



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 04.03.1998
COM(1998) 121 final

COMMUNICATION FROM THE COMMISSION

TO THE COUNCIL, THE EUROPEAN PARLIAMENT
AND THE ECONOMIC AND SOCIAL COMMITTEE

**The follow-up to the Green paper on Commercial Communications
in the Internal Market**

Table of Contents

<u>EXECUTIVE SUMMARY.</u>	
<u>INTRODUCTION.</u>	1
Objective.	1
The Green paper's proposals.	2
Response to consultation.	2
<u>SECTION I. SUMMARY OF RESPONSES TO THE GREEN PAPER ON COMMERCIAL COMMUNICATIONS.</u>	4
The European Parliament	4
The Economic and Social Committee	4
Member States	4
Interested parties	5
<u>SECTION II. THE COMMISSION'S RESPONSE</u>	7
1. Objective	7
2. Scope	7
3. Actions	8
1) Applying a transparent assessment methodology.	8
2) Setting up a Commercial Communications' Expert Group.	10
3) Making available a Commercial Communications' contact point and information network.	12
4) Establishing a Commercial Communications' Database.	13
5) Accelerating complaint resolution	13
6) Setting up an Expert network.	13
7) Promoting International co-operation.	13
8) Clarifying electronic commerce aspects.	14
9) Keeping the Parliament informed.	14
4. Priority areas for the Expert Group's consideration.	14
1) The protection of minors.	14
2) Unfair competition laws and associated matters.	15
3) Sponsorship.	15
4) Claims and misleading advertising.	16
5) Redress systems.	16
6) Application of the proportionality assessment methodology at national level.	17
Annex 1. A summary of the proposals made in the Green paper on Commercial Communications in the Internal Market.	
Annex 2. Summary of responses to the Green paper on Commercial Communications in the Internal Market.	

EXECUTIVE SUMMARY.

The May 1996 Green paper on Commercial Communications in the Internal Market recognised the importance of the sector in terms of employment and growth potential and its key role in helping European businesses and non-profit making associations to market their goods and services throughout the Union. These services affect a number of important public interest objectives such as the protection of consumers and public health and are therefore subject to a variety of different national regulations. The Green paper noted that the divergence of these national regulations together with the development of cross-border commercial communications was leading to obstacles to the proper functioning of the Internal Market. At the same time, the increase in cross-border commercial communications, in particular in the area of new Information Society services and electronic commerce, could adversely affect the efficient protection of public interest objectives.

The very high level of response confirmed this sector's importance. In addition to the European Parliament, the Economic and Social Committee and ten Member States, 433 interested parties responded to the call for comment over the past 18 months. In general, there was strong support for the Commission's proposals. Indeed, suggestions were made both to strengthen and add to them.

The Commission has therefore decided to adopt a range of actions in this sector with the objective of facilitating the cross-border provision of commercial communication services through the establishment of an efficient and transparent framework which will also ensure an appropriate protection of public interest objectives concerned. These actions represent a tool to assist relevant authorities in their analysis of problems in this field. This approach is fully consistent with, and complementary to, the Single Market Action Plan's Strategic target 1 of making rules more effective.

More specifically, the Commission proposes:

1) *The application of a transparent, assessment methodology.* In many cases, the examination of the compatibility of a restriction to cross-border commercial communications with Internal Market principles raises the issue of its proportionality with the public interest objective pursued. The Commission will apply, where appropriate, the proportionality assessment methodology described in the Green paper. This will increase the speed and efficiency with which infringements are processed and also improve the quality of any harmonisation initiatives the Commission will propose in the field of commercial communications.

2) *Setting up a Commercial Communication Expert Group.* The Commission will set up a Commercial Communications Expert Group to establish transparent and efficient administrative co-operation between itself and the Member States and a dialogue with interested third parties. In response to the calls of the Parliament and the Member States, the Commission will ensure that any possible duplication with Commission Committees' activities will be avoided. It will also ensure that the Expert Group acts rapidly in the relevant areas. The Expert group will not cover issues that are already dealt with by Commission committees.

3) *Making available a Commercial Communications' contact point and information network.* The Commission will establish a central contact point in the Directorate General for the Internal Market and Financial services (DGXV) for interested third parties which will work closely with the other Directorates General involved with policy in this field. It will also establish a Web site to facilitate information flows and transparency.

4) *Establishing a Commercial Communications Database.* The Commission will establish an information database on national and Community regulations and self-regulatory codes.

5) *Accelerating complaint processing.* The Commission will continue its general efforts to speed up the handling of complaints. In this field, it will make efforts to reduce delays by using, where appropriate, the proportionality assessment methodology.

6) *Setting up a network of academic experts.* The Commission will establish a “representative group of academic experts” interested in the various aspects of the commercial communication field in order to assist its work and that of the Expert Group of Member States’ representatives. The network of academic experts will be invited by the Commission to provide opinions on specific issues.

7) *Promoting International co-operation.* The Commission will promote the principles of this approach in international negotiations.

8) *Clarifying electronic commerce issues.* The Commission will take account of restrictions concerning commercial communication services in its current examination of the specific legal issues relating to the development of cross-border services in the Information Society. In certain areas where there is legal insecurity it will propose clarification in the context of a proposal relating to electronic commerce and associated Information Society services.

9) *Keeping the European Parliament informed.* The Commission will inform the European Parliament on the application of this approach including an evaluation of the work carried and an update of the work programme.

The Commission will apply this approach to four key areas where commercial communication regulations at the national level diverge significantly and therefore potentially give rise to both Internal Market barriers and to a lack of effective protection across borders within the Community. The four areas are (i) the *protection of minors*, (ii) *unfair competition*, (iii) *sponsorship* and (iv) *misleading claims*.

INTRODUCTION.

Objective.

The European Commercial Communications sector plays a key role in the European Community. It employs in excess of 1 million Europeans and it is growing thanks to the development of new communications technologies and demand. Examples of this growth are well reported. In the specialised area of telemarketing the current number of 193,500 employees in Europe is forecast to grow to 669,500 in the year 2001. Growth of internet related commercial communications is similarly expected to increase. For France, Germany, the Netherlands and the United Kingdom alone it is forecast that these new commercial communication services could amount to 1.3 billion Ecus in 2002. This is reflected in the development of new specialised on-line agencies and internet audience measurement specialists. Its importance for employment is further emphasised by the fact that many users of commercial communications have marketing and marketing research personnel that must be added to the total employed directly by the sector. It should be emphasised that the creative parts of this sector depend on new young talent and the sector is therefore important in terms of youth employment in Europe.

The sector also plays a key role in promoting the competitiveness of European business. Without cost-effective marketing campaigns, businesses cannot develop markets or indeed are unable to render viable investments in new products or services. Furthermore, commercial communication services are critically important for the realisation of the Internal Market given that if businesses cannot communicate their presence, products and services across borders, they will not be able to engage in cross-border trade. Finally, these services also help finance all media. It is recognised internationally that the development of information society services and electronic commerce are, and will continue to be, largely financed by revenues earned from carriage of these services.

The Commission acknowledges that an Internal Market approach was required in this area given that there existed no co-ordinated framework for the sector even though it is: (i) regulated for a wide variety of public interest objectives and (ii) increasingly offering services across borders, thanks to the development of new communications channels.

The Commission's approach to the area of commercial communications has to take account of the importance and sensitivity of the various public interest objectives – such as health, safety, environmental and consumer protection- which may be pursued by Member State measures giving rise to difficulties for cross-border commercial communications. Article 100a of the Treaty makes it clear that Internal Market measures which affect such public interest objectives must take as a base a high level of protection. The importance accorded to these public interest objectives by Community law is reflected also in Article 129, 129a and 130r of the Treaty.

It follows that a certain balance must be struck between Internal Market concerns and other objectives validly pursued by Member States. In determining what action the Commission should take in this area, a certain sensitivity must be shown towards the different social and cultural situations in the various Member States.

This Communication summarises the responses to the Green paper on Commercial Communications in the Internal Market (COM(96) 192 final) and presents the Commission's approach aiming at establishing a European policy framework for commercial communication services. Commercial communications means:

“All forms of communication seeking to promote either products, services or the image of a company or organisation to final consumers and/or distributors.”

The Green paper's proposals.

On 8 May 1996, the Commission adopted a Green paper on Commercial Communications in the Internal Market. The Green paper followed an extensive survey exercise to which over 1,000 interested parties responded.

The Green paper stressed that the sector of commercial communications was of significant importance to the functioning of the European economy; cross-border commercial communications were a growing phenomenon in the Internal Market; differences in national regulations gave rise to regulatory problems for users, suppliers and carriers of such services as well as their recipients and these problems were likely to become more manifest as communications possibilities improved with the advent of the Information Society. These problems are witnessed by the increasing number of complaints in this field. The number of these complaints and the calls for European action from interested parties will multiply as a consequence of the technical ease with which commercial communication services can now cross-borders thanks to the development of electronic commerce.

Given these concerns and since these services are used to promote cross-border trade of all goods and services circulating within the Internal Market, the Green paper proposed (see Annex 1) a review of existing restrictions to ensure that there exists a qualitative Community framework allowing for cross-border provision of such services together with effective cross-border protection of public interest objectives and redress against abuses.

Two key proposals were made to ensure, in view of the expected growth in cross-border commercial communication services, that this review would lead to the establishment of a high quality, appropriate and coherent European framework:

- the application by the Commission's services of an assessment methodology aiming to facilitate and render transparent the assessment of the compatibility with the Treaty of restrictions on cross-border commercial communications;
- two inter-related tools to improve co-ordination and information exchange between the Commission, the Member States and interested parties:
 1. An Expert Group of Member States representatives whose aim would be, on the basis of the proposed assessment methodology, to help find constructive solutions to problems for cross-border commercial communications, to safeguard the coherence of national initiatives and to improve the cross-border protection of public interest objectives in this field.
 2. In response to both the call for improved information flow and the need to provide the data required for the application of the assessment methodology, the Commission will establish a central information contact point which would co-ordinate an information and communications network between itself, the Member States and all interested parties.

These proposals meet the objective of ensuring effective regulation as set out in the Commission's Single Market Action Plan which was adopted in June 1997 (CSE(97)1 final). More specifically, they represent a framework for enforcement and problem solving in order to improve the Community legal framework for commercial communications.

Response to consultation.

European Parliament.

The European Parliament adopted its resolution on the Commission Green paper on Commercial Communications in the Internal Market ((COM(96)0192 - C4-0365/96). PE 260.946) at its Plenary meeting on 15.7.97.

Economic and Social Committee.

On the 27 November 1996 the Economic and Social Committee adopted its opinion on the Green paper from the Commission on Commercial Communications in the Internal Market. (O.J. No C 66/11 of 3.3.97).

Member States.

To date, the Commission has received responses from ten Member States. These are Austria, Belgium, Denmark, Germany, Finland, France, the Netherlands, Portugal, Sweden and the United Kingdom.

Interested parties.

The Commission received 433 replies from the five groups of interested parties demonstrating the wide interest in this field of Community policy. These can be broken down as follows: 127 suppliers of commercial communication services (e.g. advertising agencies and of which 30 were European or national trade associations), 44 receiver associations (e.g. consumer associations or public health bodies), 197 users (e.g. advertisers, of which 70 associations) 52 carriers (e.g. media, of which 18 associations) and 13 self-regulatory bodies.

SECTION I. SUMMARY OF REACTIONS TO THE GREEN PAPER ON COMMERCIAL COMMUNICATIONS.

Given the purposefully broad questions that were set at the end of each section of the Green paper, responses have tended to comment on the entire text and all its proposals. The detailed summary in Annex 2 of this Communication covers those points that received the most comments. The key positions of the Institutions and interested parties were as follows.

The European Parliament.

The European Parliament in its resolution dated 15.07.97 gave strong support to the proposals made in the Green paper. The Parliament wished for the scope of the definition of commercial communications to be extended to include on-pack commercial communications such as on-pack price promotions, coupons, free-gifts etc.

Regarding the two key proposals the Parliament's position was as follows:

On the proposed assessment methodology, the Parliament gave its full support and indeed, demanded for it to be strengthened by making it mandatory for the Commission's work, adding strict time limits for Commission decisions and requiring that it be applied to all national restrictions whether they be in law or self-regulatory codes.

As regards the Expert Group, contact point and the information network, again the Parliament voted with a strong majority in favour of these proposals.

On the Expert Group, the Parliament called for it to be as open and transparent as possible. In order to ensure transparency and efficiency it also called for the Expert Group to meet regularly and reach opinions on specific issues raised to it within short and strict time limits. It requested that the Expert Group should prepare a regular report for the Parliament to allow the latter to monitor its progress. Finally, it felt that the contact point should also provide a central data bank on regulations and self-regulatory codes in the European Community.

The Parliament also identified the areas of regulations that it felt should be the first to be examined under the new approach. These were regulations on commercial communications for children, the regulatory framework for unfair marketing methods and differing national restrictions on brand diversification, on-pack commercial communications, events and television sponsorship.

Finally, it added to the proposals. It called for a system of appeal against the Commission's decision to proceed with or close infringement cases and added that all efforts should be made to ensure that self-regulatory systems be strengthened as well as operated according to the principle of country of origin control.

The Economic and Social Committee.

In its opinion, the Economic and Social Committee strongly supported all of the proposals made in the Green paper. Unlike the Parliament, it did not indicate a priority on which areas of regulations should first be subject to the proposed approach.

The Economic and Social Committee was particularly supportive of the proposed assessment methodology and especially the economic chain reactions which it felt accurately mirrored how the market for commercial communications operated in the real world. It applauded the establishment of the Expert Group and suggested that Member States should copy the Commission's lead by establishing national central contact points for policy in the field of commercial communications.

Member States.

A large majority of the ten Member States who responded was supportive of the proposals. Only one of the ten felt that the assessment methodology was not acceptable in principle. The

others were supportive with a few suggesting that the consumer impacts should be more fully integrated in the economic chain reaction.

Likewise, all the Member States who responded on the proposal to establish an Expert Group were favourable. Two stated that consumer associations should be involved as well as self-regulatory bodies and another two insisted that it should not duplicate the work of other committees or in any way add further delay to the Commission's already long infringements' procedure.

Seven of the ten Member States commented on the contact point and information network. They all agreed to these but two made the point that consumer associations should be able to have full access to these and should be given sufficient resources to be effective.

Finally, the Member States went through the priority areas listed in the Green paper in detail (see Annex 2) pointing out where they thought the new approach should first be applied. They also made a number of further proposals including the need for further work on cross-border dispute settlement systems and the need to accelerate the existing infringement procedure which was considered to be too slow.

Interested parties.

A large number of interested parties (both from consumer associations and industry) agreed with the Parliament that the definition of commercial communications should include on-pack forms of such services. A large majority of interested parties favoured the assessment methodology and a number of differing suggestions were made to strengthen this. This majority called for mandatory application of the methodology. A number also felt that new legislative proposals should be assessed with the proposed methodology to ensure that they would not create new barriers in the Internal Market. Self-regulatory codes should also be subject to it. Finally, the majority believed that the Commission should make a commitment to process infringement cases in this field more rapidly given that the assessment methodology should allow the Commission to be more efficient in its future work. Certain consumer associations had doubts that the methodology would work without improvement. In particular, they felt that the economic chain reaction should give more emphasis to impacts on consumers. A few respondents from all the responding groups stated that subsidiarity was more important than proportionality and finally a few respondents suggested that the economic chain reaction was far too complex to evaluate and should therefore be dropped.

On the Expert Group the vast majority of respondents from all five interest groups welcomed this proposal. However, most called for the Expert Group not to add to add further delays either to the processing of infringement cases or to the launching of required harmonisation initiatives. Various suggestions were made as to how the Expert Group should be composed and operate ranging from the use of opinions from accompanying industry or consumer groups which would bring together national associations representing interested parties to its dependence on public hearings. Consumer associations opposed the continual presence of self-regulatory bodies and felt that this should be balanced with a representation of themselves. Many respondents from the five consulted groups called for the Expert Group to draw conclusions on a specific point within a fixed time frame and requested that these conclusions be made public. There was broad support for the contact point and information network.

Given the very large number of respondents and their different concerns it is not possible to summarise the priority areas that were mentioned by them all. However, it is important to note that all the problems raised in the Green paper were referred to across the responses that were received.

Finally, a number of consumer associations and public health bodies called for easier access to national and Community regulations in this field for their members. They also called on the

Commission to enforce its efforts on effective enforcement, particularly in cross-border cases. They felt that the Commission should examine and develop new systems for cross-border dispute settlement systems given the increase in cross-border commercial communications that was expected. Industry was critical of the existing infringements' procedure and called for improvements. In particular, it was felt that this should be made more transparent and timely. Some respondents called for the Commission to commit itself to strict processing time limits and to decisions that should be subject to appeal by all interested parties concerned.

SECTION II. THE COMMISSION'S RESPONSE.

1. Objective.

The approach seeks to facilitate the cross-border provision of commercial communication services within the Internal Market through the establishment of an efficient and transparent framework. This will promote the growth of the European commercial communications' sector and allow for the development of efficient cross-border marketing strategies by European industry.

This approach will at the same time ensure the efficient protection of public interest objectives. The Commission considers consumer protection and the protection of other public interest objectives as being essential for the development of the European Community and the proposed approach in the field of Commercial Communications intends to meet these objectives. The Commission considers that an efficient protection of such public interest objectives across the entire Community also ensures the efficient functioning of the Internal Market. There is therefore a balance to be found between the objective of promoting the growth of cross-border commercial communication services and that of ensuring consumer protection.

2. Scope.

The Commission approach will be applicable to 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.

The Commission has extended the scope of the definition proposed in the Green paper to include *on-pack communications* which are not covered by labelling regulations following, in particular, comments from consumer bodies and advertisers.

These services fall within the scope of Articles 59 and 60 such as interpreted by the jurisprudence of the Court. Indeed, such services are remunerated and can be, or are, provided on a cross-border basis. The fact that these services (be they to an individual or other business) are not paid for by the final consumer cannot be invoked to contest the service nature of these activities.

In certain circumstances commercial communication activities could, according to the case law of the European Court of Justice benefit from the application of Article 30 of the EC Treaty relating to the free movement of goods. The Court's recognition of the indirect economic link between commercial communication services and the sale of goods is clearly explained in a number of cases that were referred to in the Green paper.

3. Actions.

1) Applying a transparent assessment methodology.

The Commission's services will, in future decisions taken in this field, apply, where appropriate, the following assessment methodology which builds on that described in the Green paper (see Annex 1) but adds two further criteria in recognition of cultural and social differences in the Member States and the need to ensure coherence across public interest objectives. The methodology consists of two steps.

First step: (Analytical overview). The objective of the first step is not to undertake the proportionality test as such but to set out a complete "picture" of the impacts of the measure. The aim is not to identify restrictions but to provide a factual overview of all possible effects of a measure in particular on activities that the measure is meant to regulate and also on the public interest objectives such as consumer protection and public health. The first step characterises either (i) the relevant national measure restricting the free movement of commercial communication services or (ii) the harmonisation measure proposed by the Commission.

Seven criteria are proposed for this characterisation; (i) What is the potential economic chain reaction and the resulting impact on consumers caused by the measure? (ii) What are the public interest objectives motivating the measure?; (iii) Is the measure linked to the invoked public interest objective?; (iv) Does the measure affect other public interest objectives? (v) How efficient is the measure in achieving the invoked public interest objective? (vi) Does the measure reflect cultural or social specificity? (vii) Is the measure coherent across all relevant public interest objectives and notably those of consumer protection and public health?

Second step: (Legal assessment). On the basis of this overview and the factual information that it provides, the second step consists of an overall legal assessment of whether, for a national measure, it could be considered to be proportional or, in the case of Community measure, it would be proportional and also coherent with other Community measures. By knowing the key characteristics of the measure, the above mentioned seven criteria will help the relevant authority to be in a better position to assess its proportionality and coherence.

The methodology will thus take particular account of the impact of commercial communications on the public interest objectives of the protection of consumers and public health. This methodology is not an automatic test for assessing proportionality which is left to the decision of the relevant authority. Nor is it a cost-benefit or a mathematical analysis seeking to quantify the value of public interest objectives. It is only a means of ensuring that such evaluations are based on a complete overview of the effects of the measure concerned. In this respect this methodology does not substitute the criteria developed by the Court but rather assists in their application. Even if the application of this methodology is not rendered mandatory, as was explicitly requested by the parliament, the Commission's services will, where appropriate, apply it when:

- (i) considering infringement cases in the field of commercial communication services raising the issue of proportionality.
- (ii) providing analysis and discussing issues within the Commercial Communications Expert Group (see below). The Commission plans that discussions on the regulatory problems for cross-border commercial communications brought to the attention of the Expert Group will be oriented on the basis of this methodology.

The Commission's services will, where appropriate, apply the assessment methodology when designing the Commission's own initiatives which are directly linked to the provision

of commercial communication services. This will further help to ensure the transparency and coherence of such proposals across the Community's policy competencies.

The assessment methodology will provide the following benefits;

(i) Facilitate the required application of the Treaty.

As the guardian of the Treaty, the Commission, taking account of all the objectives of the Treaty, should assess the compatibility with the principle of free movement of services of restrictions arising from the application of differing national regulations to cross-border commercial communication services. As demonstrated in the Green paper, many of these cases give rise to problems of proportionality of the relevant measures and, in any case, the Commission has to assess proportionality in conformity with the jurisprudence of the Court. The Commission is obliged to undertake this task to ensure that it is not possible to remove barriers that have been identified by application of the Treaty. This has to be assessed before proceeding with Internal Market harmonisation. It is worth noting that in the opposite case where measures are considered as being disproportionate this does not mean that Member States cannot take measures to protect the public interest objectives concerned. They would rather be required to adopt other measures which meet these objectives in a more proportionate way.

(ii) Achieve greater transparency and legal security.

Some legal uncertainty in the field of commercial communications could follow from the lack of transparency and differing interpretations of the principle of proportionality in Article 3B of the Treaty and in the jurisprudence of the Court on the principles of free movement. In presenting how it intends to proceed when assessing the proportionality of national restrictions or Community initiatives in the field of commercial communications, the Commission seeks to achieve greater transparency and legal security vis à vis the European Institutions, Member States and interested parties. This legal security is crucial for entrepreneurs considering investing in Europe in electronic commerce.

(iii) Improve the protection of public interest objectives.

It is important that in line with existing Community directives or proposals for such directives, the Community and Member States should efficiently protect public interest objectives such as the protection of consumers and public health. However, it is also important to avoid these objectives being unjustifiably invoked so as to protect their own national market and thus fragment the Internal Market. The only way to achieve these requirements within the area without frontiers is to promote an approach which focuses on the quality and the substance of the protection aimed for by the measure. The recognised intention to protect should be apparent from an assessment of the concrete content of the measure. Furthermore, a more systematic analysis of the effects of measures would help detect where existing measures are not sufficient for protecting the public interest objectives and, therefore, where supplementary measures are necessary. In this respect it is worth noting that through assessing the reactions in the market, the methodology identifies the overall impact on consumer protection or other public interest objectives such as public health.

In this context the application of a transparent assessment methodology would have positive impacts on consumer protection and the protection of public health since:

- It would, in particular, help identify national legislation in terms of consumer protection or other public interest objectives which offers best practice in the Community. Given that any citizen could expect to benefit from a high level of protection, such a common methodology will facilitate the assessment of the differing levels of consumer protection.

- It will contribute to the design of efficient initiatives in this field. For example, through the economic chain reaction assessment one can evaluate how market players react to

