as to guarantee the achievement of the intended aim;

b) testing that the national restrictive measure does not go beyond that which is necessary in order to achieve that objective; in other words, that the same result cannot be obtained by less restrictive rules.

Since the jurisprudence of the Court has not yet provided precisely defined elements for assessing proportionality, the Commission thus proposed its methodology to help provide a systematic analysis of both national and community measures in this field. It would consist of the following two step procedure:

1. To characterise either the relevant national measure restricting the free movement of services or the harmonisation measure proposed by the Commission, in

order to set out a complete picture of the impacts of the measure. Five assessment criteria should be used for this purpose:
A) What is the potential economic chain reaction and the resulting impact on consumers caused by the measure?
B) What are the public interest objectives motivating the measure?
C) Is the measure linked to the invoked public interest objective?
D) Does the measure affect other public interest objectives?
E) How efficient is the measure in achieving the invoked public interest objective?
2. To make an overall legal assessment of whether a national measure could be considered proportionate or a Community measure could be considered coherent with the Treaty and other Community measures, on the basis of the overview resulting from step 1.

The second proposal of the Commission to establish a framework for commercial communications can be divided into two inter-related tools to improve co-ordination and information exchange. The Commission firstly proposed the establishment of an **Expert Group** to consider commercial communications issues and help find constructive solutions to problems. It was proposed the group would comprise representatives of the Member States accompanied by national self-regulators when they would be concerned. The group would be called when problems should arise and the problems to be discussed would be tabled by the Commission. The discussions of the group would be based on the above-described proportionality assessment methodology. The purpose would be to seek to establish a dialogue between the Commission, Member States and interested parties and allow for agreement on application of mutual recognition and avoid broad harmonisation initiatives. It would also act as a forum for administrative co-operation and for an exchange of information on new Information Society developments in this field.

In order to improve information provision and communication with interested parties, the Commission proposes a **central information contact point** to give and collect information on regulatory issues affecting commercial communications. An **on-line information network**, which would enable interested parties to have direct access to the Commission's and the Expert Group's work was also proposed.

The position of the European Parliament on the Green Paper

In its resolution on the above Green paper, adopted on 15 July 1997, Parliament was on the whole supportive of the Commission's proposals but stressed that some points clearly had to be reinforced in order to reach the goal of making the Internal Market function properly.

Concerning the scope of commercial communications, Parliament called for extending it to cover on-pack commercial communications (on-pack price promotions, coupons, free gifts, etc.). Parliament also highlighted some areas which deserved particular attention, namely multi-level marketing, unfair marketing methods, brand diversifications, packaging, sponsorship as well as regulations on commercial communications for children. The Commission was also asked to list a full inventory of existing barriers to the free circulation of commercial communication services, and to come forward with a better assessment of these services' effects on children and their impact on privacy, as well as the mechanisms through which consumer cross-border complaints should be addressed. Parliament also called for a SLIM analysis of this sector.

As regards the proportionality assessment methodology, Parliament supported

the approach but also asked the Commission to publish in its follow-up communication the definition of the methodology, including strict time limits for decisions, and explain how it is applicable to existing legislation. Furthermore, the methodology should be made mandatory for the Commission's work, and also to all national restrictions whether in law or self-regulatory codes.

Parliament also supported the proposed Expert Group, but called for it to be a tripartite Committee made up of equal numbers of representatives of the Member States, industry and consumer organisations. Parliament asked to be consulted on its rules of procedure. Furthermore, the Committee procedure was asked to be fully transparent, and the Committee should meet regularly, operate to strict time limits, publish its results, consider all complaints lodged with it and report to Parliament.

Concerning the contact point and information network, Parliament requested that the contact point should establish a central database on regulations and self-regulatory codes in the area of commercial communications.

Finally, Parliament criticised the inefficiency of the infringement procedure, and asked for a Council decision to enable possible infringement proceedings to be heard in the Court of First Instance, in order to make them open to a system of appeal.

Summary of the Commission follow-up to the Green Paper (COM(98)121)

As a result of the responses to its Green Paper, the Commission decided to adopt a range of actions concerning commercial communications, with the aim to facilitating the provision of cross-border services and to ensure an appropriate protection of public interest objectives concerned. According to the Commission, these actions represent a tool to assist relevant authorities in their analysis of problems in this field, and are in line with the Single Market Action Plan's Strategic Target 1, of making rules more effective.

In the communication the Commission has broadened the scope for the definition of commercial communications to include on-pack communications, as was proposed by the Parliament. The new definition is: 'all forms of communication seeking to promote either products, services or the image of a company or organisation to final consumers and/or distributors'. This includes all forms of advertising, direct marketing, sponsorship, sales promotions, public relations and those services used in the design of packaging excluding labelling.

These services fall within the scope of Articles 59 and 60 of the Treaty, as interpreted by the jurisprudence of the European Court of Justice. In certain circumstances commercial communications activities could benefit from the application of Article 30 relating to the free movement of goods, according to the case law of the Court.

Building on its Green Paper proposals, the Commission proposes the following actions in its follow-up communication:

1) *The application of a proportionality assessment methodology*

The methodology, as described in the Green Paper, will be applied when appropriate to increase the speed and efficiency with which infringements are processed and improve the quality of any harmonisation initiatives proposed by the Commission. The Commission proposes to add two criteria in the first step of the methodology compared to the version presented in the Green Paper, in recognition of cultural and social differences in the Member States:

1. Does the measure reflect cultural or social specificity?
2. Is the measure coherent across all rel-

evant public interest objectives and notably those of consumer protection and public health?

2) *The setting up of a commercial communications Expert Group*

This group is proposed to be set up in order to establish efficient administrative co-operation between the Commission and the Member States. The Commission proposes to ensure that the group acts rapidly and does not duplicate work done by other Commission Committees.

The Commission proposes the group should have four main functions:

- facilitate exchange of views between the Commission and the Member States;
- help the Commission to identify solutions to problems in this field and either allow for mutual recognition or identify harmonisation needs;
- provide data and information on national measures;
- provide information for the work of committees established by secondary Community law.

3) *Making available a contact point and an information network*

The central contact point is to be established in the Directorate General for the Internal Market and Financial services (DG XV) for interested third parties, and it will work closely with other Directorates General involved with commercial communications issues. The Commission will also establish a Web site to facilitate information flows and transparency.

4) *Establishing a commercial communications database*

This is intended to become an information database on national and Community regulations and self-regulatory codes, accessible via the proposed Web site.

5) *Accelerating complaints processing*

The Commission will make efforts to reduce delays by using, when appropriate, the proportionality assessment methodology.

6) *Setting up a network of academic experts*

This network would assist the Commission and the Expert Group and be invited to provide opinions on specific issues.

7) *Promoting international co-operation*

The Commission will promote its approach in international negotiations.

8) *Clarifying electronic commerce issues*

The Commission will take account of restrictions concerning commercial communication services while examining legal issues related to Information Society issues.

9) *Keeping the European Parliament informed*

The Commission will inform Parliament on the application of this approach and the evaluation of the work carried out as well as an update of the work programme.

The Commission will call on the Expert Group to examine problems arising from cross-border commercial communications i.e. areas where national regulations diverge significantly: the protection of minors, unfair competition, sponsorship, misleading advertising, redress systems and application of the proportionality assessment methodology at national level.

The views of your rapporteur

Since the adoption of the first report on commercial communications in July 1997, your rapporteur has consulted interested parties in order to evaluate the Commission's proposals as well as those which the Parliament adopted in its resolution. This period of reflection has led the rapporteur to be rather critical about the follow-up by the Commission to its Green Paper on commercial communications.

The objective of the Commission's Green Paper and the Follow-up Communication on commercial communications is to find a balance between the objective of promoting the free movement of cross border commercial communications serv-

ices and the protection of public interest objectives. Your rapporteur agrees totally that cross-border commercial communications must be based, in principle, on mutual recognition and country of origin. Non-application of the country of origin principle and the application of national measures, can only be justified if the restriction in question is proportionate and non-discriminatory.

Unfortunately, we notice that the infringement procedure (Article 169), to determine whether a national measure restricting commercial communications, is still not functioning properly. It should be faster, more efficient and more transparent.

To be more efficient and transparent the Commission developed the **proportionality assessment methodology** which is to be applied in the field of commercial communications in order to determine if a national restriction is proportionate or not, which your rapporteur welcomes very much. However, to be really transparent and efficient, this test should be mandatory and automatically applied to all measures taken in this field and not only 'where appropriate' as the Commission puts it in the Communication.

Furthermore, your rapporteur regrets that the Communication tends to overemphasize public interest objectives as a justification for creating or maintaining barriers to free movement of commercial communications. In particular, the addition of assessment criteria F in the proportionality assessment methodology puts too much weight on 'cultural and social subsidiarity'. This could undermine the establishment of a Single Market in commercial communications. Your rapporteur warns against renationalisation.

The Commission states that industry and consumers have easier access to information in the field of commercial communications by the setting up of an **Expert Group**. This group was set up in order to establish transparency and efficient administrative co-operation between the Commission and the Member States and to help the Commission identify solutions to problems in the field of cross-border commercial communications services.

Your rapporteur is very much in favour of such a group of experts but is of the opinion that this group should have a tripartite character. Apart from representatives of the Member States, industry and consumer organizations should also take part in this Expert Group to ensure that they can present effectively their positions on issues discussed within the Expert Group. In addition, to reach real transparency, your rapporteur believes that the Expert Group's agendas should be open to consultation and be published in advance of the meetings and that conclusions should be published automatically and not only 'where appropriate' as stated in the Commission's Communication. Furthermore, your rapporteur is of the opinion that pending infringement cases should be discussed within the Expert Group.

An important cause of the failure of the infringement procedure under Article 169 seems to be largely due to the lack of time limits within which the Commission should solve complaints. To be faster the Commission should observe **mandatory time limits** for reaching a decision. The 'pre-phase' to the infringement procedure, in which the Commission must apply the methodology to assess whether a formal Article 169 infringement procedure will be initiated, should be limited to six months after the date of registration of a complaint. The formal infringement procedure, in which the Commission writes a letter of formal notice and a reasoned opinion and to both of which the Member State has to reply, should last no longer than one year. In addition, your rappor-

teur is of the opinion that if the Commission fails to take a decision to take a Member State to the European Court of Justice within one year there should be a possibility that cases are being referred directly to the Court of First Instance.

Moreover, the infringement procedure is also made opaque due to the fact that the Commission is not made accountable for its decisions on whether or not to initiate infringement cases. Currently, many cases run the risk of never reaching the Court of Justice, as they are closed or are made subject to undue delays, without there being a possibility to appeal for the complainant.

This is most effectively illustrated by the fact that a decision on whether or not to pursue infringement cases is largely dependent on the opinion given by the Commission's Legal Service in respect of the complaint. Under the current procedure, complainants are not allowed to see and comment on this opinion, which allows the Commission to choose not to pursue complaints or to delay progress for political purposes. This has already led to a number of unacceptable delays in the Commission's handling of certain infringement proceedings in the commercial communications area, for example the French alcohol advertising ban and the Greek ban on television advertising for toys, which have both been pending for more than four years. It is hard to believe that such delays are motivated by purely legal reasons and this opens the current procedure to the challenge that it is prone to political considerations.

It is the view of your rapporteur that the Commission, as Guardian of the Treaty, should pursue infringement proceedings whenever there is a case to answer. Any other decision should be made known to the complainant and the complainant should be given the opportunity to challenge this opinion before the complaint is closed. Your rapporteur hopes that this will improve the current situation in which effective access to justice is often denied creating an alarming democratic deficit.

Your rapporteur is very pleased with the Commission's proposals to set up an information network and a web site, to establish a commercial communications database, and to make available a central contact point for interested third parties. These initiatives will bring more clarity and transparency to the field of commercial communications.

Your rapporteur suggests to the Commission to conduct studies on the effect of TV advertisements on children and on sponsoring at schools.

Furthermore, to create more transparency your rapporteur suggests that:

- the Commission establishes a 'register of complaints' which would be available via the Internet and accessible by interested parties. This register would bring together all the complaints brought before the Commission - pending permission from the complainant - and the follow-up of the Commission, following a pre-established procedure with fixed time-limits, admissibility, follow-up, recourse available. Such a system would guarantee the desired transparency in the treatment of infringements and the rules of litigation.
- a working group under the auspices of the European Parliament Legal Affairs Committee is established to closely monitor progress made at the Commission's infringement meetings and to give advisory opinions on certain cases.

Committee on Culture, Youth, Education and the Media

Letter from the committee chairman Mr Peter Pex to Mr von Wogau, chairman of the Committee on Economic and Monetary Affairs and Industrial Policy

At the end of 1992, the Commission launched the debate on future policy on commercial communications in the Internal Market, which concluded in 1996 with a Green Paper that discussed the importance of this area for employment, with particular reference to cross border commercial communications and the new services related to the Information Society and electronic commerce.

This document stressed, however, the existence of a number of obstacles to cross-border commercial communications, which are impediments to the proper functioning of the Internal Market.

The commercial communications sector accounts for over 1m jobs and is constantly expanding. Commercial communications are defined in the Green Paper as: 'all forms of communication seeking to promote other products, services or the image of a company or organisation to final consumers and/or distributors'. this includes all forms of advertising, direct marketing, sponsorship, sales promotion and public relations.

In the wake of the Green Paper, the Commission reached the following conclusions:

- the existence of widely divergent national rules is an impediment to the development of the Internal Market in the field of commercial communications;
- the new services related to the Information Society have created new risks and prospects for commercial communications.

The Commission proposes tackling these problems via the following measures:

- application of a transparent methodology based on evaluating the proportionality of legislative measures;
- creation of a group of experts in the field of commercial communications;
- establishment of a contact point and information network on commercial communications.

The Expert Group set up by the Commission has examined the problems of cross-border commercial communications and the goals, levels and means of protection of the public interest objectives of the national legislation in the Member States, noting the divergences existing in such fields as:

1. the protection of minors, especially as regards television advertising aimed at minors and in such areas as the sponsoring of educational programmes and direct marketing targeted on children;
2. sponsorship (the concept of sponsorship and the rules governing it differ from one Member State to another, especially in relation to television);
3. comparative and misleading advertising.

Conclusions

The Committee on Culture, Youth, Education and the Media calls on the Committee on Economic and Monetary Affairs and Industrial Policy to include the following conclusions in its motion for a resolution[1]:

1. The Commission should facilitate the cross-border provision of commercial communications services through the establishment of an effective and transparent regulatory framework which ensures the necessary protection of the public interest objectives involved.
2. The Commission should ensure that the various legislative provisions in force in the Member States relating to commercial communications are based on public interest objectives, including consumer protection, the protection of minors, public health, the protection of intellectual and commercial property and the safeguarding of pluralism.

[1] The following took part in the vote: Pex, chairman; De Esteban Martín (for Fontaine), De Coene, Guinebertière, Kerr, Mouskouri, Perry, Tongue, Vaz da Silva and Whitehead (for Kuhne).

Committee on Legal Affairs and Citizens' Rights

The Communication entitled 'The follow-up to the Green Paper on commercial communications in the Internal Market' adds little that is new to the 1996 Green Paper, apart from the summary of responses from 'interested parties' and the Member States. We learn, for example, that on the most important question - that of priority areas for Community action - only seven Member States (not quite half) made comments. Six of the seven Member States have widely differing priorities, which does not inspire excessive optimism regarding a future 'common advertising policy'.

The situation is not made any easier by the fact that the Commission makes its summary anonymous by talking about 'one Member State', 'two Member States', etc., without naming them. Why the Commission should indulge in a camouflage exercise such as this is not known. What is quite clear is that such a practice demonstrates anything but the much-vaunted 'transparency'.

As to the 'transparent assessment method', it is useful to note that the Commission itself recognises its limitations: '. this methodology does not substitute the criteria developed by the Court but rather assists in their application'[1].

Although this method can be a useful tool with which to implement the principle of proportionality, it is surprising that the Commission does not consider one of the aims of the first stage of this assessment to be 'to identify the restrictions'[2] of any given national measure. On what grounds would it criticise a Member State if not this one?

It is also surprising that the Commission intends to 'assess' two situations in exactly the same way, even though there are differences between them from the legal point of view: on the one hand, the case of a Member State introducing or retaining provisions laid down by law, regulation or administrative action representing an obstacle to the free provision of services in the area of advertising (Articles 59, 66, 50 and 56 of the EC Treaty) and, on the other, that of a Community measure intended to approximate national legislations with the object of the establishment and functioning of the Internal Market (Articles 100a, 7a of the EC Treaty).

The most disappointing thing about the Commission's follow-up is its proposed timetable. It informs us that 'in order to ensure rapid and efficient results of its policy, the Commission will prioritise its work'[3].

In this context it may be recalled that the Commission apparently decided in November 1992 to review its policy on commercial communications[4].

Conclusions

The Committee on Legal Affairs and Citizens' Rights, having deliberated on the question and heard its draftsman, has decided[5] to call on the Committee on Economic and Monetary Affairs and Industrial Policy to include the following conclusions in its report:

[The European Parliament]

1. Calls on the Commission as a matter of urgency to accelerate its work in the areas recognised as high-priority areas, namely the protection of minors, unfair competition, sponsorship and misleading advertising, and pyramid selling;
2. Asks the Commission, in the interests of greater transparency, to abandon the practice, in its communications and similar texts, of concealing the identity of the individual Member States behind formulas such as 'one Member State', 'two Member States', etc.

Letter from the committee chairman to Mr von Wogau, chairman of the Committee on Economic and Monetary Affairs and Industrial Policy

[1] P. 8 of the Communication.

[2] P. 8 of the Communication.

[3] P. 14 of the Communication.

[4] Report of 24 June 1997 by Mrs Larive for the Committee on Economic and Monetary Affairs and Industrial Policy, A4-219/97.

[5] The committee adopted the conclusions unanimously at its meeting of 24 November 1998. The following were present for the vote: Palacio Vallerlersundi, acting chairman; Añoveros Trías de Bes, draftsman; Barzanti, Cassidy, Gebhardt, Janssen van Raay and Larive (rapporteur for the Committee on Economic and Monetary Affairs and Industrial Policy).

Trading and marketing on the Internet and in similar communication systems

The Nordic Consumer Ombudsmen's position paper

At the European Commission Annual Assembly of Consumer Associations, Brussels, 12-13 November 1998 Hagen Jørgensen, the Danish Consumer Ombudsman announced that the Nordic Consumer Ombudsmen had decided to develop a common position on trading and marketing on the Internet.
At the date of this meeting, Mr Jørgensen had not seen the draft Directive on e-Commerce. His main objections to the country of origin approach adopted can be summarised as follows:

1. Companies established in markets that provide a 'high' level of consumer protection will feel disadvantaged and put pressure on their own administrations to lower consumer protection to allow them to compete equally.

2. There is a risk that companies, when deciding where to establish business, will 'shop around' and choose the countries which have the lowest levels of consumer protection.

3. The authority evaluating the commercial communication may not have the necessary knowledge of particular conditions in the target market(s).

4. The absence, in most Member States, of a statute that lays down that marketing must be carried out in accordance with fair trading.

The Nordic consumer ombudsmen have noted the rapid development in the use of information technology. In that connection, the consumer ombudsmen have ascertained a need to adopt a common position in connection with trading and marketing on the Internet and in similar communication systems.

The consumer ombudsmen have found it desirable to express their views at a common Nordic level. These views are intended to form the basis of a common Nordic position in national as well as international contexts. National negotiation situations may, however, make it necessary to modify the principles in the spirit of compromise.

This common position reflects the current knowledge of and expectations about the Internet. The rapid development of the Internet may necessitate an adjustment from time to time of some of the views expressed. The common position should therefore be considered a dynamic work intended to ensure the consumers a good legal position in the information society.

The consumer ombudsmen note that consumer confidence is a prerequisite for regarding the Internet as a serious medium. Moreover, consumer confidence is an important prerequisite for realising the potential for electronic trading. Consequently, it is very much in the interest also of trade and industry that trade and industry observe the principles expressed in this common position.

The term 'should' is used consistently in this common position. The reason for this is partly that what is expressed is a joint recommendation, partly that not in all cases is the legal position the same throughout the Nordic countries. In some cases, a 'should' may thus cover a 'shall' in national legislation.

The consumer ombudsmen further note that within the EU a number of initiatives have been taken to regulate areas comprised by this common position. Among other measures, a Directive on the Protection of Consumers in Respect of Distance Contracts (97/7EC), a Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (95/46EC), a Directive on Treatment of Personal Information in the Telesector (97/66EC) and a Directive on Injunctions for the Protection of Consumers' Interests (98/27EC) have been adopted. These directives will be implemented as part of the legislation of the Nordic countries and thus – like any other legislation – have to be complied with by businessmen using the Internet for trading and marketing.

Scope of application

The common position comprises trading and marketing on the Internet and in similar communication systems.

The common position comprises cases in which it must be assumed that the trader through his/her marketing intends to affect supply and demand on the Nordic market.

This common position shall thus apply to, for example, the use of World Wide Web, to the transmission of e-mails and to the use of news groups, etc.

This common position concerns marketing that, from an overall point of view, is directed at the Nordic market. The following criteria can be taken into special account in connection with the evaluation:

- which languages, currencies or other national characteristics are used;
- to what extent the business or the serv-

ice in question is otherwise being marketed in the Nordic country concerned;

- whether there is a connection between marketing on the Internet and other marketing activities in the Nordic market concerned;
- whether the businessman accepts concluding contracts with consumers resident in the Nordic country concerned.

The marketing laws of the Nordic countries apply in accordance with case law when the marketing is directed at the market in question.

The provisions applying to trading and marketing in the physical world, including existing legislation governing contracts, purchases, distance selling, marketing, electronic data processing, etc., shall also apply to trading and marketing on the Internet. Provisions governing international choice of law also apply to the Internet. Pursuant to the Rome Convention, a mandatory civil regulation cannot be subject to any derogation if this is detrimental to the consumer, when a contract is concluded on the basis of marketing directed at the consumer. Norway has not acceded the Rome Convention, since Norway is not a member of the EU.

Internet suppliers have to allow for the fact that in certain situations they may also be held liable for unlawful marketing material deriving from their purchasers. Such liability might arise especially in cases where the Internet supplier is aware of the infringements (e.g. as a result of a complaint made by one of the Nordic consumer ombudsmen), but allows such infringements to continue. Among other remedies, the consumer ombudsmen have the possibility of issuing different types of prohibitions. If occasion should arise, such prohibitions may also be issued to the Internet suppliers.

Identification

Marketing material should be elaborated and presented in such a way that it is obvious to the consumer that it is marketing. It should be possible to separate marketing material from other material.

Information about the businessman's name, physical address, form of organisation and e-mail address, if any, should be easily accessible to the consumer in a clear and comprehensible manner.

When a businessman uses hyperlinks to material other than his/her own, the businessman is, basically, liable also for the content of such material.

Businessmen should not use hyperlinks to material that does not comply with the legislation of the Nordic country in question and with the recommendations put forward in this common position.

When hyperlinks are used, it should furthermore be made clear to the consumer when the businessman's marketing material is being left.

When marketing material is transmitted by use of a technique whereby a sender address is naturally generated (especially newsgroups and e-mails), the sender address should be the same as the address to be used by the consumer for getting in touch with the businessman or his/her representative.

Information obligations

In connection with trade and marketing, the businessman should in a clear and comprehensible form provide all

relevant information in order to enable the consumer to evaluate the marketed service and any offers made.

The marketing material on the Internet should be updated on a constant basis and be dated. If the marketing material is valid for a limited period of time, this should appear clearly from the material.

The businessmen should retain for a sufficient period of time relevant marketing material that has been published on the Internet.

The businessman should provide enough information to enable the consumer to evaluate both the product and the offer. The information to be provided by the businessman should include the following:

- the price of the product/service including all taxes and duties;
- the main characteristics of the product/service;
- limitations, qualifications or conditions, if any, applying to the product;
- terms of payment;
- existence of a right of withdrawal from the contract, including information on how to exercise such right;
- costs and terms of delivery, and the normal time of delivery;
- guarantee, if any, terms of guarantee and after-sales services;
- how and where the consumer can complain;
- duration of the contract in case of contracts to be performed recurrently;
- any other information necessary for evaluating the service or the offer;
- how the consumer can get into contact with the businessman prior to ordering, if the consumer has questions he/she wishes to ask the businessman.

Electronic conclusion of contracts

The contract function should be clearly separated from other functions.

The businessman should give proper and reasonable directions about the properties of the product/service, including its useful qualities, its durability, safety risks and maintenance.

Prior to an electronic conclusion of a contract, the consumer should be fully aware of all terms and conditions of the contract, including what the consumer orders and at what prices (including costs of transportation, taxes, duties, etc.). Furthermore, the businessman should fully and clearly inform the consumer whether he/she has any agreed or statutory right of withdrawal.

The businessman should give the consumer an order confirmation. The order confirmation should be sent by ordinary or electronic mail, if the consumer so requests.

The consumer should have easy access to keeping all the information supplied in a physical or machine-readable form.

It is up to the complaints boards and the law courts to establish when a contract has been concluded and how much it takes to regard the contract terms as having been agreed upon. It should be noted that especially standard conditions can be of such an extent, and be formulated in such a way or can enter into the material (e.g. through hyperlinks) in such a way, that the contract terms are not binding on the consumer.

The businessman should thus ensure that the consumer is provided with all relevant information in respect of the contract prior to the conclusion of the contract. This may be ensured e.g. by requiring the consumer to 'pass' and 'accept' a page of information prior to the conclusion of the contract.

Binding communication

Businessmen should send a binding electronic communication - i.e. notices, orders, etc., that may contain a duty to act or a legal obligation on the part of the receiver - to the consumers

only when it appears unambiguously from the circumstances that the consumer has accepted it.

Businessmen using electronic mail as a means of communication should ensure that any messages received from consumers are collected from the electronic mailbox and made accessible to the business as soon as possible. This also applies when the addressee, because of holidays, illness or for any other reason, is absent from the business.

The businessman should not regard an e-mail as having been received by the consumer until the consumer has collected the e-mail from his electronic mailbox with the Internet supplier.

When messages are allowed to be sent by e-mail, and when these can be said to have a binding effect, must be determined by the complaints boards or by the courts of law on the basis of a number of concrete circumstances.

It should be noted that the person sending binding messages *prima facie* bears the risk of the message reaching the receiver.

In relation to the transmission of e-mail to consumers, businessmen should pay special attention to the fact that consumers do not necessarily collect their e-mail from their electronic mailboxes as often as consumers collect their physical mail from their ordinary mailboxes. This implies that consumers do not necessarily react as quickly to electronic mail as the businessman might expect in the case of traditional, physical mail.

Payment

Payment via the Internet presupposes that the consumer has expressly accepted that the businessman can debit the consumer's account and that the security requirements set up by the country in question in respect of such payment are complied with.

Payment on the Internet should not entail bigger risks to the consumer than the risks connected with other means of payment.

The fact that the consumer uses electronic payment should not make it more difficult for the consumer to have defects, if any, remedied or the contract cancelled.

If the consumer has paid before the product/service is delivered, the businessman should reimburse the whole amount immediately if the consumer claims not having received the purchased item or if the consumer uses his/her agreed or statutory right of withdrawal.

It should be noted that in certain cases consumers may address their claims for having an amount reimbursed to the issuer of the credit card for defects in the services/products for which the consumer has paid by means of the credit card. The consumer can thus raise a claim against the supplier of credit if the seller fails to fulfil his obligations.

Performance and complaints procedure

Businessmen should execute an order within the time period agreed upon or as quickly as possible. Digital services to be supplied electronically should be supplied on receipt of order, unless otherwise agreed.

If, within a reasonable time, a consumer claims that a digital product to be supplied electronically has not been received or does not function, the businessman should take measures immediately to remedy or to redeliver. The fact that the businessman has remedied or redelivered, however, does not exclude the consumer from pleading other remedies for breach of contract.

It should be possible for the consumer to give notice to exercise his

right of withdrawal or right of complaint in a way that is not any more difficult than the procedure for ordering the product. Immediately upon receiving such notice, the businessman should issue a receipt for it.

All reasonable mail expenses connected with the return of defective products/services should be paid by the seller.

Exercising a right of withdrawal or a right of complaint need not involve the use of the same technique as the technique used for concluding the contract. The decisive factor is whether the technique indicated is relevant in the situation in question. When consumers have access to concluding contracts via the Internet, it should generally be expected, however, that their right of withdrawal and right of complaint can be exercised electronically.

E-post etc.

Businessmen should send marketing material via e-mail or by similar means of distance communication only when the consumer has given his/her consent.

Marketing material to a consumer should be clearly identified as marketing. As a minimum, this should appear from the heading.

Businessmen should not encourage consumers to send on the businessman's marketing material to other consumers.

Businessmen should not send marketing material via systems set up with a view to exchanging information between private parties (e.g. news groups and list-servers). This does not apply, however, if it appears explicitly from the circumstances that the system may be used for transmitting or exposing such material.

The request for consent should be formulated in such a way that the consumer knows what forms of marketing material he/she can expect to receive - and the extent thereof.

The businessman should set up the system in such a way that the consumer can easily decline to receive further marketing material.

Registration and processing of data

Consumers should be able to operate freely on the Internet. Data concerning identified or identifiable persons should only be registered if the consumer (the data-subject) has specifically consented hereto.

Businessmen registering data on the Internet should give information on the Internet about how the businessmen register and process data on consumers. This information should be provided for registering and processing of data concerning identified and identifiable persons as well as for data concerning non-identified and non-identifiable persons.

This information should include information about what data are registered, how the data are registered, what the registered data are used for, for how long the data are retained, whether the data are passed on and, if so, to whom, as well as other information of relevance to the consumer.

Businessmen registering data on the Internet concerning identified and identifiable persons should enable the consumers to exercise electronically the rights they have pursuant to data-processing legislation. Businessmen should provide adequate information on the Internet about these rights (right of objection, right of erasure, etc.).

The provisions of the electronic data processing legislation in force at any time in the Nordic countries should be complied with.

It is recommended that businessmen see to it that data concerning identified and identifiable persons to be used for specially adapted marketing are primarily collected from the consumer (the data-subject) directly. Hereby, it is ensured that the consumer him/herself has influence on the criteria according to which data on the consumer are processed.

Marketing directed at children and young persons

The recommendations expressed in the earlier sections of this common position apply to marketing directed at children and young persons subject to the more rigorous rules contained in this section. Moreover, specific provisions of the country in question applies.

The marketing should be elaborated in such a way that it is obvious to that age group - which is the target group - that it is a question of marketing.

The businessman should take into account the development stage of the target group and therefore should not take advantage of children's and young persons' credulity and lack of experience. If entertainment features form part of the marketing - in the form of, e.g., play, games and the like – this entertainment should not be combined with or interrupted by advertising features.

Children and young persons should not be encouraged to give information about themselves, the household or about any other persons. Giving information may not be made a condition of gaining access to contents.

Children/young persons should not be offered rewards (money, gifts or anything else of a monetary value) for staying on or participating in activities on the Internet. This rule does not prevent the holding of prize competitions that neither directly nor indirectly have the effect that the child/young person stays longer on the businessman's homepage.

Businessmen should use the techniques available at any time for allowing parents to limit the material to which their children have access via the Internet.

Children and young persons should not be encouraged to buy goods or conclude contracts via the Internet, and appropriate precautions should be taken to ensure that children and young persons do not make purchases or conclude contracts via the Internet.

Businessmen whose marketing is directed at children and young persons should not use hyperlinks to places containing material that is not suited for children and young persons, or which do not comply with existing legislation.

Interactive marketing on the Internet is especially problematic in relation to children and young persons. Interactive advertising is more than just product presentation and product orientation. It is sophisticated forms of advertising such as games, play instruments and competitions where animal figures, dolls and other images and trade marks affiliated with the products typically form part of the marketing. This marketing method has a tendency to be hidden to the child, and trade marks etc., are thus played into the child's subconscious. Businessmen should not use techniques fit for affecting children's and young persons' subconscious.

Businessmen should bear in mind that marketing targeted to adults may also be of interest to children. Furthermore, contracts entered into by minors are *prima facie* not valid.

Can controls on alcohol advertising be counter-productive?

John Philip Jones, Syracuse University, New York

Alcohol advertising is banned from French billboards. Although the ban was imposed explicitly for public health reasons, i.e. to limit excessive alcohol consumption, I have heard it said that the ban was implicitly protectionist, i.e. to inhibit demand for wine produced outside France, *particularly* wine from the New World, some of which is judged by professionals in the wine industry to be comparable in quality to all but the most select French *Appelations*.

For some time there has been severe price competition in the French wine market, and American wines have made significant inroads - because they are both cheap and of good quality. Have the advertising restrictions played a role? To a limited extent I believe they have.

The market for wine in France is complex, with a number of special features which tend to confound our judgement and make it difficult to forecast the results of actions in the marketplace.

1. Although *per capita* consumption of wine is virtually the highest in the world, there is no long-term increase in wine consumption. Competition between individual wines is therefore very heated, and one wine can only make progress at others' expense.
2. The production of French wines is extremely polarised: something equally apparent when French wines are sold abroad. My New York wine merchant sells a top Bordeaux of a reasonably good year (Lafite 1994), for $150 a bottle excluding New York City sales tax. A lesser but recognised wine of the same year (Chateau Talbot) sells for $29.95. The American equivalent of a French *vin ordinaire* sells for $4.99. In France, supermarket *Onze Degrés* costs a good deal less than this.
3. At the top end of the market, price is determined not exclusively by whether the harvest is large or small. Remember that there is a legal limit to the quantity that can be sold of any *Appelation*. Demand naturally also plays a part, and a major characteristic is that demand is income-elastic. A lack of growth in discretionary income caps - and perhaps depresses - the demand for all high-class wine. No one can deny that the economic problems of Japan during the last year or so have had a negative effect on the demand for top quality French wine.

The vicissitudes in the demand for the top *Appelations* are however much less important to the French wine industry than the sluggishness in the demand for wine as a whole. In such circumstances, the last thing that French producers need is a price war against imported wines, allied to arbitrary and ill-considered restrictions on their advertising activity.

Without going so far as to develop a marketing plan for the French wine industry, I have no hesitation in saying that producers should be working in concert to stimulate primary demand (i.e. demand for wine as a whole). There is a creative role for branding, advertising, and particularly public relations, in stimulating interest in the health-giving properties of wine (especially important for red wine), and emphasising the role of wine in *haute cuisine*. The Chevaliers du Tastevin, based in the Clos de Vougeot, provide a model example. Their activities reach as far as Syracuse, New York. My fellow-chevaliers and I drink a toast to the President of the French Republic on many occasions every year.

An industry-wide campaign to encourage wine consumption would benefit all the producers - domestic and foreign - who supply the French market. The largest share of total sales is held by French producers, so that they would obviously have most to gain from any market-expanding program. But there is room for everybody. It does not become French wine producers to be xenophobic.

With regard to the more perplexing problem of defusing the feelings - feelings that are strongly held by many influential people - that restricting the advertising of wine will lead to improvement in public health, we should be reminded of an extremely interesting parallel from Swedish experience during the 1960s.

In Sweden, the problems stemming from excessive consumption of alcohol had been on the public agenda for decades. Indeed, the government, which incidentally controls the sale of hard liquor and wine though a legal monopoly, at first met the problem in typically *dirigiste* fashion: by giving every adult a monthly ration of alcoholic spirits. This policy was recognised by everybody, liberal and conservative alike, as ineffective and even counterproductive, but it was difficult to think of an alternative. Alas, restriction does not work. Perhaps the French would be wise to remember Bismarck's *bon* mot "the foolish man learns from his own mistakes; the wise man learns from other people's mistakes".

During the 1960s, wiser counsels prevailed in Sweden. The government turned to persuasion - carrots rather than sticks - and made the wise but brave decision to employ some selling techniques. They introduced a rich panoply of marketing activities - advertising, merchandising, public relations - to encourage the consumption of wine, in the hope that the demand for hard liquor would thereby be reduced. Most importantly, good wine was sold at affordable prices in the *Systembolaget* stores of the liquor monopoly. (At one time, the *Systembolaget* was the largest single buyer of French wine in the world).

In three words, the plan worked.

With Sweden in the European Union, the situation has been firmly consolidated. That distant, beautiful but chilly Northern land is inhabited today by a population of wine drinkers. The picture of the stupefied Swede clutching his bottle of Aquavit has been consigned to the trashcan of history.

Survey on commercial communications

Erik Vagnhammar
DG XV

In its communication on the follow-up to the Green Paper on Commercial Communications the Commission announced that it was going to examine specific legal issues relating to the use of cross-border commercial communications services in the Information Society. The objective of this survey was to analyse the practises used and the costs involved in undertaking the legal risk analysis required for using commercial communications on the Internet. The survey was launched in the May 98 issue of *Commercial Communications* and it led to a very good response from readers. Some respondents suggested that the survey itself could be a useful instrument or checklist for anyone planning or carrying out a legal assessment of using commercial communications on the Internet. The results of the survey were briefly summarised in the Commission's proposal for a Directive on certain legal aspects of electronic commerce which was adopted on 18 November 1998 and which was published in the previous special edition of *Commercial Communications*. This article is based on the 126 replies to the questionnaire aimed at operators. Another article in a future issue will summarise the results of the survey for consumer associations.

Geographic coverage

Most replies were received from German operators (36%) followed by those from the United Kingdom (15%), France (11%), the Netherlands (7%) and Sweden (6%). 3% were received from companies outside the Union. Apart from presenting the overall result of this survey this article aims to compare the situation in different Member States. When possible, or where there are clear and obvious differences between the situation in Germany, United Kingdom, France and Sweden/Finland (which together accounted for 10% of the replies), these are highlighted.

The proposed Directive on certain legal aspects of electronic commerce seeks to establish an Internal Market in Information Society services whereby operators will, on the basis of the law in the Member State where they are established, be able to supply their services across the Union without being subject to the fourteen other national sets of laws. Likewise it will ensure that consumers can achieve fast and effective cross-border redress in the country where the service originates when problems arise.

The results of the survey reflect the current situation which this Directive seeks to redress. The snapshot provided by the survey shows just how costly the current regulatory uncertainty is for operators investing in future Information Society services, the very services one hopes will help ease the unemployment witnessed in many of the Member States.

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Member States may seek exemptions to the principle of free movement. They may do this by demonstrating that differences in national regulations within the Community for commercial communications/Information Society services are such that insufficient protection of a general interest objective in another Member State risks undermining the quality of protection in their own territory if free circulation were to be allowed. Such exemptions must be shown to be in conformity with the case law of the European Court of Justice. If these exemptions are not addressed they imply that a service provider wishing to

offer a service throughout the Internal Market must, in addition to compliance with the rules where he is established, ensure that the service is compatible with the laws of the other 14 Member States. The objective of the proposed Directive is to ensure the opposite -the provider is subject to his own national legislation and benefits from the free movement into the other 14 Member States.

A number of respondents noted that they wished their activity to be cross-border but had to restrict it due to legal reasons.

Court cases that have already been decided diverge, indicating that there is a serious lack of legal certainty. The adverse effects of this are strongly amplified in a cross-border situation. Legal uncertainty arises because different Member States apply different categories of law to new on-line services and the measures themselves differ in level of restriction. Moreover, moves in certain Member States to enact new legislation are apparent and there are already differences in approach that entail a real risk in the short term of further fragmenting the Internal Market. Some Member States have already enacted legislation specifically addressing Information Society services (D) while others have begun a large scale amendment of their rules (B, F, FIN, I, NL). Lastly, in some Member States, specific issues are the subject of surveys, draft proposals or new legislation, (for example, regulated professions (A, F, D and I); liability (F, NL, S and UK); and contracts (A, B, NL, DK and S)).

Types of Information Society business undertaken by respondents

A vast majority of the companies or organisations that replied have set up their own web site (81%). Several replies indicated that these were in a pilot phase. Being in a pilot stage was the main reason for not making a legal assessment of the impact of having commercial communications on a web site.

33% answered that they are undertaking commercial communications on somebody else's web site and the same percentage (33%) are providing commercial communications through their own web site. 13% are designing commercial communications for a service provider on the Internet and 8% are providing legal advice on the use of commercial communications on the Internet. 7% answered "other" to describe their business/activity.

Is the business activity considered as a cross-border activity?

A clear majority (68%) of the respondents considers their activity to be cross-border.

Of these, 60% stated that their activity primarily focused on the national market but that they clearly wished to have more cross-border business in Europe or in countries outside the Union.

As much as 40% had from the outset designed their activity as a cross-border service and hoped to benefit from the market in other Member States of the European Community.

A number of respondents noted that they wished their activity to be cross-border but had to restrict it due to legal reasons. For example, the Camelot Group plc, the operator of the National Lottery in the UK, answered that even though their licence permits players of any EU or EEA state to participate in the National Lottery, promotion of foreign lotteries is illegal in

many EU and EEA states as well as in some other countries (such as the US). For this reason the Camelot web site is specifically aimed at the UK and it is made clear on the web site that it is not intended to promote the national Lottery outside the UK. Most European Lotteries have a web site, which is for information only and thus does not provide for lottery participation via the Internet.

Responses on Legal assessments of the impact of having commercial communications on a web site.

63% of the companies or organisations that replied to the questionnaire had made some legal assessment of the impact of having commercial communications on a web site. The reasons why or why not will be presented separately below.

Reason for not undertaking any legal assessment

37% of the participants in the survey had not made any legal assessment or such a minor one that they chose to indicate that no legal assessment had been made. The most frequent reason (38%) for not making a legal assessment was that the company/organisation was in a pilot phase and intended to undertake such an analysis later. Only 23% of the total sample had decided not to make a legal assessment for reasons other than being in a pilot stage. 35% of these did not do so simply because of a lack of resources while 30% had not given this issue any priority. 30% did not specify a reason. Only 27% denied that there was a risk. As regard differences across Member States it is interesting to note that no French respondents indicated 'no risk' as a reason for not making a legal assessment while 33% of the German respondents did so. A major German Brewery, marketing their beer on the Internet and wishing to increase their European share of the European market, was among these companies that could not see any risks in having commercial communications on the internet!

For those who indicated that no assessment could be made due to 'Lack of resources' four sub-categories could be distinguished:

- those who do not have in-house expertise (69%);
- those for whom it was too expensive to do so given the company's resources or company's size or level of business involved (62%);
- those who do not have time to undertake such an analysis (46%)
- those who believed it to be too expensive vis-à-vis the risks (23%).

Reason for making a legal assessment

72% of the respondents indicated that it, as for any other business, was normal practice to undertake such a risk assessment. Several respondents chose to indicate that they also had other reasons for making the assessment. No less than 36% believed that the legal uncertainty that characterised on-line commercial communications was greater than for other lines of business. While French and British respondents found the Internet to be an area of more legal uncertainty (respectively 50% and 45%), German and Swedish/Finnish (respectively 25% and 11%) respondents saw less uncertainty than in other lines/types of business.

A major German brewery, marketing their beer on the Internet and wishing to increase their European share of the European market, was among these companies that could not see any risks in having commercial communications on the internet!

Apart from comparing this Internet business with any other business related commercial communication, there were

other reasons for undertaking a legal assessment. 31% wanted to go as far as possible in providing a new innovative form of commercial communication and made the legal assessment to avoid being sued. UK respondents seemed more concerned with the risk of being sued - a clear 55%, while only 25% of German and French respondents indicated this fear.

16% did the legal work to identify how their activity would be treated in other Member States and 15% wanted to evaluate with some certainty whether or not a commercial communication campaign would be accepted across all markets from which the campaign might be accessed (country of destination). Other reasons for making a legal assessment (6%) mainly covered situations where the respondent's business involved advising other interested parties setting up web sites or providing commercial communications on the Internet.

The legal analysis

Who undertakes the legal analysis?
56% of the respondents do the work in-house through their own lawyers or law department. In these cases there were 1 to 8 lawyers involved in this analysis. 25% used outside lawyers in addition to their own resources (up to 26 lawyers) and 19% had only outside lawyers to undertake the legal analysis. It was not exceptional to find that more that one law office was involved and, in some cases, expertise from a branch organisation was added. The use of only in –house lawyers was most frequent in France (89%) and Sweden/Finland (67%), and the exclusive use of outside assistance was most common in UK (36%) and Sweden/Finland (33%).

One of the key operators in the electronic commerce market noted that he had to rely on 8 in-house lawyers dedicating 45 hours per week and 18 outside legal advisers who on average supply 175 hours of advice per week!

Amount of time and level of costs associated with the legal analysis.
The current fragmented legal framework inflates such legal costs significantly for operators or service providers wishing to develop their activities across borders. Estimated legal costs to launch an Information Society service varied enormously. Several examples demonstrate how they often amount to considerable sums:

- one operator responded that he is using 3-4 days of legal advice per month, whilst another uses 50 hours per month of both internal and external legal advice (amounting approximately to 70.000 DM per year). A third used fifty days of both in-house and external advice to launch a new service and a SME indicated that it had to employ a lawyer on a full-time basis.
- One of the key operators in the electronic commerce market noted that he had to rely on 8 in-house lawyers dedicating 45 hours per week and 18 outside legal advisers who on average supply 175 hours of advice per week! For the UK market alone this operator estimated that a review of the regulatory framework for his Information Society service cost him Euro 60.000. During the pre-launch period of an on-line service the consideration of legal issues was crucial and represented approximately 50-60% of the legal resource workload.

All forms of operators spend large amounts on the analysis. A German bank, focusing primarily on the German market but wishing to have more cross-border business, spent approximately 700 man-hours on their legal analysis. A copyright organisation found it very difficult to estimate how much time and expense their legal assessment involved – since 'on line

issues arise in numerous scenarios'. An operator of a national lottery faced the same problem when trying to specify how much time it spent on legal analysis. Approximately one year's planning was put into the setting up of the web site and this required legal input on a number of issues at various stages of the process, making it extremely hard to quantify the time and costs involved throughout.

Issues covered by the legal analysis

98% of the respondents indicated that their legal analysis focused on national legal aspects. The cross-border dimension of on-line activity makes it distinct, since a very high proportion (66%) also evaluated legal aspects other than those in their own country. 82% of these believed that it was essential to evaluate how the activity would be treated in other Member States. Of the 32% of respondents who had indicated that they had focused exclusively on their national legal aspects, 60% nevertheless considered their activity to be a cross-border activity. Indeed, some of these even indicated that their activity was designed as a cross-border activity and that they hoped to benefit from the market in other Member States in the European Community.

These optimistically hoped that receiving Member States would show goodwill towards their services even if they broke their laws! These companies limit their analysis to their national legislation and assume that as long as their activity is legal in their country of establishment they can benefit from the freedom of providing services within the Community. In other words, they assume that the Single Market exists. The survey would suggest that many other operators feel these companies are clearly taking an enormous risk with their new services.

A clear majority of respondents indicated that their legal analyses had focused on several national and Community legal regimes. Of those 66% that focused on other legal aspects than their national legal aspects, 82% focused on national legal aspects in other Members States, 73% on Community legal aspects and 61% on International law. There are clear differences by nationality on which non-domestic legal aspects the operators focused. National legal aspects were given high priority in UK and Sweden/Finland (both 100%), but less so in Germany (69%) and in France (57%). The figures for analysis on community legal aspects were Germany (88%); Sweden/Finland (75%); France (71%) and UK (62%). Finally, International law was covered in 86% of the French legal analyses, as against 85% in the UK, 50% of the Swedish/Finnish respondents and 44% of the German.

These companies limit their analysis to their national legislation and assume that as long as their activity is legal in their country of establishment they can benefit from the freedom of providing services within the Community. In other words, they assume that the Single Market exists.

What kind of legal problems were carefully thought about?

The legal problem that most of the respondents considered (82%) was that of the applicable law. Under which set of laws should the activity fall? For example, are rules on advertising for the press applicable to an on line service? Whilst 68% considered the interpretation of certain legal provisions in the context of an on-line activity in their analysis. Once again the strong cross-border element was stressed by the fact that 39% of the respondents saw a need to check the regu-

latory situation in various Member States when an on-line commercial communications' campaign was being planned.

The main subjects requiring legal analysis

The key areas giving rise to legal analysis are as follows. The applicability or interpretation of copyright regulations (75%) concerned most respondents (The Commission has responded to this issue. A proposed Directive on copyright is available on the Internet in all Community languages [COM (97) 628 final]. General advertising requirements (e.g. comparative advertising) was the subject for the analysis in 56% of the cases. Two other subjects also reached the same percentage: the applicability or interpretation of contracts and consumer protection issues.

Other major issues indicated by more than 40% of the respondents were promotional offers (50%), unfair competition (49%) and the body of law determining liability (45%).

39% mentioned that legislation relating to children was a subject for legal analysis and 36% of the respondents' thought that the applicability or interpretation of legislation concerning advertising bans for certain products or services required legal analysis.

German figures for promotional offers were 37% lower than the British and 35% lower than the French. This reflects the strong restrictions in Germany which German industry tends to see as effective protection against non-German competition.

Pharmaceuticals, tobacco, alcoholic beverages, weapons and condoms are examples of such products or services. Three issues were indicated by around 25% of the respondents: audio-visual advertising restrictions (26%), press advertising restrictions (25%) and regulatory language requirements (24%). Only 19% of the analysis focused on sponsorship regulation issues on the Internet. The survey identified that the legal issues giving rise to analysis differed significantly from one country to another. The following four examples can be used to illustrate these differences:

1. German figures for promotional offers were 37% lower than the British and 35% lower than the French. This reflects the strong restrictions in Germany which German industry tends to see as effective protection against non-German competition.
2. While 62% of the UK respondents made a legal analysis of general requirements on advertising (e.g. misleading advertising) only 1/3 of the Swedish/Finnish did so. This reflects the remaining differing interpretation of what is classed as "misleading" in different Member States.
3. Unfair competition was a central issue in France (60%) and in Germany (59%) but not in the UK (31%) and an almost ignored issue in Sweden/Finland (11%). Again, this is hardly surprising since the notion of "unfair competition" is hardly known in the Anglo-Saxon and Nordic countries.
4. 40% of the French replies stated that language requirements required legal analysis but only 9% of the German and 8% of the British did so. Clearly, these last two are unaware of laws protecting linguistic diversity which exist in such countries as France.

Conclusion.

This summary of the survey results shows that the current legal uncertainty caused by the lack of clarity as to which Member State's law applies and which regulatory authority covers on-line commercial communication services is inflating the legal search costs involved with the launch of European-based Information Society serv-

ices. The Directive on electronic commerce is seeking to resolve this problem by ensuring that Internal Market principles apply and companies are subject to the law of their country of origin. It also sets down certain conditions to ensure that such free circulation of commercial communication services can be agreed to.

Until this text is transposed into national law, on-line commercial communicators will be forced to undertake full-scale legal reviews of the laws in all the Member States. They need to ensure that their brand equity will not suffer as a consequence of legal action in one or other Member State where their Web-site can be seen.

Large companies can afford to do this and pass the inflated costs onto consumers via higher final prices for their products and services. In contrast, small companies cannot afford to undertake such legal reviews. As a consequence they are either not investing in e-commerce or taking the risk of finding themselves subject to foreign Court action in the hope that other Member States will show them goodwill given as they cannot know all the laws that might apply to them.

This destabilising situation is precisely why the German Presidency of the Council and the European Parliament both agree that the new Directive should be adopted as quickly as possible. As the text is negotiated in these institutions additional case studies highlighting the existing problem will be useful in demonstrating to the decision-makers the kinds of problems that operators are facing on a daily basis. We would therefore encourage readers to submit articles for publication in this newsletter that is read by these very same decision-makers.

As for consumers and receivers of commercial communications, they too face the same legal uncertainty and therefore cannot trust e-commerce as much as they might wish. An article in a later issue of the newsletter will demonstrate this aptly when we analyse the results of their responses to the questionnaire. We would also encourage consumer associations to send their views to this publication on the key issue of cross-border on-line redress and how this could be developed and improved in the Community. This is because we recognise that the Internal Market principle of free movement and the resulting country of origin control requires efficient and transparent cross-border redress systems for the benefits of the Internal Market to be maximised.

The Directive on electronic commerce is seeking to resolve this problem by ensuring that Internal Market principles apply and companies are subject to the law of their country of origin.

An interview with Jessica Larive

Jessica Larive, rapporteur to the European Parliament on the Commercial Communications dossier spoke with Mike Sainsbury, Editorial Director of *Commercial Communications*.

It was entirely a coincidence that *Commercial Communications* met with Jessica Larive on the 'historic day' of the 16th March. The meeting had been arranged a while before and it could not have been foreseen that it would be the day when the Commission offered their resignation following the preliminary report of the group of independent experts. It proved a happy coincidence, as Mrs. Larive returned to many of the themes covered in her exchange with Commissioner Monti published on the cover of this issue.

We were interested, first, in establishing directly from Mrs. Larive how she felt the transparency issue might be addressed. As readers will note from the report, she feels (and the Parliament supports her fully) that the Expert Group should not meet behind closed doors, but should include an industry expert and an expert from consumer groups. There are those who argue that this will simply mean that the representatives from the Member States will not discuss issues as readily and that this would stand in the way of rapid progress. Jessica Larive will have none of this:

To deal with their responsibilities adequately, I believe the Expert Group should meet four times a year and report to the Parliament every six months.

'We have been told this repeatedly over the years and I am just not convinced it is the case. In fact, the same argument was used by the government in the Netherlands until about ten years ago, when discussion was opened up in the way I have proposed. It has worked very well, and I see no reason why it should not work at the European level.'

She does, however, acknowledge that it might be difficult for industry to decide on who their appointed expert should be. 'I want to be clear about this. I am not insisting that the Expert Group should only meet if it is composed as a tri-partite. If industry cannot come to any agreement as to who their representative should be, so be it. The opportunity should be there. I do insist, however, that the agendas and conclusions are always published, not simply "where appropriate" as the Commission has proposed. The agendas need to be open to consultation and published in advance and a deadline for publication of results should be fixed.

'Currently, complaints issued to the Commission under Article 169 will not be forwarded to the Expert Group. I believe they should be. In fact, I believe that part of the information made available on the proposed Internet site should be a register of such complaints and an account of the progress made in dealing with them. I think it would be helpful if *Commercial Communications* were to consider publishing such a register. Naturally, complainants would have the right to remain anonymous if they wished.

'To deal with their responsibilities adequately, I believe the Expert Group should meet four times a year and report to the Parliament every six months. The functioning of the group should be subject to a full review every three years.'

Our discussion then turned to the handling of infringement cases under Article 169 of the Treaty. 'Well, of course, the views I expressed on these to Commissioner Monti in January I believe have been entirely vindicated by the report of the independent experts. I haven't had the time yet to read the text too closely as I only received it this morning, but one particular sentence struck me as appropriate here and I made a note of it. The report says "The Committee have too often revealed a growing reluctance among the members of the hierarchy to acknowledge their responsibility. It is becoming difficult to find anyone who has even the slightest

sense of responsibility." You may remember that I complained to Commissioner Monti that the Commission's continuing failure to progress infringement cases was unacceptable. The European Commission has been failing in its duty to act as guardian of the Treaties. Understand, this is not a criticism of Mr. Monti and his performance as a Commissioner, rather a comment on the procedural mire into which infringement cases are led. Nor is this purely a commercial communications problem. Access to justice is being hampered and obstructed at every turn. An enormous, and damaging, democratic deficit is the consequence.

'The European Parliament will not tolerate this and I believe that now is our opportunity to ensure the incoming Commission understands this fully. I believe the Parliament should establish, probably through the Legal Affairs Committee, a committee which will 'shadow' the progress of these infringement cases.

'Readers should understand that these cases cannot be pursued unless the Legal service of the Commission gives the go-ahead. Once it gives the green light, the College of Commissioners decides to forward the case to the European Court of Justice. However, no one knows what the Legal Service's views on any particular case are since its legal opinions are only made available to the College and never made public. Believe it or not, this assessment and the Commission's subsequent decision is never open to challenge! Now, clearly, this lack of transparency results in a corresponding lack of access to justice. If the Legal Service decides against pursuing a case, there should be the opportunity for the complainant to react before a final decision is made by the Commission.

'In any event, if the Commission decides to close an infringement case, we need to know why. It is my belief the existing procedure is a device by which the Legal Service takes political decisions as to whether or not to pursue a complaint. As guardians of the Treaty, the Commission should pursue infringement proceedings when there is a case to answer against a Member State. Failure to reveal their reasons for not pursuing such cases makes it easier for the Commission to choose not to pursue complaints for political purposes.'

However, no one knows what the Legal Service's views on any particular case are since its legal opinions are only made available to the College and never made public. Believe it or not, this assessment and the Commission's subsequent decision is never open to challenge!

Mrs. Larive was asked whether she felt there might be some appeal that a complainant might lodge with the Legal Affairs Committee of the Parliament. 'No, absolutely not. The members of the proposed committee "shadowing" the infringement cases are not lawyers – or, rather, not necessarily lawyers. Besides, Montesquieu's principles on the separation of power seem to have stood up pretty well to the test of time and I don't think the Legislature should interfere with the Executive branch in this way. What I do think, however, is that this shadow committee should call upon the Director General of the Legal Service to come before it and report on the status of the outstanding infringement cases.'

What of the time taken in the pursuit of infringement cases? 'Well, as you know, the Parliament feels the Commission needs to work within strict time limits to resolve this issue. We believe the early stage of the procedure should be no longer than six months. The formal stage itself should take no longer than a year. If

the Commission fails to take a decision within a year then there should be the opportunity for the cases to be referred directly to the Court of First Instance.'

What of the procedure proposed in the Green Paper for assessing the proportionality of restrictions imposed by Member States? 'It seems a useful tool that may well help decisions to be taken more quickly. Cross-border commercial communications must be based on mutual recognition and the country of origin principle. Any failure to apply these principles must be tested and the proposed assessment methodology is welcomed by the Parliament. What would be further welcomed by the Parliament is for the application of this test to be mandatory, automatic and applied to all measures in this field. It should not only be applied "where appropriate".'

Acknowledging Parliamentary support for mutual recognition and self-regulation rather than harmonisation, how did Mrs. Larive regard the problems associated with consumers gaining cross-border redress? We know of the efforts of the EASA, but it is scarcely a well-funded body. If consumers are not aware of its activities, or even its existence, it is unlikely to provide much reassurance to consumer bodies or access to effective redress to the consumer, is it?

'Since the new Commission will be charged with accepting responsibility – with which, of course, comes accountability – I shall be tabling questions in the Parliament on the status of the stalled infringements on the infamous Greek toy case and the Loi Evin. We have a right to know, and the Parliament is in the mood to demand answers.'

'Well, again it is up to industry to make self-regulation work and I sincerely hope that they will find the necessary will and means to make it work. Otherwise, I am certain that regulation will be imposed to a greater extent than should have been necessary. I am reminded of an instance a few years ago when we advised the banking sector that the amount of money they were charging for currency exchange was unacceptable and that they had two years to put their house in order. They did nothing. We moved to introduce regulations and the financial sector started to bleat about being victimised. There is a lesson here to be learned by the commercial communications sector and I am confident that good sense will prevail.'

After fifteen years in the Parliament, Mrs. Larive will be standing down at the forthcoming elections. She has shown an enormous amount of energy whilst working on a complex dossier over the past years and certainly seemed to show no signs of taking any time-out to plan her future. She has developed an active interest in the commercial communications sector and intends to follow developments closely.

In the meantime, she wants to spend her last few months as an MEP developing the theme she identified from the report of the Independent Experts. 'There is still so much to be done. Since the new Commission will be charged with accepting responsibility – with which, of course, comes accountability – I shall be tabling questions in the Parliament on the status of the stalled infringements on the infamous Greek toy case and the Loi Evin. We have a right to know, and the Parliament is in the mood to demand answers.'