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"ADVERTISING AND COMPETITION IN THE ENLARGED EUROPEAN COMMUNITY"

An address given on Tuesday, 18th September 1973
by Mr. Sean G. Ronan,
Director-General for Press and Information,
Commission of the European Communities.

(Introductory remarks)

The combination of the two words "advertising" and "competition" in the title of this talk is no accident. Advertising is part of the public face of competition. Their interdependence is such that when either is diminished the other suffers. The opposite is not necessarily true, however, and massive advertising by a single undertaking can have the effect of inhibiting competition. It is at this point that the element of fairness may be introduced and we come to the last part of the title, namely the context of the enlarged European Community.

One of the earliest phrases in the preamble to the Treaty of Rome is that which reads: "Recognising that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition" and the Treaty goes on to make provision for doing just that. Fair competition, in this context, is seen in the phrase of Article 3 of the Treaty as an undistorted pattern in the economic sense. Articles 85 and 86, to which I shall return later, go on to set out the parameters for this economic field. Unfair competition, in its non-economic but ethical sense is something rather different, and it is within this field that advertising is affected.

In seven of the nine member countries of the Community there is a general law of unfair competition. In Ireland and the United Kingdom there is no

law as such. It is important that you should know something of the background of this area of law because it comes within the harmonisation programme of the Community and the outcome will affect advertising, particularly as between one competitor and another - and the building society world is very competitive.

The basic principle of the law of unfair competition is summed up in the words of Article 10 bis of the International Convention for the Protection of Industrial Property (known as the Paris Convention) 1883 - 1964. It describes it as "any Act of competition contrary to honest practices in industrial or commercial matters". I am not a practising lawyer and do not want to get bogged down in legal technicalities of international law, but it might help us all to know the kind of thing that is regarded as being contrary to honest practices. Within the area of unfair competition, a broad classification has been made by Professor Paul Roubier, a late dean of the Law Faculty at Lyons University. The ingredients are: (1) causing the public to confuse one's own business with a rival one, (2) disparagement of a competitor, (3) creating disorganisation within a rival concern, (4) creating general confusion in the market, although looking at the market today one wonders if it could get more confused.

Acts of unfair competition may be grouped under eight main heads, but I will speak only of those which might be relevant in building society terms. The first is the risk of confusion of name and reputation, which may occur when a society changes its name or adopts one so similar to that of a competitor that confusion may arise. This has happened. Three other relevant acts are: misleading advertising, denigration and comparative advertising which often go together, and what is called annoying and offensive sales promotion methods. These include touting and "psychological pressure", such as giving people free rides or entertaining them before applying a sales spiel. I cannot imagine anyone in this audience doing such a thing, but you never know.

I have thought it necessary to give you this background because the harmonisation programme of the Community in this field will concentrate on misleading advertising as a priority. At the first meeting of government experts held last November, an expose was made by Professor Ulmer of the

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Max Planck Institute, Munich, of the whole area of unfair competition law of the member states, and it became apparent during the meeting that in addition to unfair competition, what had to be tackled was the wider concept of fair trading, taking into account the role of the consumer who for so long has been left out of the picture. Although the three new member states had not at that time acceded to the Community, representatives of the Irish, British and Danish governments were present at the meeting and were able to give their views. Another meeting will be held later this year, when no doubt guidelines will be started upon.

One of the tasks will be to align the law of unfair competition, which is part of the civil code of those countries which have such a law, with the penal regulations of criminal codes or legislation such as the British Trade Descriptions Act, 1968. Civil law carries with it the remedies of damages and injunction, which can be sought to stop an advertising campaign alleged to be misleading or damaging to a competitor; criminal law has its sanctions of fines and imprisonment if the public is being deceived or defrauded.

As an example of the kind of definition which is likely to be discussed, let us take one of the most recent European laws, the Belgian decree of 14th July 1971, which defines advertising as "all statements published with the direct or indirect object of promoting the sale of a product or service to the public, wheresoever and whatsoever the means of communication may be", and the measure goes on to forbid all advertising which contains statements likely to mislead the public as to "the identity, nature, composition, origin, quantity or characteristics of a product.....". This seems to be the kind of definition which reasonable people would think was about right.

You may know that the subject of misleading advertising has already been closely examined by a working party of the Council of Europe, whose report was adopted by the Ministers in March 1972 (Reference-Supplement to B (72) 21). This called upon the member states of the Council to take appropriate measures necessary to introduce into their national legislation comprehensive provisions - where they did not already exist - to prohibit in any form or medium advertising which directly or indirectly was likely to mislead consumers of the advertiser's goods or services in such a way as to influence

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their decision to avail themselves of those goods and services. Special emphasis is given to advertising which is likely to mislead as to the nature, composition, origin, quantity, qualities, date of manufacture or properties of the goods or, so far as is relevant, services described by the advertisement; and the price actually to be paid by the consumer for the goods and services offered or any favourable comparison made by the advertiser with other prices.

It is likely, then, that parallel action will be going on with the Commission proceeding with its harmonisation programme and individual countries, both inside and outside the Community, bringing forward legislation in this field. I have already quoted the Belgian law, but the United Kingdom has just passed the Fair Trading Act which will have far reaching effects. France also has a Bill before Parliament, as has Denmark, so there is plenty of action afoot.

As all this legislative activity embraces both goods and services, the Building Society movement cannot but be involved, and the closest attention should be paid to the march of events.

I have no need to emphasize to this audience the points which feature in building society advertisements which are likely to be under scrutiny for accuracy and fairness, such as true rate of interest, withdrawal facilities, tax concessions, special facilities for pensioners, capital accretion. These are merely some that come to mind. As to the way in which these matters are actually handled, rather than how they are advertised, we enter into another field.

The position within the Commission is that some preliminary work has been done with regard to hire-purchase and other forms of consumer credit. A study was made in the section dealing with consumer affairs when it was part of DG IV, the department responsible for competition, and the subject is now within the competence of the Internal Market Department, DG XI. The Consumer Information and Protection Division also has a keen interest in this subject and will no doubt have a reference to it in the action programme on consumer matters which will be coming before the Commission shortly. The Consumers Consultative Committee which the Commission decided to establish at its meeting on 11th September will also no doubt be keenly interested. The studies which have been so far completed are likely to lead to a harmonising directive on hire-purchase, taking into account other forms of consumer credit. It is too early yet to say in what ways current building society practice is likely to be affected, if at all, but I am sure that you

will have ample opportunity to give your views if your interests are concerned.

I turn now to the wider field of competition. I suspect that the implications of Articles 85 and 86 of the Rome Treaty are well enough known to you to save me elaborating on them. In a sentence, Article 85 prohibits agreements restricting competition and Article 86 deals with improper exploitation within the Common Market by one or more companies in a dominant position. Both aim at maintaining effective competition in the Common Market.

It would seem to me that the Building Society movement is one in which there is a healthy, lively competition fully in keeping with the spirit of the Treaty of Rome, and I have no inside knowledge of any view to the contrary. Perhaps then, we should look at the other side of the coin - the dangers of over-concentration resulting from mergers. The Paris Summit Conference of October 1972 drew attention to the problem of such mergers. Let me read you the relevant extract from the communiqué:-

"The Heads of State or of Government consider it necessary to seek to establish a single industrial base for the Community as a whole. This involves the formulation of measures to ensure that mergers affecting firms established in the Community are in harmony with the economic and social aims of the Community, and the maintenance of fair competition as much within the Common Market as in external markets in conformity with the rules laid down by the Treaties." To achieve this end the Heads of State or Government agreed that "it was desirable to make the widest possible use of all the provisions of the Treaties, including Article 235 of the Treaty of Rome". (This Article states that where action by the Community appears necessary to achieve one of the objectives of the Community, and where the Treaty has not provided for the necessary powers of action, the Council shall, by unanimous decision , on a proposal from the Commission and after the Assembly has been consulted, take the appropriate steps.)

Obviously, for the Commission to know whether particular concentrations are likely to be such as to upset the balance of competition, it needs to be informed of proposed mergers of any size. This requirement has led to the

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preparation of a proposal for a Regulation of the Council on the control of mergers. You have perhaps heard of this, as it has been publicised. I think it worthwhile for me to say something about this proposed Regulation which is going forward to the Council of Ministers. It could obviously have an effect on Building Societies and would be relevant if operational links were to be established between building societies, banks, insurance companies and the like. In a constantly changing world - to return to the theme of this Congress - new ideas, new combinations of financial forces, new company structures are emerging all the time. We like to see them emerging - but merging can sometimes be a different matter.

That this question of concentrations is important can be seen from the figures. Between 1962 and 1970 the number of business concentration in the Community of the Six - defined as financial participations of more than 50% - rose from 73 to 162. In comparison with 1962, the yearly number of concentrations had increased three and a half times by 1970. In comparison with 1962-1966, the rate of increase in 1966 - 70 had almost doubled. Of the new countries, there has been a particular increase in the number of concentrations in Great Britain.

The dangers to the maintenance of effective competition caused through over-concentration are well enough known and lead not only to the adoption of price policies which may be completely arbitrary, but also to restricted consumer choice and workers' freedom to choose between employers. Furthermore, dominant undertakings are often in a position to keep potential competitors out of the market.

The draft regulation debate upon which, in the words of Commissioner Albert Borschette, is likely to be "long and difficult", will oblige firms to notify all envisaged mergers where the ultimate organisation would have an accumulated turnover of more than one billion units of account - the intricacies of which as a subject I shall not attempt to describe. However, it is proposed that this provision of notification will not apply where the aggregate turnover of the undertakings participating in the concentration is less than 200 million units of account and the goods or services covered by the concentration do not account in any one member state for more than 25% of the turnover in identical or similarly regarded goods or services by

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consumers. It has been calculated that in 1971, about 25 mergers within the Community would have met the criterion of two billion units of account. I should add that firms already exceeding this turnover will be obliged to notify intent to purchase another firm only if the latter has a turnover of more than 30 million units of account.

In the draft article dealing with rules for calculating turnover and market shares, it is proposed that for banking and financial institutions the criterion of turnover should be based on their total assets - the suggested figure is one-tenth because it was found that the total assets of the banks and finance-houses represent approximately ten times the turnover of the corresponding industrial undertakings. For insurance companies the total of premium received by them has been adopted as a criterion. It seems to me that building societies should be regarded as financial institutions for the purpose of that draft regulation, as well as for the purpose of all the other regulations mentioning "financial institutions" (such as directives on capital movements; freedom of establishment and services; harmonisation of company law). It seemed to me important that I should bring this proposal to your attention and, if you were not already fully briefed on its implications, to stimulate you to ascertain how your own affairs might be affected. Everyone has to look to his own bread and butter.

There are, of course, other provisions in the proposed regulation of an explanatory and defining nature, as well as the nuts and bolts of administrative action. I have no doubt that your liaison machinery will be in operation with my colleagues in DG IV (Internal Market) who have the matter in hand.

Incidentally, I have assumed that you appreciate the difference between an EEC Regulation and a Directive. For those of you who may not be thoroughly familiar with Community procedures, perhaps I may be allowed to explain that a Regulation is binding in all respects on large matters of policy and becomes effective in all member states immediately according to the date laid down within it, whereas a Directive is an edict which is binding as to its end, but not as to the means by which it is to be applied; in other words, it is addressed to the member states who then have to decide how they will implement the objective of the Directive. Let me repeat that the proposal regarding concentrations is for a Regulation and not a Directive.

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I have been talking about legislations both national and Community-wide which concern all the different sectors of business, industry and banking alike. I should mention briefly, I think, that some banking and financial regulations contain particular provisions which have a bearing on competition in the credit sector. The banking laws of some countries require, for instance, an authorisation for every merger in the banking sector. This does not directly aim at regulating fair competition in banking, but has much more to do with the protection of savings. However, indirectly such clauses will have to be taken into account when studying competition problems in your field.

Immediately, other provisions of this kind come to our minds, especially, are the commercial banks free to hold participations in non-banking companies? As you know, the answer to this question differs from one member state to another according to the differences in banking legislations. Since we are going to have a monetary union, wouldn't it be necessary indeed to have some of the basic structures of the banking systems harmonised as well? And if I say "banking", I mean it in the broadest sense, including, of course, the building societies' world. For this reason, a working party on "coordination of banking legislations" was set up some time ago and is at present studying a draft coordination directive which contains some clauses such as those that I have just mentioned. What the results of these discussions will be - nobody yet knows. But in any case, they will have a bearing on the problems that I have been talking about. As I understand, some of the specialised committees of this Congress will be dealing with these coordination questions in more detail, and another colleague of the Commission, Mr. Clarotti, will take the opportunity of saying some words in this context. Thus, I may leave it at these few remarks.

In an organisation like the EEC Commission which has so many projects in various stages of gestation from a gleam in an official's eye to the promulgation of a Council decision in the Official Journal, it is extremely difficult to be a successful Jack Horner and pick out a particularly juicy plum, (~~and I do not claim to be an unusually good boy.~~) Nevertheless, I hope I have given you some food for thought which will not be too great a strain on the digestion.

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