



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 13.13.1996
COM(96) 700 final - COD.343

OPINION OF THE COMMISSION

pursuant to Article 189 b (2) (d) of the EC Treaty,
on the European Parliament's amendments
to the Council's common position regarding the

proposal for a
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

**AMENDING DIRECTIVE 84/450/EEC
CONCERNING MISLEADING ADVERTISING
SO AS TO INCLUDE COMPARATIVE ADVERTISING**

AMENDING THE PROPOSAL OF THE COMMISSION

pursuant to Article 189 a (2) of the EC Treaty

EXPLANATORY MEMORANDUM

I THE BACKGROUND

On 19 March 1996 the Council of the European Union established a common position with a view to the adoption of a Directive amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising.

On 23 October 1996 the European Parliament adopted at its second reading, in the framework of the co-decision procedure, its opinion on the common position (rapporteur: Mrs Oomen-Ruijten). This opinion contains 16 amendments, eight of which were accepted by the Commission at its plenary meeting.

Pursuant to Article 189b(2)(d) of the Treaty, the Commission must deliver an opinion to the Council concerning Parliament's amendments. In this particular case the opinion alters the Commission's proposal as provided for in Article 189a(2) of the Treaty.

II THE COMMISSION'S POSITION ON THE AMENDMENTS

At its plenary meeting the Commission agreed to accept amendments 1, 2, 4, 8, 9, 16, 20 and 21. However the Commission cannot accept amendments 3, 6, 12, 13, 15, 17, 18 and 19, for the following reasons:

Amendments 3 and 15 concern comparative tests. At the Edinburgh European Council in 1992, the Commission undertook to revise a series of proposals - including the proposal on comparative advertising - so as to remove certain aspects that were incompatible with the principle of proportionality. In the case in point the Commission considered that the provisions on comparative tests (which featured in the initial proposal) could be withdrawn because they were not strictly necessary in order to achieve the proposal's objectives.

Amendments 6, 18 and 19 concern voluntary regulatory systems. The creation of a "European self-regulatory umbrella body" (Amendment 19) is unacceptable because of the potential financial implications for the Community budget. The role of the national self-regulatory bodies (Amendments 6 and 18) is already given due recognition in Article 5 of Directive 84/450/EEC and Amendment 18 could lead to distortions not only with regard to comparative advertising but also with regard to misleading advertising (which is also covered by the same provision).

Amendments 12 and 13 have to be rejected because of the excessive and unreasonable burden they would place on advertisers, bearing in mind the other conditions already contained in the text of the common position (Article 3a).

Amendment 17 modifies the first paragraph of Article 4 of Directive 84/450/EEC. If accepted, its effect would be to allow Member States to "require prior recourse to other established means of dealing with complaints, including those referred to in Article 5" (self-regulatory procedures). Such an amendment could prevent or at any rate delay consumer access to ordinary justice, and might well be incompatible with Article 6 of the European Convention on Human Rights.

III AMENDED PROPOSAL

In view of the above, and in compliance with the provisions governing the co-decision procedure, the proposal has been amended by the Commission so as to include Amendments 1, 2, 4, 8, 9, 16, 20 and 21 of the European Parliament.

**AMENDED PROPOSAL FOR A EUROPEAN PARLIAMENT
AND COUNCIL DIRECTIVE
AMENDING DIRECTIVE 84/450/EEC
CONCERNING MISLEADING ADVERTISING
SO AS TO INCLUDE COMPARATIVE ADVERTISING**

COMMON POSITION OF THE COUNCIL

THE EUROPEAN PARLIAMENT AND
THE COUNCIL OF THE EUROPEAN
UNION,

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

Having regard to the proposal from the
Commission¹,

Having regard to the opinion of the Economic
and Social Committee²,

Acting in accordance with the procedure
referred to in Article 189b of the Treaty (3),

(1) Whereas one of the Community's main
aims is to complete the internal market;
whereas measures must be adopted to ensure
the smooth running of the said market;
whereas the market comprises an area which
has no internal frontiers and in which goods,
persons, services and capital can move freely,

(2) Whereas the completion of the internal
market will mean an ever wider range of

AMENDED PROPOSAL

THE EUROPEAN PARLIAMENT AND
THE COUNCIL OF THE EUROPEAN
UNION,

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

Having regard to the proposal from the
Commission,

Having regard to the opinion of the
Economic and Social Committee²,

Acting in accordance with the procedure
referred to in Article 189b of the Treaty,

Unchanged

(2) Whereas the completion of the internal
market will mean an ever wider range of

1. OJ No C 180, 11.7.1991, p. 14.

2. OJ No C 49, 24.2.1992, p. 35.

choice; whereas, given that consumers can and must make the best possible use of the internal market, and that advertising is a very important means of creating genuine outlets for all goods and services throughout the Community, the basic provisions governing the form and content of comparative advertising should be uniform and the conditions of the use of comparative advertising in the Member States should be harmonized; whereas this will help demonstrate the merits of the various comparable products; whereas comparative advertising can also stimulate competition between suppliers of goods and services to the consumer's advantage;

(3) Whereas the laws, regulations and administrative provisions of the individual Member States concerning comparative advertising differ widely; whereas advertising reaches beyond the 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, in particular, firms may be exposed to forms of advertising developed by competitors to which they cannot reply in equal measure; whereas the freedom to provide services relating to comparative advertising should be assured; whereas the Community is called on to remedy this situation;

(4) Whereas the sixth recital of Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of laws, regulations and administrative provisions of the Member States concerning misleading advertising³ states that, after the harmonization

choice; whereas given that consumers can and must make the best possible use of the internal market, and that advertising is a very important means of creating genuine outlets for all goods and services throughout the European Community, the basic provisions governing the form and content of comparative advertising should be uniform and the conditions of the use of comparative advertising in the Member States should be harmonised; whereas if these conditions are met this will help demonstrate objectively the merits of the various comparable products; whereas comparative advertising can also stimulate competition between suppliers of goods and services to the consumer's advantage;

Unchanged

Unchanged

3. OJ No L 250, 19.9.1984, p. 17.

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';

(5) Whereas point 3 (d) of the Annex to the Council resolution of 14 April 1975 on a preliminary programme of the European Economic Committee for a consumer protection and information policy⁴ 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 Economic Community for a consumer protection and information policy⁵, point 40 of the Annex, which deals specifically with consumer information; whereas comparative advertising, when it compares relevant, verifiable and representative features and is not misleading, is a legitimate means of informing consumers of their advantage;

(6) Whereas it is desirable to provide a broad concept of comparative advertising to cover all modalities of comparative advertising;

(5) Whereas point 3(d) of the Annex to the Council resolution of 14 April 1975 on a preliminary programme of the European Economic Committee for a consumer protection and information policy⁴ 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 Economic Community for a consumer protection and information policy⁵, point 40 of the Annex, which deals specifically with consumer information; whereas comparative advertising, when it compares essential, verifiable and representative features and is not misleading, may be a legitimate means of informing consumers of their advantage;

Unchanged

4. OJ No C 92, 25.4.1975, p. 1.

5. OJ No C 133, 3.6.1981, p. 1.

(7) Whereas conditions of permitted comparative advertising, as far as the comparison is concerned, should be established in order to determine which practices relating to comparative advertising may distort competition, cause damage to competitors and have an adverse effect on consumer choice; whereas such conditions of permitted advertising should include criteria of objective comparison of the features of goods and services;

Unchanged

(8) Whereas the comparison of the price only of goods and services should be possible if this comparison respects certain conditions, in particular that it shall not be misleading;

Unchanged

(9) Whereas, in order to prevent comparative advertising being used in an anti-competitive and unfair manner, only comparisons between competing goods and services meeting the same needs or intended for the same purpose should be permitted;

Unchanged

(10) Whereas the conditions of comparative advertising should be cumulative and respected in their entirety; whereas this shall not prevent Member States from defining modalities of implementation for each of the conditions, in order to find the appropriate solution in each case;

Deleted

(11) Whereas these conditions should include, in particular, consideration of the provisions resulting from Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs⁶, and in particular Article 13 thereof, and of the other Community provisions adopted in the agricultural sphere;

Unchanged

(12) Whereas Article 5 of First Council

Unchanged

6. OJ No L 208, 24.7.1992, p. 1.

Directive 89/104 of 21 December 1988 to approximate the laws of the Member States relating to trade marks⁷ 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;

(13) 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;

Unchanged

(14) Whereas such use of another's trade mark, trade name or other distinguishing marks does not breach this exclusive right in cases where it complies with the conditions laid down by this Directive, the intended target being solely to distinguish between them and thus to highlight differences objectively;

Unchanged

(15) Whereas provisions should 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 conditions laid down by this Directive; whereas Article 6 applies to unpermitted comparative advertising in the same way;

Unchanged

(16) 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

Unchanged

7. OJ No L 40, 11.2.1989, p. 1. Directive last amended by Decision 92/10/EEC (OJ No L 6, 11.1.1992, p. 35.)

profession, and the general public, should not apply to comparative advertising, given that the objective of amending the said Directive is to establish conditions under which comparative advertising is permitted;

(17) Whereas a comparison which presents goods or services as an imitation or a replica of goods or services bearing a registered trade mark shall not be considered to fulfil the conditions to be met by permitted comparative advertising;

Unchanged

(18) Whereas this Directive in no way affects Community provisions on advertising for specific products and/or services or restrictions or prohibitions on advertising in particular media;

Unchanged

(19) Whereas if a Member State, in compliance with the provisions of the Treaty, prohibits advertising regarding certain goods or services, this ban may, whether it is imposed directly or by a body or organization responsible under the law of that Member State for regulating the exercise of a commercial, industrial, craft or professional activity, be extended to comparative advertising;

Unchanged

(20) Whereas Member States shall not be obliged to permit comparative advertising for goods or services on which they maintain or introduce bans, including bans as regards marketing methods or advertising which targets vulnerable consumer groups;

(20) Whereas Member States shall not be obliged to permit advertising for goods or services on which they maintain or introduce bans which comply with the provisions of the Treaty, including bans as regards marketing methods or advertising which target vulnerable consumer groups and bans based on the codes of ethics laid down by some professions in the exercise of the self-regulating powers granted under the general legal system;

(21) Whereas regulating comparative advertising is, under the conditions set out in this Directive, necessary for the smooth running of the internal market and whereas action at Community level is required;

Unchanged

whereas the adoption of a Directive is the appropriate instrument because it lays down uniform general principles while allowing the Member States to choose the form and appropriate method by which to attain these objectives; whereas it is in accordance with the principle of subsidiarity.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

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

1. the title shall be replaced by the following: *Unchanged*

'Council Directive of 10 September 1984 concerning misleading and comparative advertising'; *Unchanged*

2. Article 1 shall be replaced by the following: *Unchanged*

'Article 1 *Unchanged*

The purpose of this Directive is to protect consumers, persons carrying on a trade or business or practising a craft or profession and the interests of the public in general against misleading advertising and the unfair consequences thereof and to lay down the conditions under which comparative advertising is permitted.';

3. the following point shall be inserted in Article 2: *Unchanged*

'2 (a): "comparative advertising" means any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor'; *Unchanged*

4. the following Article shall be added: *Unchanged*

'Article 3a

1. Comparative advertising shall, as far as the *Unchanged*

comparison is concerned, be permitted when the following conditions are met:

(a) it is not misleading according to Articles 2 (2), 3 and 7 (1);

Unchanged

(b) it compares goods or services meeting the same needs or intended for the same purpose;

Unchanged

(c) it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;

(c) it objectively compares one or more essential, verifiable and representative features of those goods and services, which may include price;

(d) it does not create confusion in the market place between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor;

Unchanged.

(e) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services or activities of a competitor;

(e) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services or activities, personal qualities or circumstances of a competitor;

(f) for products with designation of origin, it relates in each case to products with the same designation;

Unchanged

(g) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;

Unchanged

(h) in the case of professional services, it does not conflict with codes of conduct which comply with the provisions of the Treaty and have been laid down in the exercise of the self-regulating powers granted under the general legal system.

2. Any comparison referring to a special offer shall indicate in a clear and unequivocal way

Unchanged

the date on which the offer ends or, where appropriate, that the special offer is subject to the availability of the goods and services, and, where the special offer has not yet begun, the date of the start of the period during which the special price or other specific conditions shall apply ;

5. the first and second subparagraphs of Article 4 (1) shall be replaced by the following: *Unchanged*

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

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

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

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

6. Article 4 (2) is hereby amended as follows: *Unchanged*

(a) the indents in the first subparagraph shall be replaced by the following: *Unchanged*

- to order the cessation of, or to institute appropriate legal proceedings for an order for the cessation of, misleading or unpermitted comparative advertising, or *Unchanged*

- if the misleading or unpermitted comparative advertising has not yet been published but publication is imminent, to order the prohibition of, or to institute appropriate legal *Unchanged*

proceedings for an order for the prohibition of, such publication,;

(b) the introductory wording to the third subparagraph shall be replaced by the following: *Unchanged*

'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 unpermitted comparative advertising, the cessation of which has been ordered by a final decision:'. *Unchanged*

7. Article 5 shall be replaced by the following: *Unchanged*

'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.'. *Unchanged*

8. Article 7 shall be replaced by the following: *Unchanged*

'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. *Unchanged*

2. Paragraph 1 shall not apply to comparative advertising as far as the comparison is concerned. *Unchanged*

3. The provisions of this Directive shall apply without prejudice to Community provisions on advertising for specific products and/or *Unchanged*

services or to restrictions or prohibitions on advertising in particular media.

4. The provisions of this Directive concerning comparative advertising shall not oblige Member States which, in compliance with the provisions of the Treaty, maintain or introduce advertising bans regarding certain goods or services, whether imposed directly or by a body or organization responsible, under the law of the Member States, for regulating the exercise of a commercial, industrial, craft or professional activity, to permit comparative advertising regarding those goods or services. Where these bans are limited to particular media, the Directive shall apply to the media not covered by these bans.

Unchanged

Article 2

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive at the latest 30 months after its publication in the Official Journal of the European Communities. They shall forthwith inform the Commission thereof.

Unchanged

2. When Member States adopt these measures, they 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 Member States.

Unchanged

3. Member States shall communicate to the Commission the text of the main provisions of domestic law which they adopt in the field governed by this Directive.

Unchanged

Article 3

This Directive is addressed to the Member States. *Unchanged*

Done at . . .

For the Council
The President

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