

# COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a  
COUNCIL DIRECTIVE  
concerning comparative advertising and amending  
Directive 84/450/EEC concerning misleading advertising

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(presented by the Commission)

EXPLANATORY MEMORANDUM

I. BACKGROUND

1.1. Two basic consumer rights

On 14 April 1975 the Council adopted a Resolution on the Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy. The programme, annexed to the Resolution, summed up consumers' economic interests by a statement of five basic consumer rights, amongst them the right to protection of economic interests and the right to information<sup>(1)</sup>.

1.2. The protection of consumers' economic interests is set out in a number of principles, including the following: "No form of advertising - visual or aural - should mislead the potential buyer of the product or service. An advertiser in any medium should be able to justify, by appropriate means, the validity of any claims he makes"<sup>(2)</sup>.

1.3. The consumer's right to information rests on the following principle: "Sufficient information should be made available to the purchaser of goods or services to enable him to:

- assess the basic features of the goods and services offered, such as the nature, quality, quantity and price;

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(1) Point 3 of the Annex to the Council Resolution of 14 April 1975.

(2) Id. point 19 (iv).

- make a rational choice between competing products and services..."(3).

1.4. All these principles were confirmed by the Council Resolution of 19 May 1981 on a "Second Programme of the European Economic Community for a Consumer Protection and Information Policy", in which the Council noted - as it did in the Preliminary Programme - that the Commission would submit suitable proposals for the effective implementation of the programme.

The global approach

1.5. On 1 March 1978 the Commission sent the Council a proposal for a Council Directive relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading and unfair advertising<sup>(4)</sup>.

The proposal was a global approach that covered not only misleading and unfair advertising but also comparative advertising. It included definitions of misleading advertising and unfair advertising, the pronouncements to be taken into consideration in determining whether advertising is misleading or unfair, and also an article permitting comparative advertising.

All of these issues were discussed during the negotiation of the proposal, not only with the Council, the Parliament and the Economic and Social Committee but also with representatives of commerce and industry, the advertising profession and consumers.

1.6. The reticence of some Member States at that time to deal with unfair advertising and the firm opposition of one of them to dealing with comparative advertising had the effect - at the end of the discussions in the Council - that the provisions on unfair advertising and on comparative advertising were dropped. (It has to be remembered that the Single European Act had not then been adopted and that unanimity was therefore required).

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(3) Id. point 34.

(4) OJ No C 70, 21.3.1978, p. 4.

## II. THE STEP BY STEP APPROACH

- 2.1. Since the provisions on misleading advertising proved acceptable, on 10 September 1984 the Council adopted Directive 84/450/EEC relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising.

In adopting that Directive, the Council inserted a recital stating that "It is in the interest of the public in general, as well as that of consumers... to harmonize in the first instance national provisions against misleading advertising and that, at a second stage, unfair advertising and, as far as necessary, comparative advertising should be dealt with, on the basis of appropriate Commission proposals."

### Misleading advertising

- 2.2. Directive 84/450/EEC deals with:

- (a) The minimum and objective criteria for determining whether advertising is misleading. (The characteristics of goods and services; the price and the conditions on which goods are supplied or services provided; the nature, attributes and rights of the advertiser).
- (b) Adequate and effective means of controlling misleading advertising, i.e. the possibility of taking legal or administrative action against misleading advertising, as well as the possibility of ordering the cessation or the prohibition thereof either temporarily or permanently, but without excluding voluntary control by self-regulatory bodies.

(c) The reversal of the burden of proof, i.e. the advertiser may be required to furnish evidence as to the accuracy of factual claims in advertising.

The Directive has so far been implemented by all the Member States except Italy and Belgium (the legislation in force in Belgium must be considered incomplete).

#### Unfair advertising

2.3. Within its definition of unfair advertising, the abovementioned 1978 proposal included a number of acts which can be considered typical of unfair advertising: to appeal to sentiments of fear; to promote social and religious discrimination; to infringe the principle of the social, economic and cultural equality of the sexes; to exploit the trust, credibility or lack of experience of a consumer or of the public in general in any other improper manner.

2.4. Although unfair advertising has still not been properly dealt with, some of its aspects have already been harmonized, at least as regards television advertisements. The need to take some of those principles into account was recognized in Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities<sup>(5)</sup>.

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(5) Articles 10, 12, 16.

Comparative advertising

- 2.5 Unless it meets a certain number of restricting conditions, comparative advertising too can become misleading and/or unfair. However, this is not always the case, despite the implications of certain national laws or the practices of the courts in some Member States. That is why the issue needs to be settled by means of an amendment to Directive 84/450/EEC.

III. THE NEED FOR RULES ON COMPARATIVE ADVERTISING

- 3.1. There are three main reasons for harmonizing comparative advertising in the Community:

1. the need to harmonize the rules on an important marketing tool and on comparative testing;
2. to improve consumer information;
3. to stimulate competition.

Consequences of the rapid development of new communication techniques

- 3.2. Though not all advertising crosses frontiers there is a good deal which certainly does. Advertising crosses frontiers on the packaging of goods. It may be broadcast across borders through the medium of radio or television or in the press. In such cases differences between advertising rules in the Member States can complicate the marketing process and may go so far as to disrupt the free movement of goods and the availability of services in the European single market.

In other words, the proliferation of cross frontier means of communication (especially TV channels) will mean that comparisons in advertising are permitted in some Member States (United Kingdom, Ireland, Denmark, Spain and Portugal - and France too is in the process of authorizing it), thus giving them a competitive advantage, while it is condemned in others which, in the absence of controls or standards, will lack adequate means of redress or, in many cases, the ability to counteract effectively.

- 3.3. The Court of Justice has on a number of occasions dealt with situations where an advertisement lawful in one Member State has run up against the laws of a neighbouring Member State; in the GB-INNO case<sup>(6)</sup> the Court held that a particular law of this type constituted an obstacle to free movement within the meaning of Article 30 of the Treaty and was not justifiable under Article 36 or other imperative principles.

The need to regulate the use of comparative tests in comparative advertising

- 3.4. Comparative tests can provide an excellent basis for comparative advertising. Such tests are usually carried out by a third party not itself in competition; it must therefore be ensured that test results are not used in such a way as to cast doubt on the credibility and independence of action of the third party.

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(6) Case C 362/88, GB-INNO-BM v. Confédération du Commerce Luxembourgeois. Judgment of 7 March 1990.

Comparative advertising as a means of improving consumer information

- 3.5. Consumers in the single European market will be faced with a growing number of products and services from Member States other than their country of residence, displaying variations in composition, size and other objective characteristics. In such a situation, comparative advertising can be a useful source of information for consumers and can facilitate a rational choice in the market place, provided that the advertising meets certain conditions.
- 3.6. Although, when Directive 84/450/EEC was adopted in 1984, there were still some doubts as to the value or even the need for this type of information, the economic and legal situation has since evolved.

The case law of the European Court of Justice, which states that national regulations prohibiting the marketing of certain goods not corresponding to specific features fixed by the law of a Member State should, in cases of doubt, be replaced by a simple obligation to provide suitable labelling clearly pointing out any differences, has also evolved.<sup>(7)</sup> Recently the Court of Justice has also stated that in principle any information accompanying the marketing of a product is valuable to the consumer since it is a form of protection and that a national regulation hindering consumer information cannot be justified on the grounds of imperative reasons relating to consumer protection.<sup>(8)</sup>

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(7) See, for example, the Communication on the free movement of foodstuffs within the Community (OJ No C 271, 24.10.1989, p. 3).

(8) Case C 362/88, GB-INNO-BM v. Confédération du Commerce Luxembourgeois. Judgment of 7 March 1990.

In a more general way, completion of the internal market will bring an ever greater diversity of goods. Faced with such diverse information, consumers will benefit more from comparative advertising, which will demonstrate the merits of different goods belonging to the same range, than from other sources of information.

#### Comparative advertising as a means of stimulating competition

3.7. Authorization of the comparative advertising technique throughout the single market will better equip firms to make an effective challenge to leading brands. The resulting increase in competition will benefit consumers and favour innovative and enterprising firms.

3.8. The present situation where comparative advertising is allowed in some Member States puts advertisers in other Member States at a disadvantage. Because rules vary between Member States, differing even between press, television and radio, considerable distortions of competition occur. For example, a firm wanting to use comparative advertising to promote the sale of its products would be inviting legal action in some other Member States on grounds of unfair competition, even though it may have legitimately used this technique on its home market. Conversely, an advertiser may have to cope with a comparative advertising campaign on its home market, launched from a State where comparative advertising is allowed, without effective means of using the same technique itself. Therefore there is a distortion of competition both ways.

#### IV. ENSURING FAIRNESS: SETTING STRICT LIMITATIONS

4.1. In order to prevent any distortions of competition or confusion of the consumer resulting from unfair or misleading advertising, it is important to establish strict limitations on the use of comparative advertising.

4.2. The following limitations will apply:

- (1) The elements to be compared should only be the material ones, which means that they should be relevant, important, decisive.
- (2) Those elements of comparison should be chosen fairly, which means that they should be comparable and the information provided complete without being silent about other potentially material elements of a significant comparison.
- (3) The comparison must be objectively verifiable, which means that any advertiser must immediately be able to furnish scientific evidence of the accuracy of his claims.
- (4) The comparison should not mislead, within the meaning of the Directive on misleading advertising (the criteria by which to determine whether an advertisement is misleading having been established in Article 2(2) of that Directive).
- (5) The statement should not cause confusion in the market place between the advertiser and his competitors or between the advertiser's trade marks, trade names, goods or services and those of competitors.
- (6) It should not denigrate competitors, which means that the advertiser must not cause discredit, disparagement or contempt of competitors or their trade marks, trade names, goods, services or activities, except for the unavoidable effects of its advertising action.
- (7) Lastly, comparison must not be a means of capitalizing on the reputation of the trade mark or trade name of others.

4.3. The provisions of Articles 4, 5 and 6 of Directive 84/450/EEC on misleading advertising, which this proposal will amend, will continue to apply. This ensures that:

(a) the legal and/or administrative mechanisms for controlling misleading advertising will also apply to comparative advertising;

(b) voluntary control of comparative advertising by self-regulatory bodies is not excluded;

(c) the burden of proof will lie with the advertiser, who must prove compliance with the safeguards and conditions of this proposal.

4.4. In the event of disputes the courts or other competent bodies will have the final decision. The administrative or legal mechanisms set up in Member States to deal with disputes or conflicts on misleading advertising since the adoption of Directive 84/450/EEC are working successfully, and should be able to deal with any new complaints arising from comparative advertising. In fact, evidence from the Member States which allow comparative advertising does not point to a large number of disputes.

4.5. The general authorisation of comparative advertising requires some explanation of its relation to patent rights, especially the trade mark law; comparative advertising can often only have a significant effect if it involves a clear identification of the object of comparison, i.e. the competitor's product or service marketed under a specific trade mark or trade name.

Member States' laws on trade marks have been harmonized since 1988 by Directive 89/104/EEC of 21 December 1988, which should come into force at the end of 1991. It is therefore permissible to overlook certain peculiarities of the present legislation on this matter in some Member States and to limit oneself to the wording of the Community text, which stipulates that the registered trade mark confers exclusive rights on the proprietor, including the right to prevent all third parties from using in the course of

trade any sign which is identical with, or similar to, the trade mark in relation to identical goods and services or even, where appropriate, other goods. Yet it may be indispensable, for comparative advertising to be effective, to identify the goods or services of a competitor, making reference to a trade mark or trade name of which the latter is a proprietor. In fact, the use of another's trade mark or trade name in accordance with the conditions established by this proposal does not breach his exclusive right; the aim is not to steal reputations but to distinguish between them.

Although Article 5(3)(d) of Directive 89/104/EEC on trade marks expressly prohibits, *inter alia*, the use of another's trade mark in advertising, this presupposes nonetheless that use of that trade mark is illegal within the meaning of paragraphs 1 and 2 of that Article, which is not the case with comparative advertising when the conditions laid down by the proposal are met.

The limitation of the trade mark law was implicitly understood when the Council adopted Directive 89/104/EEC.

- 4.6. As emphasized in paragraph 3.4., the use in advertisements of the results of comparative tests on goods and services can be particularly important. Given that the law does not currently provide proper protection for the person carrying out the comparative test, such use must only be allowed if that person expressly agrees. In that case the advertiser should accept responsibility for the test as if it had been performed by himself or under his direction. This will help protect the credibility and independence of action of the third party and permit legal action under the unfair competition rules against the advertiser even if a mistake is made by the third party during the performance of the test; in other words, advertisers willing to benefit from a test which is favourable to their products should also assume liability for it.

## V. CONCLUSIONS

- 5.1. It is proposed that the necessary changes be made by amending Directive 84/450/EEC on misleading advertising, which already provides an appropriate regulatory framework. That Directive will then apply to comparative advertising, which will be permitted subject to a number of conditions, and will also apply to the use of comparative tests in comparative advertising.
- 5.2 The provision of the Directive on misleading advertising enabling Member States to retain or adopt provisions with a view to ensuring more extensive protection for consumers should not apply to comparative advertising, the aim being to allow it under identical conditions in all Member States. The application of a more restrictive rule on this kind of advertising in one Member State than in another is thus prohibited.

## VI. THE SITUATION IN THE MEMBER STATES

- 6.1 In Belgium comparative advertising is by implication outlawed. The law of 14 July 1971 on commercial practices bans any commercial advertising using comparisons (that are either misleading or denigratory or) identifying other business enterprises, even if not competitors (Article 20(2)).

Under Belgian law, to mention the name of another person in advertising without permission is considered illicit and the Cour d'Appel of Brussels has held such a reference to be "an act contrary to honest practices"<sup>(9)</sup>.

However, there are several exceptions to the general rule, such as self-defence, and the use of comparisons orally at the request of customers, as well as the right of criticism.

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(9) 23 November 1953, Jur. Comm. Bruxelles, 1954, 19.

7.2 In Denmark the Marketing Practices Act (No 297 of 14 June 1974) does not prohibit comparative advertising as such. However, it must not be false, misleading or unreasonable. Article 2(2) prohibits practices that, because of their form or reference to irrelevant matter, are "improper" in relation to traders and consumers. The Commercial and Maritime Court of Copenhagen has repeatedly accepted the lawfulness of comparative advertising<sup>(10)</sup>.

In 1980 the Danish Advertising Standards Board (Reklame Radet) organised a meeting with representatives of a number of public and private organisations to discuss the opinions of the parties concerned on comparative advertising. Below are some of the conclusions reached at the meeting:

- comparative advertising should be genuinely informative;
  
- comparative advertising should always be correct, relevant and fair. The information which it contains must be truthful and verifiable. The points of comparison shall be selected in such a way that all relevant items are included - even if this means emphasizing the advantages of the selected competitors - and the comparison shall not contain any derogatory statements;
  
- any other use of competitors' trade marks must be prohibited<sup>(11)</sup>.

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(10) Commercial and Maritime Court of Copenhagen. 13 January 1982.

D-212 News Section European Digest [1982] 10 E.I.P.R.

(11) Reklame Radet : "Comparative Advertising", April 1982.

6.3 In the Federal Republic of Germany, the relevant provision is section 1 of the Act against unfair competition of 7 June 1909 (Gesetz gegen den unlauteren Wettbewerb). Section 1 states: "Anyone who, in the course of competitive business activity, commits acts contrary to honest practices, may be enjoined from continuing such acts and held liable for damages."

A long-standing case law has considered this provision as the basis for a general prohibition of all direct comparisons, even truthful ones. There are some exceptions, such as advertising comparisons for defensive purposes, comparisons of systems which are technically different (but without identification of the respective producers) and comparisons made to display a technological development.

6.4 In Greece the basic legislation is Law 146 (1914) on unfair competition, Article 1 of which prohibits any competitive act that is contrary to honest practices. The Law does not appear expressly to prohibit comparative advertising.

Whether advertisements making specific reference to competitors or their products or services is lawful or not will depend on the circumstances of the case, though the trend is to consider it unlawful, especially in cases of denigration. However, when the advertisement only compares the quality of a product to that of another it may be acceptable.

The Advertising Code of the Greek Association of Advertising Agencies allows comparative advertising provided it is not untruthful, misleading or unfair.

6.5 Spain has a recent General Advertising Act (Ley General de Publicidad) of 11 November 1988, Article 3 of which declares unfair advertising to be illegal. This Act is one of the few that includes a definition of unfair advertising.

According to Article 6 advertising is unfair which:

- (a) by its content, appearance or dissemination causes discredit, denigration or direct or indirect contempt of a person, his business or his products, services or activities;
- (b) causes confusion with a competitor's business, activities, products, names, trade marks or other distinguishing marks, makes unjustified use of the name, brand or mark of other businesses or institutions, and in general is contrary to honest practices and proper commercial usage;
- (c) in the case of comparative advertising, it is not based on essential, similar and objectively verifiable features of products or services, or compares products or services with others which are dissimilar or unknown or those having a limited share of the market.

This law marks a change in Spanish legislation. Traditionally, comparative advertising has been considered illegal. Modern thinking is tending to accept comparative advertising provided that certain conditions (similarity of products, verifiability of statements, etc.) are respected.

6.6 Until recently, the French courts generally held comparative advertising to be a form of unfair competition, often of a misleading nature. On 24 April 1991 a draft law improving consumer protection was approved at first reading and will soon be adopted. Article 10 of that Law expressly permits comparative advertising, subject to certain conditions being met, conditions which are in fact fairly similar to those of this proposal.

6.7 Ireland has no specific legislation on comparative advertising and it is not prohibited unless, like any other advertising, it is false or misleading within the meaning of the Consumer Information Act of 1979.

6.8 In Italy, in the absence of specific legislation, Article 2598 of the Civil Code applies. Under clause 2 of that Article any reference to a competitor's products is generally considered an act of unfair competition. However, some exceptions are tolerated (puffery, self-defence, etc.).

Article 15 of the Code of Advertising Self-Regulation of the Istituto dell'autodisciplina pubblicitaria lays down that "indirect comparison is not allowed unless intended to illustrate from a technical or economic point of view the characteristics and real advantages of the activity or product advertised."

6.9 In Luxembourg Article 17(g) of the Law of 27 November 1986 regulating certain commercial practices and adopting penalties for unfair competition qualifies as unfair competition "any advertising which consists of comparison with other competitors or with their products or services."

As in Belgium and the Netherlands, comparisons may also infringe the 1969 Benelux Uniform Law on Trademarks if they refer to marks without the authorisation of the proprietor.

6.10 The Netherlands has no specific legislation on unfair competition. Articles 1401 and 1402 of the Civil Code have been interpreted as prohibiting unfair competitive practices that harm others; comparative advertising may constitute one of these practices. In addition, Article A(2) of the Benelux Uniform Law on Trademarks allows the proprietor to oppose any unauthorised use of his registered trademark which, without a valid reason, would cause him damage.

Case law seems to be divided about whether truthful comparative advertising is permissible. Comparisons referring to all the relevant features of a product are usually permitted while false statements, not necessarily offensive, are considered illegal.

The Advertising Code Commission [Stichting Reclame Code] set up by the Reclameraad, responsible for self-regulation in advertising, considers it permissible to compare "comparable" products provided that: (1) the comparisons are based on complete, objective and verifiable data, (2) unnecessarily denigratory statements are avoided, and (3) the statements are not misleading. It also allows references to product tests carried out by consumer organizations, if such references are accurate and up to date.

6.11 In Portugal Decree-law No 303/83 of 28 June 1983 allows comparative advertising in principle; it is not considered per se to be an act of unfair competition.

Article 18 of the Decree-law states that advertising containing direct or indirect comparisons must not:

- (a) mislead consumers as to the quality and the price of the product;
- (b) be denigratory;
- (c) use messages which may influence the consumer's choice through their hyperbolic or superlative tone;

(d) create confusion between brands, products, services or competing firms;

(e) generally fall within the scope of unfair competition.

The Code of the Portuguese Advertising Agencies Association states that the elements of a comparison must be based on objectively verifiable facts and ought to be chosen fairly.

6.12 In the absence of specific legislation in the United Kingdom, common law permits comparative advertising that is truthful; it also tolerates puffery and allows the use of scientific comparative test results. Statutory law essentially deals only with misleading practices.

Use of a registered trademark in comparative advertisements without the authorisation of the proprietor may constitute an infringement of the 1938 Trademarks Act. Use of a competitor's name, however, appears to be legal.

Section B.21.1 of the British Code of Advertising Practice of the Advertising Standards Authority states that "In order that vigorous competition may not be hindered, and that public information may be furthered, comparisons between products and their prices, including comparisons in which a competitor of the advertiser or his product are named, are regarded as in conformity with this Code, provided that they do not conflict with the requirements of this or the following three paragraphs [B.22 (denigration) B.23 (Exploitation of goodwill) and B.24 (imitation)]. Section B.21.2 states that in advertisements containing comparisons it "should be clear with what the advertised product is being compared, and upon what basis"; "the subject matter of the comparison and the terms in which it is expressed should not be such as to confer any artificial advantage upon one product as against another."

## VII. THE LEGAL SITUATION IN NON-MEMBER STATES

- 7.1 Outside the EEC, comparative advertising is in principle allowed in the USA, Canada, Sweden, Norway, Finland and Switzerland.
- 7.2 In general, common law countries allow comparisons provided that they are truthful; the use of comparative test results is permitted. No action for defamation or injurious falsehood will lie if the statement is true and there is no comparable action for unfair competition.
- 7.3 Scandinavian countries have similar provisions. Truthful comparisons are allowed if complete and therefore fair.
- 7.4 In Switzerland, Article 3 of the Federal Act against Unfair Competition of 19 December 1986 stipulates that unfair actions include those by persons who "in an inaccurate, fallacious, unnecessarily injurious or parasitic manner compare their person, goods, works, performances or prices with those of a competitor or who, through such comparisons, benefit third parties at the expense of their competitors." It follows that comparative advertising is permitted, provided it does not fall within the categories condemned by the law.

IX. INTERNATIONAL RULES

8.1 Particularly interesting is the reversal of the rules on self-regulation regularly published by the International Chamber of Commerce. While previous editions of its International Code of fair practice in Advertising stated that comparisons should be avoided, that of 1986 permits them, stating in Article 5 the qualification that "if advertising includes a comparison it should not mislead the consumer and should comply with the fair competition rules. The elements of comparison should be based upon objectively verifiable facts, which should be chosen fairly."

Article 7 prohibits denigration of a firm or product, directly or by implication, which causes any sort of discredit.

8.2 The International League against Unfair Competition at its Congress in Antwerp in June 1980 adopted a motion stating, inter alia, that "in order to safeguard fair competition and in the interest of consumers, comparison with a product or service of a named competitor is permissible when it elicits comparable features and deals with objective matters which are precise, concrete, essential, verifiable, accurate and as representative as possible; such advertising should not mislead either deliberately or by the omission of a vital element; comparative advertising should never consist of a simple denigratory message, damaging by its nature, emotive, or a mere parasitic exercise, i.e. consisting of a reference which cannot be objectively justified to a sign which is legally protected..."(12).

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(12) Revue Internationale de la Concurrence, 141/2, 1980

REACTIONS OF THE SECTORS CONCERNED

(A) Consultation of the advertising industry

Specific meetings have been held with representatives of the European Advertising Tripartite, a body which brings together advertisers, advertising agencies, the advertising media and the Advertising Information Group, which is an informal grouping of national "tripartite" institutions representing the advertising business and organisations responsible for self-regulatory systems of advertising control. Representatives of the Commerce and Distribution Committee (CCD) were also present.

These organizations emphasized three main points:

- (1) The need for a directive. There was general agreement on the need for a harmonizing directive, given that the present situation as far as comparative advertising is concerned can be said to lack harmony.
- (2) The acceptance of the text itself. The limitations introduced in the proposal were deemed satisfactory. Attention was drawn mainly to the use of trade marks in order to prevent goodwill being "stolen" by a competitor. The advertising agencies, the media and the CCD came out clearly in favour of identifying competitors, thus making comparisons possible.
- (3) The need to avoid excess (unfair advertisements). The text of the proposal was deemed capable of dealing with this problem. However it was stressed that tough penalties would be needed to ensure compliance. The Commission stated that it was for the Member States to decide about penalties.

(B) Consultation of business

The business circles that have been consulted (Banking Federation of the EEC; European Association of Pharmaceuticals; AGREF; etc.) expressed some reservations at different levels, questioning in particular the "beneficial effects" that the authorisation of comparative advertising would have for consumers as well as the "stimulating" effect on competition.

(C) Consultation of Consumers

The Consumers' Consultative Council, at its plenary session of 11 and 12 March 1991, unanimously approved the proposal to allow comparative advertising subject to the following conditions and guarantees:

Comparative advertising should be allowed when, in respect of competing goods and services, it compares precise, objective, verifiable and complete data and is based on decisive features which have been chosen fairly.

Concerning the chosen points of comparison, it must be accurate, fair and relevant even if this highlights the advantages of the goods or services of the other chosen competitors.

Moreover, comparative advertising should not:

- include contemptuous, hurtful, denigratory assertions or assertions which cause confusion;
- compare goods or services not found on the market concerned.

Finally, the use in advertising of comparative tests made by a third party should only be allowed if the party responsible for the test expressly agrees. In such cases the advertiser will be responsible for the test as if it has been performed by himself or under his control.

## OBSERVATIONS ON THE PROPOSAL

### 1. GENERAL

The proposal is based on Article 100a of the EEC Treaty, since the question of whether or not comparative advertising can legitimately be used will directly affect the marketing prospects of the goods and services on offer and thus affect the functioning of the single European market.

Although the minimal nature of the rules on misleading advertising should be maintained (see Article 7(1)), given that implementation of these rules and actual practice in the Member States is not yet sufficiently uniform, the conditions required by Article 100a have been met as regards comparative advertising.

Firstly, the proposal is aimed at the "approximation of the laws, regulations and administrative provisions of the Member States." Laws on comparative advertising vary from one Member State to the next; some allow it but apply different rules, while others ban it, directly or indirectly.

Secondly, the proposal is aimed at "the establishment and functioning of the internal market" with a high level of consumer protection. The aim of approximating the relevant laws is to facilitate the free movement of advertising services, which will be subject to the same harmonized rules in all the Member States.

### 2. COMMENTARY ON THE ARTICLES

#### Article 1

##### Paragraph 1

Given that the proposal aims to amend Directive 84/450/EEC on misleading advertising to include comparative advertising, the title of the amended Directive should reflect this fact.

Paragraph 2

This paragraph contains a definition for incorporation into Article 2 of Directive 84/450/EEC on misleading advertising.

The definition of comparative advertising identifies the feature that distinguishes comparative advertising from advertising in which no mention is made of a competitor or of a competitor's similar goods or services.

Paragraph 3

This paragraph introduces a new Article 3a to Directive 84/450/EEC with the purpose of allowing comparative advertising, identifying what is acceptable in comparative advertising and determining responsibility when the results of comparative tests made by a third party are used in advertisements.

The proposal sets out the following restricting conditions for comparative advertisements:

- The features to be compared should only be the material ones, i.e. the relevant, essential, important, significant aspects of goods and services.
- The comparison should be objectively verifiable, which means that any advertiser should be able immediately to provide scientific evidence of the claim he makes.
- The elements of the comparison should be chosen fairly, which means that they should be comparable and that the information provided must be complete without being silent about the essential elements of the comparison.

By way of prohibitions and limiting conditions the proposal contains the following:

- The comparison must not mislead, within the meaning of Directive 84/450/EEC on misleading advertising.
- The comparison must not cause confusion in the market place between the advertiser and the competitors or between the advertiser's trade marks, trade names, goods or services and those of competitors. This particular condition ensures that the use of another's trade mark or trade name is strictly limited to identification purposes.
- It must not denigrate competitors. An advertisement denigrating a competitor or his trade marks, trade names, goods or services must clearly not be allowed. To this end the proposal states that an advertisement which causes discredit, disparagement or contempt of a competitor or his trade marks, trade names, goods, services or activities is, except for the unavoidable effects of a comparison as such, unfair and is therefore not allowed. The mere fact that a comparison is unfavourable to a competitor is not in itself to be considered unfair if the comparison is accurate.
- On the other hand, comparative advertising must not be carried out in conditions which allow the advertiser to take advantage of a brand's reputation.

In short, comparative advertising cannot validly perform its functions unless it compares material features, in other words, relevant or essential aspects of a product or service which are verifiable. In this context it should be recalled that Article 6 of Directive 84/450/EEC on misleading advertising enables the burden of proof to be reversed, so that the advertiser can be called upon, where appropriate, to substantiate his claims.

It must be pointed out that comparative advertising "per se" is neither misleading nor unfair. It can provide the consumer with valuable information about goods and services and help him decide what to buy. It can also give competitors the opportunity to demonstrate more clearly the features of their products or services.

As for comparative tests performed by a third party, the use of the results in advertisements can only be allowed if the person responsible for the test expressly agrees. In this case the advertiser will be responsible for the test as if it has been performed by himself or under his direction.

#### Paragraphs 4, 5 and 6

These paragraphs incorporate into Directive 84/450/EEC the amendments needed to ensure that the same legal and/or administrative means of redress mentioned in Articles 4 and 5 of that Directive may be applied to control comparative advertising which does not meet the requirements of fairness set by the proposal.

#### Paragraph 7

Article 7 of Directive 84/450/EEC allows Member States to retain or adopt provisions with a view to ensuring more extensive protection for consumers, persons carrying on a trade, business, craft or profession, and the general public. This rule will not apply to comparative advertising, given that the objective of the proposal is to allow such advertising in all Member States under the same conditions.

Article 2

The implementation date is 31 December 1992.

Member States are to communicate to the Commission the texts of all provisions of national law which they adopt in the field covered by the proposal, referring at the same time to this Directive.

Article 3

The Directive is addressed to the Member States.

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Proposal for a  
COUNCIL DIRECTIVE

concerning comparative advertising and amending  
Directive 84/450/EEC concerning misleading advertising

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THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission,<sup>(1)</sup>

In cooperation with the European Parliament,<sup>(2)</sup>

Having regard to the opinion of the Economic and Social Committee,<sup>(3)</sup>

Whereas one of the Community's main aims is to complete the internal market by 31 December 1992 at the latest; whereas measures must be adopted gradually to establish the internal market; whereas the internal market comprises an area which has no internal frontiers and in which goods, persons, services and capital can move freely;

Whereas advertising is a very important means of creating genuine outlets for all goods and services throughout the Community; whereas the basic provisions governing the form and content of advertising must therefore be uniform; whereas, however, this is not currently the case for comparative advertising;

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(1)

(2)

(3)

Whereas the completion of the internal market will mean an ever wider range of choice; whereas, given that consumers can and must make the best possible use of the internal market, the use of comparative advertising must be authorized in all the Member States since this will help demonstrate the merits of the various products within the relevant range; whereas comparative advertising can also stimulate competition between suppliers of goods and services to the consumer's advantage;

Whereas the laws, regulations and administrative provisions of the Member States concerning comparative advertising differ widely; whereas advertising reaches beyond frontiers and is received on the territory of other Member States; whereas the acceptance or non-acceptance of comparative advertising according to the various national laws may constitute an obstacle to the free movement of goods and services and create distortions of competition;

Whereas the sixth recital of Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising<sup>(4)</sup> states that, after the harmonization of national provisions against misleading advertising, "at a second stage..., as far as necessary, comparative advertising should be dealt with, on the basis of appropriate Commission proposals";

Whereas point 3(d) of the Annex to the Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy<sup>(5)</sup> includes the right to information among the basic rights of consumers; whereas this right is confirmed by the Council Resolution of 19 May 1981 on a second programme of the European Community for a consumer protection and

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(4) OJ No L 250, 19.9.1984, p. 17.

(5) OJ No C 92, 25.4.1975, p. 1.

information policy<sup>(6)</sup>, point 40 of the Annex to which deals specifically with consumer information; whereas comparative advertising, when it compares relevant and verifiable details and is neither misleading nor unfair, is a legitimate means of informing consumers to their advantage;

Whereas objective criteria must be established in order to determine which practices relating to comparative advertising are unfair and therefore may distort competition, cause damage to competitors and have an adverse effect on consumer choice;

Whereas, in particular, in order to prevent comparative advertising being used in an unfair and anti-competitive manner, only comparisons between competing goods and services of the same nature should be allowed;

Whereas comparative tests carried out by third parties can constitute a valuable basis for comparative advertising; whereas, however, this independent activity requires clearly defined protection against the unauthorized use of results by advertisers; whereas, where such use is lawfully made, advertisers must themselves assume responsibility for it;

Whereas Article 5 of the first Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks<sup>(7)</sup> confers exclusive rights on the proprietor of a registered trade mark, including the right to prevent all third parties from using in the course of trade any sign which is identical with, or similar to, the trade mark in relation to identical goods or services or even, where appropriate, other goods;

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(6) OJ No C 133, 3.6.1981, p. 1.

(7) OJ No L 40, 12.2.1989, p. 1.

Whereas it may however be indispensable, in order to make comparative advertising effective, to identify the goods or services of a competitor making reference to a trade mark or trade name of which the latter is the proprietor;

Whereas such use of another's trade mark or trade name, provided it complies with the conditions laid down by this Directive and, in particular, does not try to capitalize on the reputation of another trade mark, does not breach this exclusive right given that this kind of use is not intended to steal reputations but to distinguish between them and thus objectively highlight differences;

Whereas provision must be made for the legal and/or administrative means of redress mentioned in Articles 4 and 5 of Directive 84/450/EEC to be available to control comparative advertising which fails to meet the requirements of fairness laid down by this Directive;

Whereas Article 7 of Directive 84/450/EEC allowing Member States to retain or adopt provisions with a view to ensuring more extensive protection for consumers, persons carrying on a trade, business, craft or profession, and the general public should not apply to comparative advertising, given that the objective of this amendment is to allow it in all Member States under the same conditions and with a high level of protection,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 84/450/EEC is hereby amended as follows:

1. The title is replaced by the following title:

"Council Directive of 10 September 1984 concerning misleading and comparative advertising."

2. In Article 2, point 3 is replaced by the following:

"3. 'comparative advertising' means any advertising which explicitly or by implication identifies a competitor or goods or services of the same kind offered by a competitor;

4. 'person' means any natural or legal person."

3. The following Article is added:

"Article 3a

1. Comparative advertising shall be allowed, provided that it objectively compares the material, relevant, verifiable and fairly chosen features of competing goods or services and that it:

(a) does not mislead;

(b) does not cause confusion in the market place between the advertiser and a competitor or between the advertiser's trade marks, trade names, goods or services and those of a competitor;

(c) does not discredit, denigrate or bring contempt on a competitor or his trade marks, trade names, goods, services or activities or aim principally to capitalize on the reputation of a trade mark or trade name of a competitor.

2. Reference to or reproduction of the results of comparative tests on goods or services carried out by third parties shall be permitted in advertising only if the person who has carried out the test gives his express consent. In such cases the advertiser shall accept responsibility for the test as if it had been performed by himself or under his direction."

4. Article 4(1) is replaced by the following:

1. Member States shall ensure that adequate and effective means exist for the control of misleading advertising and comparative advertising in the interests of consumers as well as competitors and the general public.

Such means shall include legal provisions under which persons or organizations regarded under national law as having a legitimate interest in prohibiting misleading or comparative advertising may:

(a) take legal action against such advertising; and/or

(b) bring such advertising before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings.

It shall be for each Member State to decide which of these facilities shall be available and whether to enable the courts or administrative authorities to require prior recourse to other established means of dealing with complaints, including those referred to in Article 5."

5. Article 4(2) is replaced by the following:

"2. Under the legal provisions referred to in paragraph 1, Member States shall confer upon the courts or administrative authorities powers enabling them, in cases where they deem such measures to be necessary taking into account all the interests involved, and in particular the public interest:

- to order the cessation of, or to institute appropriate legal proceedings for an order for the cessation of, misleading or comparative advertising, or
- if misleading or comparative advertising has not yet been published but publication is imminent, to order the prohibition of, or to institute appropriate legal proceedings for an order for the prohibition of, such publication,

even without proof of actual loss or damage or of intention or negligence on the part of the advertiser.

Member States shall also make provision for the measures referred to in the first subparagraph to be taken under an accelerated procedure:

- either with interim effect, or
- with definitive effect,

on the understanding that it is for each Member State to decide which of the two options to select.

Furthermore, Member States may confer upon the courts or administrative authorities powers enabling them, with a view to eliminating the continuing effects of misleading or comparative advertising the cessation of which has been ordered by a final decision:

- to require publication of that decision in full or in part and in such form as they deem adequate,
- to require in addition the publication of a corrective statement."

6. Article 5 is replaced by the following:

"Article 5

This Directive does not exclude the voluntary control of misleading or comparative advertising by self-regulatory bodies and recourse to such bodies by the persons or organizations referred to in Article 4 if proceedings before such bodies are in addition to the court or administrative proceedings referred to in that Article."

7. Article 7 is replaced by the following:

"Article 7

1. This Directive shall not preclude Member States from retaining or adopting provisions with a view to ensuring more extensive protection, with regard to misleading advertising, for consumers, persons carrying on a trade, business, craft or profession, and the general public.

2. Paragraph 1 shall not apply to comparative advertising."

Article 2

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 1992 at the latest. They shall inform the Commission thereof forthwith.

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

Article 3

This Directive is addressed to the Member States.

Done at Brussels,

For the Council

The President

COMPETITIVENESS AND EMPLOYMENT IMPACT STATEMENT

Question

I. What is the main reason for introducing the measure?

Answer

I. To harmonize the laws on comparative advertising in order to ensure that the consumer's right to information is respected and that appropriate safeguards exist to avoid conflicts between advertisers due to incompatible national laws.

Question

II. Features of the businesses in question. In particular:

(a) Are there many SME?

(b) Are they concentrated in regions which are:

(i) eligible for regional aid in the Member States?

(ii) eligible for ERDF aid?

Answer

II. A number of advertising agencies and manufacturers can certainly be considered to be SME, but there are no particular regional concentrations.

Question

III. What direct obligations does this measure impose on businesses?

Answer

III. It imposes no obligations. Advertisers will be free to use comparative advertising in those Member States where it is currently banned or potentially risky.

Question

IV. What direct obligations are local authorities likely to impose on businesses?

Answer

IV. None.

Question

V. Are there any special measures in respect of SME?  
Please specify.

Answer

V. None.

Question

VI. What is the likely effect on:  
(a) the competitiveness of businesses?  
(b) employment?

Answer

VI. (a) Competition should be enhanced.  
(b) None.

Question

VII. Have both sides of industry been consulted?  
Please indicate their opinions.

Answer

VII. The advertising industry is in favour of this enabling directive, although some businessmen regard comparative advertising as unfair competition.

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