

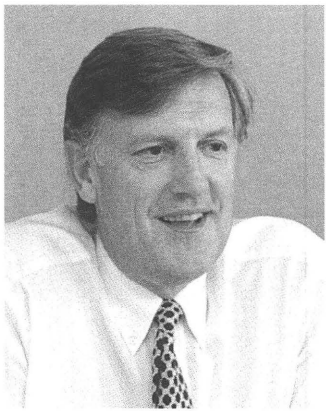
COMMERCIAL COMMUNICATIONS

The Journal of Advertising and Marketing Policy and Practice in the European Community
Sponsored by DG XV (The Directorate General for the Internal Market and Financial Services) of the European Commission

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A question of proportionality

John Mogg, Director General, DG XV



John Mogg

The second issue of this newsletter followed in the tradition of the first; we received a most positive response from our readers. Many of your comments served to confirm the results of our survey, which showed that there appear to be significant regulatory problems in the field of commercial communications within the Single Market. This third issue discusses some of those problems; later issues will no doubt extend the discussion.

The Single Market potentially offers many opportunities both to consumers and to users and to the providers of commercial communications services. These advantages range from economies of scale or scope for providers to better and more consistent information to consumers. Indeed, there is a fundamental principle of the EC Treaty that enshrines the freedom to provide services. That freedom is reflected in what is known as 'secondary legislation', such as Directives and Regulations.

As part of its tasks the Commission is required to ensure that the provisions of the EC Treaty are correctly applied by the Member States. If a company or an individual complains that a specific law or administrative measure is not compatible with Internal Market Law, the Commission has a duty to examine the complaint it receives. If the measure is considered incompatible, the Commission may start an infringement procedure. Complaints have proved to be an effective way of drawing the Commission's attention to national legislation that may be incompatible with EC law. It is worth stressing that the Commission is bound to examine and evaluate all such complaints. The identity of complainants is confidential, and the procedure is free of charge! The results are, of course, subject to any subsequent decision of the European Court of Justice.

The Commission will determine whether the measure in question gives the nationals of the Member State concerned preferential treatment. Justification by the Member States concerned for such measures (known as "discriminatory" measures), may be based on

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three specified grounds: public policy, public security or public health. Even where measures are applied to all operators irrespective of nationality, but nonetheless have a restrictive effect (referred to as 'indistinctly applicable' measures) such measures have to be justified by 'overriding requirements relating to the general interest'. These general or public interest objectives have been developed in the case law of the Court, and include the protection of privacy, the protection of workers and consumers, industrial and intellectual property and the protection of national treasures possessing artistic, historic or archaeological value.

National measures designed to promote a recognized general interest objective must meet the test of proportionality. This is currently determined using the guidelines laid down by the Court, namely that the measure should be appropriate to the objective, necessary to achieve the objective, and finally, that it does not go further than required. For example, are there other less restrictive measures that could be used by the Member State to achieve the objective?

These are admittedly rather vague legal concepts. They can be evaluated differently by various interested parties in relation to any particular restriction. For example, certain restrictions on advertising to children can obviously be justified under the fundamentally important general interest objective of the protection of minors. The Commission is currently considering this issue in the context of national bans on children's TV advertising.

In this issue of the newsletter, the complexity of the proportionality test is demonstrated by some very different views on the subject expressed by the interested parties: the Swedish Ombudsman, who favours such bans; a toy manufacturers' association, which gives its view of the impact of such a measure; and commercial television channels whose activities are also affected. These views provide some insight into the complexity of assessing the proportionality of complaints in the field of commercial communications. When considering the proportionality criteria laid down by the Court, the Commission has to reflect on the effect of the measure on the business of the 'user' of commercial communications services, the business of the service 'suppliers', the business of the 'carriers' (media) of these commercial communications, and, of course, on the target group which the measure is seeking to protect.

The issue of proportionality will be considered in greater depth in a Green Paper on commercial communications. Meanwhile, readers are encouraged to write to the Editor or to the Commission about any regulatory restrictions on transfrontier commercial communications service contracts that they believe affect their operations (whether they are suppliers of such services, such as advertising agencies, or users, such as branded goods manufacturers or suppliers or providers of services). I hope that organizations representing consumers will also make their views known. The essential purpose of this Newsletter is to act as an effective communications channel between you and us. I hope it will be used to voice your opinions. In this way the debate will be better informed and more sharply targeted. And more lively too!

Editorial Comment

This issue sees debate being joined in earnest in three public policy areas relating to the development of commercial communications. It is a measure of the widespread support for a publication that affords readers this opportunity that our contributors are turning to its pages so readily. We hope you will continue to take the opportunity to raise with us issues of concern to you. We will schedule these for publication as soon as possible.

One of the issues that continues to be the subject of much debate is that of advertising to children. It is particularly helpful that Sweden's Consumer Affairs Ombudsman has taken the opportunity to explain the attitudes to this held by the Swedish people. Equally, the implications of restrictions on commercial communications for both industry and broadcasters need to be acknowledged. There may, indeed, also be implications for children, some of which may not be wholly benign.

These considerations are but a short step away from a closer examination of the principles of subsidiarity and proportionality. Certainly subsidiarity does not appear to be a concept that is clearly understood or defined although, as a principle, it seems all too readily invoked. At the present time, from the point of view of commercial communications, there needs to be a closer examination of this in relation to discussions on the revisions to the Television Without Frontiers Directive.

There is also the question of self-regulation and the extent to which the commercial communications sector in Europe can evolve a code, or set of codes, which need only be underpinned by a minimal regulatory framework. Support for this view, put forward in this issue by a leading Dutch lawyer, is qualified by Jim Murray of BEUC (the European Consumer association) who gives an account of his organization's attitude to this approach.

Commercial Communications does not concern itself exclusively with these public policy matters, however. We hope that we are also able to provide practical information of value to those engaged in cross-border communications. To that end, this issue provides an account of the dramatic changes taking place within the German television market, practical advice on the implementation of cross-border sales promotions and the first findings of a campaign which has been using the new measure of short-term advertising effects described in the last issue.

We are also glad to welcome some valued additions to our Editorial Advisory Board. These are: Mr Spyros Pappas, the Director General of DG XXIV (Consumer Policy) of the European Commission; Mr Kenneth Collins (Chairman of the Committee on the Environment, Public Health and Consumer Protection of the European Parliament); Mr Karl von Wogau (Chairman of the Committee on Economic and Monetary Affairs of the European Parliament) and Mr Elmar Brok (Member of the European Parliament).

Given the nature of *Commercial Communications* and our attempts to provide a forum for debate, the views expressed in the publication are not necessarily those of the publisher or any member of the Editorial Board. We hope you will continue to participate in the development of the publication.

Advertising and Children

Television advertising directed at children

Axel Edling
Consumer Affairs Ombudsman
The National Swedish Board
for Consumer Policies

The Swedish legal tradition has a very negative view on censorship and the general rule is that citizens enjoy complete freedom of information - both to receive and disseminate it. In line with this, and to support these fundamental rights, the public including the press and other media also enjoy considerable rights concerning access to official documents and records. These fundamental rights are afforded special protection in the Instrument of Government, the Freedom of the Press Act and the Fundamental law on Freedom of Expression. These documents form the corner stones of the Swedish constitution.

By any international standard, Sweden is an open society. Indeed Sweden has sometimes been criticized for being too open. However, there are some, if very few, limitations. In line with many other countries there is, for example, a restriction on TV tobacco advertising. One

further restriction that has been discussed very much in recent years is the Swedish ban on TV advertising directed towards children.

In Sweden television advertising directed towards children under the age of 12 is not allowed under the Radio Act 1966. Also all kinds of advertising directly before and after children's programs is forbidden. This provision was first introduced in 1989 and its present formulation was laid down by amendments in 1991 (SFS 1991:1066). The provisions received widespread support in Parliament. Section 11 of the Radio Act provides that

The ban on advertising to children under Section 11 is supported by a majority of the Swedish population

"Advertisements transmitted during commercial breaks on television must not be aimed at attracting the attention of children under the age of 12. Persons or characters who play prominent parts in television programmes directed primarily towards children under the age of 12 may not appear in commercial advertisements." Section 15 provides, inter alia, that "Commercial advertisements may not be made during the advertising time immediately preceding or following a programme directed primarily towards children under the age of 12."

It should be added here that Section 11 covers not only advertising of children's products such as toys but also advertising of other products such as food. The ban is not aimed categorically at any specific type of product. Instead the decisive criteria are considerations like the shaping of the commercial message (participation of children, sort of language used etc.), and the hour of transmitting



Axel Edling

the commercial.

The ban on advertising to children under Section 11 is supported by a majority of the Swedish population¹. It is also wholeheartedly supported by Swedish consumer organisations and by television viewers.

Reasons for the stand

What are our reasons for this firm stand? The ban has attracted considerable attention in the ongoing revision of the European Directive on TV broadcasts (1989). The application of the Swedish Marketing Act to satellite television is currently subject to proceedings at the European Court of Justice. I will not discuss here the legal issues involved but wish rather to look at the underlying moral and ethical issues on which section 11 of the Radio Act is based.

It is evident that the idea of a ban such as the Swedish one will be opposed by advertisers. Also the idea of banning TV advertising to children will perhaps be considered as alien in many countries where such advertising has taken place for many years.

The most important difference between advertising and programmes in television is that advertising always tries to influence us to buy something. The difference is the commercial purpose. And if children do not understand the true purpose it is impossible for them to be able to make any discriminating assessment of the situation. They represent a group of potential consumers, indeed a group with increasing purchasing power, yet on account of their youth are easily influenced by impressions conveyed by adults. They are perhaps the most susceptible group of all consumers in this respect. As grown ups we usually put on a pair of critical eye glasses when we see advertising.

But children cannot do this. They are exposed and should be protected. The first line of protection is usually provided by the adults closest to them, normally the parents. But this is a difficult, perhaps impossible, task for parents alone and the

A substantial part of the research done in this field indicates that it is only around or after the age of 12 that we can be more certain that most children have developed a more complete understanding of the purpose of advertising

common view in Sweden, particularly on the part of parents, is that children should not be the target of commercial pressure through a medium as potent as TV.

Further, there are clear indications that children cannot generally distinguish between television advertising and programmes. It is important to stress the fact that children at an earlier age may very well be aware that TV ads are presented in a different form than TV programmes. That however, does not mean that they are also aware of the commercial purpose. A substantial part of the research done in this field indicates that it is only around or after the age of 12 that we can be more certain that most children have developed a more complete understanding of the purpose of advertising². Therefore it is not fair play - and consequently not morally acceptable - to create advertising in order to influence children. This is the main rationale for the Swedish ban (the preparatory works state that "to use television in this way would clearly violate the interests of children"). This view has been adopted not least from an understanding of the enormous effectiveness of the TV medium.

But children look at advertising for

adults, why can they not have their own? In fact, research shows that children more easily understand the purpose of TV advertising directed toward adults than the purpose of ads directed at themselves. They are, for example, likely to perceive

Young viewers are, however, inexperienced in economic issues. It is also from this point of view that commercials for children should be regarded as an ethical issue

toy advertising as mere information on how to play with the toys³.

Children are an important economic factor. To companies they represent an enormous purchasing potential. They become aware of certain products at an early age and significantly affect the purchasing decisions of their parents. Therefore they are an attractive target group for many players in the market. Young viewers are, however, inexperienced in economic issues. It is also from this point of view that commercials for children should be regarded as an ethical issue.

A large proportion of food advertising in connection with children's programmes bears testimony to the fact that companies increasingly to challenge the decisions of parents. One negative result may be the deterioration of children's eating habits. This aspect is developed in a recent report from The National Food Alliance in Great Britain ("Advertisers Dream - Nutrition Nightmare"). According to this report, advertising for food high in fat, sugar and salt and with low dietary fibre seems to be very common on children's television in the UK. In my view these findings deserve to be taken seriously.

Conclusion

To sum up and conclude. The Swedish ban on TV advertising towards children aims at protecting a vulnerable consumer

group, namely children, from undue commercial pressures. A majority of Swedish consumers consider this ban to be a vital part of modern consumer protection. The issue should be seen as an even wider one than a consumer issue in that it touches upon the family, inter alia, by challenging parental authority and interferes with the right of a country to uphold its cultural traditions. Consequently the consumer side is anxious to retain it, even in the face of strong business pressures to have it removed. Particularly in the spirit of subsidiarity within the EU, people in Sweden would assume support from other Union Members to retain possibilities of our carefully considered restriction on TV commercials directed towards children.

Footnotes

¹ Allmänhetens inställning till TV-reklam, (Study of the public opinion on TV-advertising), Report 1993/94:11, The National Swedish Board for Consumer policies, 1993

- Erling Bjurströms compilation of research in this field, Children and Television advertising - A critical study on international research concerning the effects of television advertising on children. The National Swedish Board for Consumer Policies, 1994

³ Børn og tv-reklame (Children and TV advertising, NORD 1992:4)

Advertising to Children

The perspective of a commercial broadcaster

Sue Eustace
Responsible for European Affairs
The ITV Association

Anyone involved in the discussions over the last 12 months on the revision of the TV Without Frontiers Directive, must have been struck by the change of mood since the 1980s, particularly with regard to the advertising chapter. The first time around, the whole rationale for a Directive was to enable television broadcasts to circulate freely around the Community. As long as broadcasters complied with the Directive's minimum rules, as implemented in the country of origin, they would have a passport into other EU countries and could not be blocked, even if the receiving country's rules on advertising were more restrictive.

The crusade to liberalize the Internal Market appears to have ended - for television at least - and now the Directive's whole rationale is under threat. What was once an Internal Market Directive has become a Culture Directive. The big political issues have been how to protect our audiovisual heritage by tightening up European quotas, and whether or not to include 'new services' (such as Video-on-Demand) in the Directive. Advertising - the lifeblood of commercial broadcasters and an essential element in the development of markets - has, until recently, been somewhat overlooked. However, it is now moving rapidly to the top of the agenda, due to issues which are 'hot' in some Member States. One such issue is Sweden's restrictive position on advertising to children. The industry now fears that the 1989 Directive's careful balance between consumer protection and freedom to advertise could be prejudiced by trade-offs. More important from my perspective is the knowledge that the introduction of unnecessarily stricter rules on TV advertising would directly impact on broadcasters' ability to invest in programmes.

Advertising revenue is, for many commercial broadcasters, their sole source of revenue. It is they who would be primarily

affected by any reduction in children's advertising. However, there would also be an impact on public broadcasters in Europe because, unlike in the UK, most of them rely on revenue from advertising as well as licence fees. In a study recently carried out by the European Group of Television Advertising (EGTA)¹, which has 25 public broadcasters in its membership, children's advertising made up about 6% of their revenue. This translates as approximately 240 million ECUs of net global annual revenue, excluding agency commissions. Programme spend (of which 65% was spent on own programme production and 12% on European production) was roughly equivalent (228 million ECUs). No corresponding figures exist for European commercial broadcasters, but I strongly suspect that the link between programme spend and commercial revenue would be even more marked.

In the UK, commercially-funded programming has a particularly long history and a beneficial effect in terms of expanding choice. ITV and, more recently, Channel 4 and satellite channels - the Children's Channel, Nickleodeon and Disney - have expanded the options for children's programming in a way which

The industry now fears that the 1989 Directive's careful balance between consumer protection and freedom to advertise could be prejudiced by trade-offs

would not have been possible with public service funding alone.

To take one particular example, ITV, the UK's oldest and largest commercial broadcaster, invests about £40 million a year in programmes for children, most of which originate in the UK. These are quality programmes, funded solely by advertising (and some sponsorship) revenue. Yet ITV competes head-on for audiences with the UK's public service



Sue Eustace

broadcaster, the BBC, which is funded by licence fee, not advertising.

ITV, unlike most European commercial broadcasters, has public service obligations to broadcast children's programmes and its regulatory body, the Independent Television Commission (the ITC), must ensure that it maintains diversity and quality in the schedule. When ITV companies bid for their licences in 1991, they willingly took on these programme obligations and calculated the cost of meeting them on the basis of pro-

Where is the in-depth research to support the notion that advertising to children is undesirable? Is it true for the majority of EU countries?

jected advertising revenue over the next ten years. In calculating their licence bids, the ITV companies assumed that they would continue to sell advertising in and around children's programmes on the same basis as before - i.e., that it would be strictly regulated, but permissible. It is important for legislators to recognize that, were European rules to introduce new restrictions or bans on advertising revenue that were unforeseen at the beginning of the licence period, business plans would be thrown into disarray. More importantly for its viewers, ITV's capacity to invest in a quality schedule, which attracts nearly half the UK children's audience, would inevitably be diminished.

For evidence of the direct correlation between advertising revenue and investment in children's programme production, we have only to look at what is happening in Greece, where commercial broadcasters have been prevented for the past year from broadcasting toy advertising between 7.00 a.m. and 10.00 p.m. I am told that their 1996 programme

schedules have already been affected. One broadcaster is substituting children's programmes with adult-targeted films. Another is trying to keep its children's programming alive by re-runs of 1993 cartoons and by broadcasting low-budget action series. New entrants to the TV market in Greece broadcast hardly any children's programmes, except on weekend mornings before 7.00 a.m. There are, therefore, clear signs - only one year after the ban was introduced - of direct production investment being drastically cut. This also affects indirect production investment from other sources like sponsorship and barter agreements.

In view of these serious consequences for broadcasters, European programme producers and viewers, one would expect proposals for new restrictions or bans on children's advertising to be based on very compelling reasons indeed. But where is the in-depth research to support the notion that advertising to children is undesirable? Is it true for the majority of EU countries? And is the need proportionate to the proposed measure? These are fundamental issues which the Commission must examine in the study it has promised to conduct on advertising to children, prior to the next review of the Directive.

The ITC will shortly publish the results of recent qualitative research into the ability of 4 to 9 year old children to understand and interpret television advertising. The research probed whether modern advertising techniques confuse or mislead children and whether the UK's current rules are sufficient. We will have to wait for the published results, but I am confident that they will support the argument that even quite young children are adept at interpreting advertising aimed at them.

At the heart of the 'ban advertising to children' lobby is a sincere and often unchallenged assumption that 'pester power' is caused by TV advertising. TV ad-

vertising is of course influential, which is why there are so many restrictions on content and timing in our Codes of Practice. But this view conveniently ignores the many other influences on children. In December 1993 and 1994, Good Morning Television (GMTV), the commercial breakfast television channel, conducted research, with a panel of over 1,000 households (regular viewers of breakfast television), which showed that, for children between 6 and 11 years' old, catalogues and visits to toy shops played a more influential role than TV advertisements on their choice of toys and games. Children are also mightily influenced in the playground. It is interesting to note that the modern version of marbles - 'POG' milk caps manufactured by Waddingtons - has become one of the most popular playground games of the 90s, despite the fact that it has received no above-the-line advertising at all. Such is the power of peer-group pressure. And it would be strange if this phenomenon were an isolated one in Europe!

Perhaps, too, it is not entirely fanciful to suggest that, since children in the EU are growing up in a free-market economy, an acquaintance at an early age with one of the most visible manifestations of that economy might not be altogether a bad thing, subject of course to proper controls on content.

This category of advertising is already subject to very substantial rules and restrictions in terms of its content. This was amply demonstrated by the recent survey carried out by the European Advertising Standards Alliance (EASA)², on the subject of advertising to children in Europe.

Despite the lack of convincing objective evidence to support the notion of the supposed harmful effects of advertising to children, it is, unfortunately, all too easy to take the moral high-ground and simply to argue that it should all be banned, as Sweden has done. We are told that it is a

top political priority with the Swedes, now they have entered the EU, to extend their domestic restrictions to everyone else through European legislation. Recent signs from the Council of Ministers suggest that, if they do not get their way this time, they might do so the next time around. In attempting this, they will almost certainly receive some support from Greece, which will presumably seek to perpetuate its own protectionist ban on toy advertising.

As I have shown, the consequences should not be underestimated and there is no doubt that the European children's programme production sector would be seriously threatened. With so much at stake, the Commission, when it undertakes its study on the effect of children's advertising, will have to take a firm stand to ensure that arguments in favour of prohibitions, which seem sometimes to owe more to crusading zeal than to empirical observation, are examined with proper intellectual rigour and that emotional reactions do not cloud the facts.

Footnotes

¹ EGTA (European Group of Television Advertising) represents the sales houses/departments of 25 European broadcasters who are members of the EBU (European Broadcasting Union).

² EASA (European Advertising Standards Alliance) brings together 21 national self-regulatory organisations from 18 European countries. Its main activities are to promote advertising self-regulation, to co-ordinate cross-border complaints and to provide information on self-regulation in Europe. In October 1995 it published a 'Survey on Self-Regulation for Advertising and Children in Europe' which is available on request from the EASA's Brussels office.

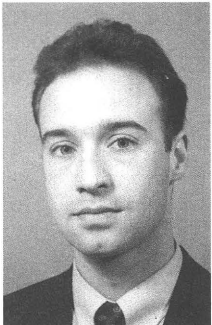
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Advertising to children in the Internal Market

The manufacturer's perspective

Stefan Luiten
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Stefan Luiten

The European Commission is currently considering whether it will proceed with a letter of formal notice challenging the Greek ban on television advertising for toys which has been in place since November 1994. The significance of getting this ban removed is generally understood to transcend the specific interests related to toys. The ultimate effect of the ban being tolerated may be to create a precedent for banning advertising for the same or different products by other Member States.

The TME (Toy Manufacturers of Europe) have repeatedly stressed that the Greek ban is clearly a protectionist measure. From the procedure in the Greek Parliament which led to the toy advertising ban, it is evident that this ban was actively lobbied for by local Greek toy manufacturers and traders as a protectionist measure to shield their business against toy companies from elsewhere in the EU trying to access the Greek market. The best evidence of this lies in the nature of the ban itself since it is limited to prohibiting advertising only for toys.

It seems obvious that the Commission is being taken advantage of by Greece, which uses emotional arguments (the protection of children) to cover up blatant trade protectionism. The Greeks, however, are increasingly being exposed in this. A large number of articles have appeared in the Greek press in which Greek retailers and Greek toy manufacturers

A large number of articles have appeared in the Greek press in which Greek retailers and Greek toy manufacturers openly state their satisfaction with the 20% rise in market share for Greek toys

openly state their satisfaction with the 20% rise in market share for Greek toys. This they ascribe to the reduced level of international competition following the intro-

duction of the toy advertising ban.

It is to be hoped, therefore, that the Commission will proceed to consider the trade protection basis of this measure and consequently to perform its duty to remove barriers to the functioning of the Internal Market. Not surprisingly, the measure is regarded as a highly sensitive matter because it is claimed to be necessary to protect minors. However, the following views could be put forward on how an outright ban on television advertising for toys does not assist in such protection.

1. There would seem to be no justification for upholding bans such as that imposed in Greece. Advertising that conforms to statutory and voluntary national and European rules (as laid down in the Broadcasting Directive) guarantees that children are not being misled and is a form of communication that has no harmful influence on children's development. This has been established by extensive reviews of academic research on the subject.

2. Greek children will be disadvantaged, with a greatly restricted choice of toys compared to that enjoyed by other children within the Union. For many toy manufacturers, television advertising is the most effective, if not the only, means of launching new products. If TV stations are prevented from being able to broadcast toy commercials, they will be failing to provide a service to manufacturers which is essential to the introduction of their products to the Greek market. Furthermore, the reduced competition on national manufacturers could lead to increases in the prices of local products and a failure to promote innovation and product development.

3. Greek children will be further disadvantaged since the loss of advertising revenues will severely limit the budgets

available to broadcasters for the development of quality children's programming. Toy advertisers currently invest about 20 MECU a year in advertising on Greek television channels. Greek broadcasters will be unable to compete with foreign channels broadcasting in their home market which are not subject to similar restrictions on their programming budgets.

The Wider Perspective

4. From an industrial point of view, the measure can be criticized from a number of perspectives. Such a ban infringes the principle of free movement of services and will seriously affect the business of providers of services that are linked to TV advertising. In addition to the loss of revenue to Greek broadcasters, advertising agencies' contracts, with manufacturers from outside Greece alone in relation to toy advertising, amount to 25 MECU.

5. The ban acts as a barrier to trade. Companies from elsewhere in the EU will be prevented from accessing the Greek market and getting their products into distribution. Wholesalers and distributors increasingly demand effective TV advertising support as a precondition for taking products into distribution. The advertising support diminishes the risk that they will be left with unsold stock. For companies already in the Greek market, the ban results in a loss of competitiveness. This is particularly true for toy companies as they are required to invest in constant product innovation with their business being subject to ever changing trends. As a result of the ban, the market share of companies will ultimately erode as their inability to introduce new products with TV advertising reduces customer loyalty and brand share.

6. As a matter of principle, products which are legally produced and sold, as is the

case with toys in Greece and elsewhere in the EU, should also be able to be legally advertised.

Figures collected by the European Group of Television Advertising (EGTA) indicate that a reduction of children's advertising income as a result of advertising

Hopefully the Green Paper can also do away with some of the myths about the alleged effects of advertising on minors

bans will put at risk a major part of the investments currently injected into the European audiovisual industry (estimated to be over 1 billion ECU). It goes without saying that all of this contradicts the EU's current commitment to strengthen the European audiovisual industry.

It is therefore of paramount importance that the Commission gives priority to the Green paper on Commercial Communications which has been pending since 1992. As we understand it, the Green Paper aims to launch a procedure whereby infringements on the freedom to provide services related to commercial communications will be dealt with adequately and rapidly inside the Commission. Obviously, the current developments concerning the Greek case and the discussions surrounding the Broadcasting Directive clearly point out that the importance of advertising for the functioning of the Internal Market still needs to be underlined. Hopefully the Green Paper can also do away with some of the myths about the alleged effects of advertising on minors and encourage the Commission to base its policy on facts rather than on assumptions. These assumptions are easily misinterpreted for political reasons which seem to have little to do with safeguarding the integrity of the Internal Market.

The German Television Market Before the digital revolution

Dr Gerhard Franz
Research Director
Schmitter MediaAgentur

Following de-regulation of television markets across Europe there has been a rapid increase in the number of channels available to the consumer. This has been particularly the case in Germany. What are the lessons to be learnt from this early development stage as companies assess the opportunities presented by the introduction of digital broadcasting?

In the mid eighties the German TV market faced a political revolution when deregulation set off the big bang of commercial television. Ten years later we can look back on a decade of dramatic change. The two pre-revolutionary public channels now compete with a wide variety of commercial channels. German TV audiences today live in a multi-channel environment with a lot of choice. In the nineties, however, we will witness the digital revolution. While deregulation only changed the TV landscape, this digital revolution will in the end change the medium itself.

Before examining this prospect, it's useful to learn from the present and past developments within the extremely dynamic German television market.

The media market

The growth of adspend invested in the classical media will be slowing down to about 6% in 1995. Up to now this is the lowest annual growth of the nineties.

Extrapolating this trend in the future suggests that you need an annual budget growth of roughly 10% to maintain the awareness level of your brand in the German market

The same is true for TV advertising. After enormous growth in the early nineties, rates have declined to about 8% in 1995. There is much evidence that this decline of growth will be stopped by a

turnaround in the economy. The short-term economic outlook in the advertising industries is looking increasingly positive. As a consequence, we expect the return of higher rates of growth in 1996, especially in TV advertising.

An examination of the internal dynamics of the media market reveals that the redistribution between media categories has been slowing down. TV almost doubled its turnover share since 1989 and will keep the leading position in the media market with a 40% share.

These developments in the TV market illustrate significant changes in competitive relations. In the past the overall success of commercial channels was driven by an extremely booming television market and the continuously declining revenues of the public channels. In the process the public channels, ARD and ZDF, have stabilized at a low level and the smaller channels have gained market share.

Compared to 1993, market leader RTL has dropped 4%-points to a share of 30% in 1995 and SAT. 1 also dropped slightly. In the first league of commercial TV only PRO 7 made any gains. The real winners were the smaller channels in the second league like Kabel 1, RTL 2 and DSF. Their market share increased to 12% in 1995.

The commercial television market has reached the stage of crowding out competition.

Branding requirements

To achieve top-of-mind awareness, brands must be supported by ever increasing budgets. From 1990 to 1994 the average budget per brand has grown to 8.8 million DM by annual growth rates of about 10%.

Over the same time period, the average advertising recall has not changed at all and is still at the 15% level.

Extrapolating this trend into the future suggests that you need an annual budget

growth of roughly 10% to maintain the awareness level of your brand in the German market. To build up additional awareness means an additional investment on top of the 10%. Of course those averages vary in specific market segments and strongly depend on factors such as the advertising pressure of competing brands.

Marketshares of channels

A look back to the past shows how in 1988 the two public channels ARD and ZDF held more than 70% of the audience market. After 7 years of competition this had slumped to a share of 30%. RTL is now market leader with a share of 18%, followed by ARD, ZDF and SAT.1 in second position with 15% shares. Significant gains are likely in the second league where RTL 2, Kabel 1, VOX and DSF together now hold 10% of the audience market.

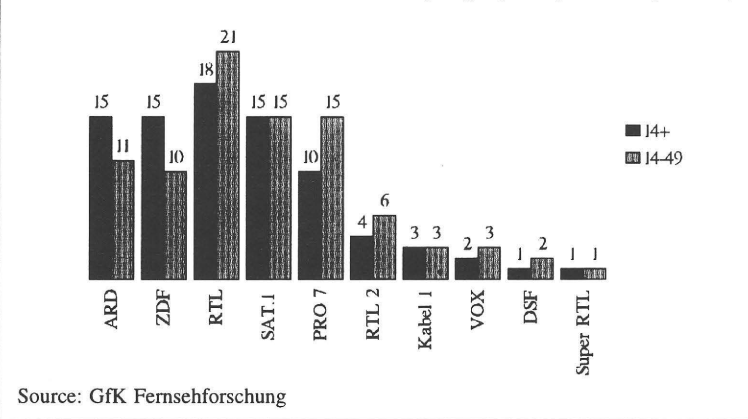
For younger audiences (14 to 49) the picture is rather different. Amongst the bigger players, RTL is in the lead with a 21% share, followed by PRO 7, SAT.1 and ARD, with ZDF in last position. The second league is headed by RTL 2 with a share of 6% followed by Kabel 1, VOX and DSF. Newcomer Super RTL, launched in April 1995, already holds a 1% share. Taken together, the second league of commercial television attracts 15% of the younger audiences (Figure 1).

Brand image of channels

Like anywhere else in the world, more channels mean more audience fragmentation. The advertiser needs a wider selection of channels, genres and time slots to achieve sufficient coverage and penetration. In a multi-channel environment programme success is harder to predict, because heavy competition makes the ratings fluctuate.

The real challenge for a channel in a highly competitive market is to offer reli-

Figure 1
Marketshare of TV Broadcasters by Age (1995, January-June)

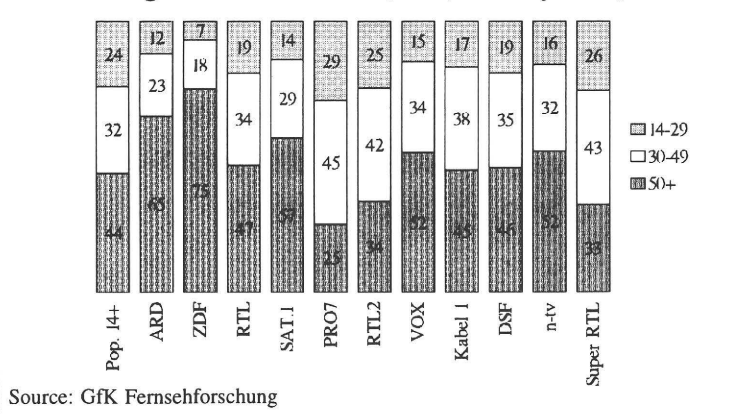


able and predictable ratings. In the meantime it is a piece of received wisdom that a unique brand image is extremely helpful. As uniqueness is the crucial point, there is no other way to achieve this than by targeting specific population groups and providing them with the programming that satisfies their needs.

A comparison of the demographics of the channels by age reveals that three of them are very young: PRO 7, Super RTL and RTL 2; two are very old: ZDF and ARD, whilst between these extremes are positioned RTL, SAT.1, Kabel 1 and VOX (Figure 2).

This pattern of channel positioning is a consequence of programme quality,

Figure 2
Age Profile of Viewers (1995, January-June)



genre concentration and marketing efforts. Of course, market constraints also play an important role for the market position of a channel.

This begs a number of questions. Is there a niche in the market that guarantees uniqueness? Is this niche big enough to generate sufficiently high ratings to cover the cost of staff, distribution and programming? Is there sufficient access to programming which makes the channel appealing to the audience?

Targeting a channel is much harder than the targeting of most brands. This is mainly because the primary objective is to maximize ratings around the clock. The presence of target groups depends very much on both time of day and day of week. The art of programming is to address different segments of the basic target group in the course of a day. The gradual adaptation of genres and the channel's 'tone of voice' guarantees maximum programme flow. Hard breaks in the programme schedule motivate people to switch the channel.

What have been the basic branding strategies adopted by some of the more important channels? PRO 7, for example, addresses the young family with top movies, US sitcoms, US detective series, action, talkshows and cartoons for children. RTL's programming is targeted to the younger adult segment with top movies, German soaps and detective series, talkshows and big sport events. SAT.1 addresses adults without an upper age cut by concentrating on game shows, German family series, talkshows and soccer. On the whole, the genres covered by the commercial channels are very much alike.

The distinction is in the genre-mix and station 'tone of voice'. In the daily programme flow a channel is, for the audience, nothing but the same old chameleon slowly changing its colour during the day. Since the uniqueness of the pro-

gramme offer is not very apparent, at least the packaging has to be. In the process of brand building, the importance of on-air design, on-air promotion and off-air marketing cannot be overstated.

The special task of design and marketing is to anchor the names and images of the individual chameleons on the shelf in the mind of the audience. It is without doubt crucial for the future success of TV channels to establish a tight audience commitment, which grants a certain protection against the permanent attempts at seduction by competing programmes. It's a necessary survival assurance, because it can motivate people - as soon as they switch on the TV set - to tune into their favourite channel and stick to it, in spite of the poor quality of one or other particular programme. A positive channel image makes the perception of the programme more positive. If it is strong enough, it can even make a mediocre programme seem brilliant.

Pricing and efficiency

The attractiveness of a channel to the audience is one side of the coin; efficiency is the other. Our forecast for 1996 reveals some significant increases of Cost per Thousands (CPT) in prime time TV. This is especially true for the already established smaller channels which now feel strong enough to abandon their low price strategy. They are quickly approaching the CPT levels of the first league.

We need, however, to consider the efficiency against the 14-49 age group, as it is still the most attractive target audience for advertisers. For targeting the younger population RTL, SAT.1 and PRO 7 offer about the same value for money. ARD and ZDF are appropriate to build coverage in target groups without an age cut at 50. Of course, the second league channels are also very efficient in the younger age groups and can be used as additional

media to improve target group penetration.

The most significant developments in the German TV market in 1996 will be the increase in the air time supply and the simultaneous decline in ratings for most of the established channels. This is a consequence of the developing market and counteracts the intentions of almost all the channels to force through price increases. The critical question is: Will they succeed or will market dynamics be stronger?

Moving to the future

In just the last three years, cable penetration in Germany has increased from 34% to 60% and satellite penetration from 8% to 22%. More than 80% of the population already live in a multi-channel environment and have basic access to the communication highway.

The German audience has a choice of up to 36 nationwide programmes. People of other European countries have to be satisfied with less than half this number. Five new channels were launched in Germany in 1995. At the moment the average household can choose between 21 channels.

Cable networks and satellite transponders still have only limited capacities for additional channels. This bottleneck can be overcome by digitalization and data compression. These are the technological keys to open the door to a vast extension of existing distribution capacities. The bandwidth requirement of a conventional TV channel will be sufficient to transmit 10 digital programmes in standard definition quality. Theoretically, this is an extension to 300 digital programmes in the conventional cable networks. Satellite capacities can be extended almost infinitely, as long as there is space left in the orbit. The use of digital programmes requires set-top boxes to decode signals and transform

them into readable input for the conventional TV set.

Genre channels: a new television offer

The CLT group and the Kirch group are preparing the launch of a range of genre channels. Audience acceptance of these new offers surely would be stimulated if both CLT and Kirch could agree to work with compatible set-top boxes. The new channels may be designed as pay TV, as free TV exclusively funded by advertising or as a mix of subscription fees and advertising.

More than 80% of the population already live in an multi-channel environment and have basic access to the communication highway

Which are possible subject areas or target groups for genre channels? Already on air in Germany are channels covering sports, news, music, and women and children's interests. Many more topics are conceivable or already in the planning stage.

Basically, any general or special interest topic can be developed into an attractive TV offer. The critical point is the potential size of the target group. Compared to a continent like the US with one language, limitations in multi-lingual Europe are obvious. Anyway, the crucial questions are: Will genre channels be a success story? Will they be accepted by the audience? What kind of unique proposition can they offer?

German audiences have clear-cut genre preferences. They satisfy their needs for entertainment, suspense and information above all with movies and news, followed by programmes concentrating on humour, action, consumer advice and US detective series. These are the top-rated programmes, which 60% to

80% of the younger adult audience like much, or very much. The flops are Westerns and arts and culture, attracting less than 30% of the audience. It might be wondered where the shows which fill most of the programme schedules figure: series, sitcoms, gameshows, talkshows and reality TV. They rank in the middle and lower ranges of the scale. Does this indicate that TV channel programming consequently ignore the needs of the audience?

The psychological preconditions for the acceptance of the new channels are known. Audiences have a clear understanding of their likes and dislikes

Not really. Priority ranking totally shifts if we consider the viewing time. Fans of series, game shows or reality TV spend about two and a half hours in front of their TV sets. News and movie fans watch only two hours a day. That is, people preferring premium programmes are relatively light viewers. From the perspective of a commercial channel, it's more profitable to concentrate on genres that motivate the heavy user to tune in and stick to the channel. This strategy, which contributes to the maximization of ratings, has the additional advantage of cheaper production costs than premium programming.

**Genre channels:
a new way of watching**

The psychological preconditions for the acceptance of the new channels are known. Audiences have a clear understanding of their likes and dislikes. If they are offered the chance to select programmes according to their preferred genres any time they are ready to watch, they will make use of it. Channels with clear and simple programme structures are very

helpful in the search of programme contents. One of the major obstacles to convenience is the time-consuming selection process in a complex TV landscape. Genre channels can offer an easy solution to this problem. If they don't impose too much additional cost on the consumer they will be a success story.

The future of genre channels

This year genre and other channels hold a minor audience share of about 8% of the market. General commercial TV and public TV are still the unchallengable giants. By the year 2000, however, we forecast an audience share of 25% for genre channels.

They will gain from both public and general commercial television. Genre channels will educate the audiences to be more selective in their programme choice. This is a useful preparation for the forthcoming Video-On-Demand age when anybody has the chance to be programme scheduler of his or her individual channel.

Of course, we should never make the mistake of underestimating human inertia. At least heavy users will still be spending a great deal of their TV time passively watching the programmes of their favourite channel. However, upmarket consumers will more actively select programmes or demand services. They haven't so much time to spare. That's why they are motivated to make a conscious choice. Conventional television is only attractive for them when top movies or top events are on the schedule.

A lot of discussion on the future of TV speculates about how active or passive the audience will be. Maybe this is not the key question, because both ways of watching don't contradict. High activity in selection suggests high passivity in consumption. Future TV consumption might have people passively watching actively selected programming.

Advertising's Short-Term Effects

Findings from the German market

In the last issue of *Commercial Communications* there was an account of how a measure of the short-term effects of advertising (STAS) has been developed by John Philip Jones of the University of Syracuse (see box).

This measure has generated a considerable amount of interest, and some controversy, amongst advertisers, agencies and the media in the United States. The first application of the technique in Europe has been introduced by Nielsen in Germany, and some early case histories are beginning to emerge which provide an insight into the usefulness of the measure.

In December 1995, the case history detailed below was presented to a Nielsen client. The product category was detergents and the brands under observation were that of the client and a major competitor. Results of the analysis are highlighted in Tables 1 and 2.

The advertising weight for the client brand was considerably higher than that of the competitor, with the client brand having 1.5 times the exposure (102532 vs 68243).

However, it is clear that the client's campaign was not as successful as expected. The analysis shows how, where one or more exposures have occurred, share of the purchases of the client's brand only rises by 4%. When compared to the competitor brand, this would appear rather low since that product had seen its share rise by 26%.

Closer analysis indicates that the very first exposure for both brands seems to have pretty much the same effect with the STAS increasing to 104 and 106. Nevertheless, a heavier weight (2 or more) within seven days before purchase did not lead to any further increase for the client brand, whilst the competitive brand's STAS index increases to 141!

Clearly, for the client brand, simply increasing advertising weight will not necessarily result in a higher STAS

index. In other words, higher exposure (and consequently, higher media expenditure) are ineffective and do not stimulate sales.

Why was this the case?

For the client brand, several spots with totally different creative approaches were shown alternately. The competitive brand, too, ran several spots, but with some essential differences. Here, all the ads were based around a similar topic relating to everyday life, e.g., kids playing or a housewife washing. Thus a possible explanation might be that this link between the ads made it easier for the TV viewer to keep them in mind.

Whilst Nielsen's client was not particularly pleased with recognizing the relative ineffectiveness of his campaign in relation to the competition, it has allowed the company to reassess its creative approach and consider modifications to the campaign.

As Jones pointed out in his original article, 'The STAS is a precondition for a long-term effect. Those people who urge that if there is no short-term effect, the spending of a few million more dollars will ensure a long-term effect, should be treated with caution. The

STAS differential can be either positive or negative. Advertising can actually reduce sales. It doesn't mean that it unsells the brand, it simply means that the campaign is not strong enough to protect the brand from the STAS of competitive brands. It is a measure, very clearly, of creative effect.'

How the STAS measure is calculated

The STAS measure is based on single-source data drawn from a panel. The purchase data is recorded by handheld barcode scanners and the television data from peplemeters. The identification of advertisements broadcast is derived from Nielsen Werbeforschung S + P.

STAS is the brand's share of all purchasing and is compared between all cases where there has been no television advertising received by the household for the brand during the previous seven days (the Baseline STAS) and cases where advertising had been received (Stimulated STAS). This, of course, allows for different weights of advertising to be assessed.

Table 1

Client brand	Total contacts	Total purchase acts	Purchase acts w/o exposure	Purchase acts with 1 adv. exp.	... with 1 or more adv. exp	Purchase acts with 2 adv. exp.	...with 2 or more adv. exp.
Product Category	299454	3347	1554	626	1793	369	1167
Brand	102532	568	258	108	310	62	202
Market Share	34.2	17	16.6	17.3	17.3	16.8	17.3
STAS				104	104	101	104

Table 2

Competitive Brand	Total contacts	Total purchase acts	Purchase acts w/o exposure	Purchase acts with 1 adv. exp.	... with 1 or more adv. exp	Purchase acts with 2 adv. exp.	...with 2 or more adv. exp.
Product Category	299454	3347	1893	644	1454	304	810
Brand	68243	621	316	114	305	57	191
Market Share	22.8	18.6	16.7	17.7	21	18.8	23.6
STAS				106	126	112	141

Regulating 'On-Line' Services

The Minitel experience

Nicolas Macarez
Director
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Nicolas Macarez

Since the introduction of Minitel in the early 1980s, France has been at the forefront as a pioneer in the development of on-line systems. Today, several million French people own or have easy access to this once revolutionary device. The range of services available has broadened enormously and there seems little indication that this dynamic is diminishing since each day sees the launch on average of eight new services. Amongst this wide range there are a number of tele-shopping facilities. It is these that make the experience of Minitel particularly instructive when considering the implications of the introduction of other means of on-line selling.

Before turning to consider this, however, it is necessary to consider the structure and changes within the distribution sector in France and the current situation in relation to tele-shopping.

Changes in the retail sector

Over the last years, the retail sector has undergone some profound changes. These changes are manifest both in the retailers themselves and in the behaviour of consumers. Competitive pressure has increased and has given rise to large markets. The type of retail outlet has diversified and the sector has restructured itself to provide the small, often specialist, shop, the department store, the supermarket and the hypermarket.

Today, however, these outlets face stagnation or decline. Other, newer forms are gaining ground, with hard discount stores and huge specialist department stores (IKEA, garden centres, etc.) as well as mail order. This last development is of particular interest since Minitel has played a significant role in this area. Consumers look to Minitel for an increasing range of services - clothes, books and also for banking, insurance and other financial services.

The consumer has changed as well.

He is better informed, largely due to television and advertisements in general. The economic crisis has left scars and, as a consequence, the consumer is much more cautious in his buying behaviour. He will, for example, be much more likely to consider purchases carefully through mail-order catalogues at home and be wary of indulging in impulse buying in shops.

This harsh, competitive environment, together with developments in information technology, has moved the retail sector towards widespread computerization: from line and stock management through to customer relations. This is the reason for the growing presence of computers, telecommunications and multimedia. At the same time a kind of 'de-localization' - one could say a dissolution - of the point of sale and point of purchase has taken place. Today, it is possible to order goods from afar and collect them from a distribution point, perhaps a shop, near your home or to order the product at the point of sale for it to be delivered to your home.

Distance selling/purchasing

Mail order is currently the most widespread means of distance selling. It is a fast growing sector and has certainly taken advantage of economic uncertainty. Overall, the market turns over more than FF50 billions and is dominated by two big players, La Redoute with a turnover of FF10 billions and Les Trois Suisses of FF 7 billions. There are, however, other significant operators such as CAMIF, Quelle (the French subsidiary of the German company), La Blanche Porte (a subsidiary of Les Trois Suisses), Movitex (a subsidiary of La Redoute), Damart (clothes), Sélection du Reader's Digest, France-Loisirs (books, records), Yves Rocher (cosmetics).

Of this mail order business, 10% of purchases are made through Minitel and 20% are made over the telephone. These media, which are favoured because of their

interactivity and speed, are growing faster than other ways of communicating such as mail or fax. Audiotel, the little brother of Minitel, has a minor role to play in the development of home shopping. It is a voice service where the consumer dials an 8 figure telephone number (beginning with 36) to receive pre-recorded information, from which a selection can be made using the buttons of the telephone device. 2% of the orders to La Redoute are sent in this way.

In the long term, the use of on-line media will allow companies to dispense with publishing catalogues. Publishing a few million of these large volumes twice or more each year generates considerable expense in page-setting, printing and mailing. This represents a cost of around 7% or 8% of turnover and could be considerably reduced by replacing paper and providing information on the screen of a computer or through an advanced Minitel, handling text, pictures, photographs and video. Les Trois Suisses can already be accessed on the Internet, or by videotex and audiotex through the Chouchoutel service. (The same is also true for La Redoute with Redoutel and CAMIF with Telia.)

Another form of distance selling is sales following a TV programme on specific products. However, the French market is small (no more than FF 600 millions) because of tight regulatory controls: there are limits to the amount of time that may be devoted to such broadcasts; low audiences; brands may not be displayed and there is a limited range of products available.

However, given a certain relaxation of the regulatory framework and the arrival of cable networks with firms such as HSS and Philip Plaisance/Générale Occidentale, some change may occur. No doubt the development of fully interactive TV will help these programmes break into the on-line market.

True home-shopping is a little different in that it depends upon the active partici-

pation of the consumer and requires an instrument in the home (phone, cable television, Minitel) which allows the selection and ordering of products.

In France this is widespread under a telematic form due to the success of Télémarket, launched some ten years ago. Télémarket has an annual turnover of FF 102 millions on 150,000 orders which is roughly the turnover of a large store. Half are placed by telephone, 40% by Minitel (3614 and 3615 TELEMARKE) and the rest by fax. A catalogue list is sent to 40,000 potential customers of whom 15,000 to 20,000 are active. The catalogue contains a wide range of products on offer and the whole enterprise demonstrates how difficult it is to entirely dispense with printed material. The purchaser's credit card number is only communicated with the very first order and home delivery reduces considerably the risks of fraud. Even though Télémarket is the only player in the French market the breakeven point has barely been reached. Certainly a restructuring of the operation and an alignment of prices in relation to shops is necessary.

The Minitel experience

A pioneer in the sector, although it has not succeeded in exporting the concept anywhere else, France has today a little under 7 million Minitel units. Télétel turnover is close to FF 7 billions. For the service providers who have contracted with Télétel, turnover is in excess of FF 5 billions and is divided between the wide range of services they offer (there are no fewer than 23,000 access codes).

This success can be attributed to the fact that Minitel is everywhere. 14 million French people have access to a device either at home or in their office. It is convenient and simple to use and any charges relate only to the time the user is connected.

Meanwhile, the quality of the services has improved and the users have become

more adept at accessing them, resulting in less time being spent connected even though more services are being used. France Télécom and service providers reacted by raising the price and this has resulted in lowering the overall use of the system. The service faces a further challenge with the growing use of micro-computers.

In its most common form, named Minitel 1, the transmission of data is poor (1200 bauds) and data processing is almost non-existent. The TVR Minitel (Télétel Vitesse Rapide or High Speed Télétel) operates at 8 times the speed, that is to say at 9,600 bauds. It can show on screen a black and white photograph in less than three seconds (JPEG format) which has obvious attractions for on-line shopping services.

Finally, there is also the Magis Minitel, which is equipped with a credit card reader making it possible to select and pay simultaneously. Clearly this is a great leap forward for those services that require telepayment like SNCF railway tickets. More than 300,000 of these devices have been installed since they were introduced last February. Club Minitel, launched last October, is like the Magis but it also has the TVR function and a printer.

In 1994, France Télécom launched the FACITEL service which allows secure on-line payment by credit card. By dialling FACITEL 3615, the user accesses a reduced number of service providers: SNCF, Air Inter, Novalis (records), À la page (books), MC France (entertainment tickets), Episodes (weekend holidays), Reflex (insurance), Interflora (presents/flowers) and, soon, Nouvelles Frontières.

This bouquet provides a good-looking showcase of secure services which are the equivalent to those on offer in any regular retail outlet accepting credit cards. The service provider needs to make the necessary investment in software to be able to integrate this on-line payment system.

We are facing two distinct developments in telematics. On the one hand, the offer to the general public remains stagnant. This is partly because of the inadequacy and oldness of the equipment, and partly because of the cautiousness of investors and suppliers. They are still hesitating before committing to what may be no more than a fashionable trend.

On the other hand, more professional telecom networks are developing and taking the place of the old systems with companies like America On Line, CompuServe and Prodigy becoming active. They simply require a microcomputer and a modem to access. The cost of this access is cheaper than Télétel whilst the modem output of 14,400 bauds, the picture quality and data processing capacity make an attractive offer. The main drawback is the lack of equipment in households and it is this which is standing in the way of the development of such on-line services. This situation will undoubtedly change as the cost of computers continues to fall and the new generation of Nintendo games players, which does not regard computers as alien, exerts its influence.

In the long run, French teletext will have a challenge to face. However, as Henri de Maublanc, the Chairman of AFTEL (the trade association representing the French telematic operators), puts it, 'The train is not dead because of the airplane. The microcomputer will not replace Minitel completely, only partially.'

The way forward for Minitel will probably be the 'Kiosk micro', the successor to Minitel on a micro, with access to the Internet and thus able to compete with the new service providers already referred to. As of today, we have more than 700,000 modems capable of emulating Minitel on the computer screen. This new service should attract new information providers such as the CCF (Crédit Commercial de France) which plans to offer via the 'Kiosk

micro' financial services as well as package holidays and general leisure shopping (theatre, opera, flowers. etc.).

The 'Minitel only' option is clearly not one banks feel able to pursue. The BNP (Banque Nationale de Paris) is the most widely accessed of the French banks, with 1.2 million Minitel connections each year, and yet it does not feel it has been able to provide a satisfactory range of services through the Magis Minitel. It plans to launch an 'all microcomputer' solution in 1996.

As the use of Minitel has spread both at home and at work, the regulatory framework governing use has gradually developed. This deals with the ethical and technical issues faced by service providers and consumers. As always, both good and bad experiences have occurred in the construction of this framework.

The issues that have arisen are of many different types. There is the question of consumer protection and, particularly, the consumer of home-shopping. Here, for electronic transactions, mail-order rules will apply. There quickly follows the questions of security, confidentiality (particularly as regards credit card numbers), integrity and authorization. These questions need both legal protection and technical solutions.

It is for these reasons that the Ministère des Postes et des Télécommunications established two years ago two organizations charged with regulating the ethics and practice in telematics: the Conseil Supérieur de la télématique (CST) and the Conseil de la télématique anonyme (CTA).

The role of the CST is firstly to oversee the contractual arrangements between service providers and France Télécom. It also provides ethical guidelines (with particular reference to the young) on the provision of 'anonymous' telematics, whether in written or audio form and on the conditions for access. ('Anonymous' telematics refers to those services provided by members of the public rather than those pro-

vided by companies.) The Minister, France Télécom or any user of telematics can lodge a complaint against the CST or address a complaint to it.

The other regulatory organization, the CTA, supervises the market players - the service providers, France Télécom - to ensure they follow guidelines laid down by the CST and monitor the implementation of those commercial elements of the contracts between the parties which are not strictly financial. In this way, the CTA acts as a regulator or policeman. Under the auspices of France Télécom, it may or may not sanction the granting of a licence for the provision of a service, suspend or cancel an existing contract or levy a fine on any service provider for any departure from the guidelines. In 1994, the CTA made more than 400 rulings and was invited to take action 350 times by France Télécom.

There are a number of ethical criteria that service providers commit themselves to meet. User information and the integrity of the service are examples of such commitments (for example, where stock exchange quotations are listed, the date and time of day must also be clearly mentioned) and there are further guarantees demanded on the nature of the service content. Activities against the law or which might harm the public image of France Télécom and telematic providers are forbidden. Service providers undertake not to supply to the public material of a violent or pornographic nature, or anything likely to promote discrimination, incite crime or the consumption of forbidden substances. Certain elements of the law could be applied to form the regulatory framework of videotex: laws on audiovisual communication, on young people and on procurement, on consumer and data protection, on gaming and the provision of stock exchange information and so on.

In the specific case of home shopping, some legal texts reinforce what is already

specified in the consumer code. Most notably, the ability of the consumer to return the ordered product to the seller within 7 days of delivery must be clearly stated, together with information to reassure as to the integrity of the transaction or guard against any fraudulent advertisement. Such information might comprise the retailer's name, address and phone number as well as a considerable amount of detail about the product itself.

On the Minitel service, the 'Kiosk' operation must not be used in itself as a method of communicating payment for a product. Some contracts with service providers have been cancelled because the providers were found to have fraudulently incited their customers to extend their connect time. A 'resolution' to this was found by the giving of a 'present' to such customers, although the cost of the present had been paid for by the extended connection.

Ultimately, one of the weak points of Télétel remains the identification of users. In effect, for those services that are not part of the bouquet offered by FACITEL, a fraudulent customer can place an order with a simple communication and a credit card number. It is only the delivery address to which the goods are to be sent that provides any opportunity for legal redress to be affected. A payment by the Magis system with direct reading of the credit card is guaranteed to the supplier who may prosecute the bank if necessary, as is the case with any retail outlet.

Conclusion

The Minitel experience is of interest because it already exists; no small point when one is considering the development of multimedia projects. The whole area seems to be very rich in promise, although it can scarcely be said to have delivered much.

However limited it may be customers are faithful to shopping on Minitel and the regulatory framework, inspired by existing

legal texts (on consumer protection) and modified in the light of experience of the development of the various services, may well provide a useful guide to a juridical framework for home shopping in other countries in other forms.

Besides, other forms of 'virtual' shopping are being developed. Notable among these are the initiatives taken by Les Trois Suisses and La Redoute. Already established on Minitel, they are developing new media. 310,000 copies of a catalogue were sent to PC owners on CD-Rom by La Redoute, which claims that 15% of its sales are being made by Minitel. On the Internet, Les Trois Suisses has been attracted by the flexibility of being able to update the company's offer easily, responding to changes in fashion, for example. Furthermore, the quality of the images and the ability to communicate orders in a straightforward way are powerful attractions.

Amongst the other multimedia on-line shopping initiatives underway, we should not forget those of La Lyonnaise des Eaux (Multicâble, with VTCOM of France Télécom Group), Wanadoo (France Télécom and ODA of Havas Group), France en Ligne (France Télécom/Bellanger Filipacchi) and La Générale des Eaux and the Infogrammes company (the Infonie project, started at the beginning of October).

Confronting these developments it is clear that the existing hardware equipment is primitive. Too few households own a PC and television is still semi-interactive, with the pictures received by the cable network and the order being placed by the telephone. With a substantial physical presence and the benefit of being extremely familiar, Minitel is in a strong position. The emulation solution on computer, the 'Kiosk micro' solution of Télétel, should allow France Télécom to offer a complementary service and maintain a comfortable position in the electronic marketplace.

Back to the Future

A question of subsidiarity?

Lionel Stanbrook
Director of Political Issues
The Advertising Association

It all started with Mrs Thatcher and her Sovereignty. It may be implicitly acknowledged that her nationalist perspective, whilst wholly unwelcome to the architects of the post-Eurosclerotic 1980s, has nevertheless had a greater influence on the charted direction of the European Union in the 1990s than that of anyone else.

Expressed first as an issue of sovereignty, the 'juste retour' argument is based on the same principle as the current debate in several Member States of the Union about the repatriation of policy and the emergence of 'variable geometry'. This principle seems on occasions also to be justified even by the principle of subsidiarity. What can be objectionable about rendering to Member States what was, and arguably should again be, rightfully theirs?

Subsidiarity has, on the face of it, become a central policy commitment of the European Commission and an Article of Faith for the Council. Even the European Parliament renders tribute to the principle (an unusual self-denying ordinance on its part).

The real difficulty about this is that there is no accepted definition of what subsidiarity actually means, and none seems to be forthcoming. And yet subsidiarity continues to be claimed - especially by Governments - as the excuse for the re-construction of barriers to trade, especially in the highly competitive service sectors. Few sectors are more subject to these excuses than the broadcast media.

On the eve of the publication of the European Commission's Green Paper on Commercial Communications, the debate about the Television Without Frontiers Directive (TWF) has provided an admirable if highly ironic case in point.

It is an irony that the European Parliament should appear to be the first publicly to blow the whistle on single market mutual recognition in this sector, evoking wholly false notions of subsidiarity as justification.

Some Parliamentary activity would appear to support government-led efforts to resist European mutual recognition of rules and standards in commercial communications. The wording, for example, of the 19 December 1995 Council Declaration on the rights of Member States in regard to re-transmissions is likely to be proposed as a statutory alternative in the Parliament.

The aim of the original TWF Directive was to create a single market in broadcasting by applying the mutual recognition of home country rules, as in the banking sector. Such a single market could only be effective on the basis that the European rules were common to all Member States and not only implemented but also respected according to the same conditions.

This is no Faustian pact; this is a sensible recognition at international level of the mutuality of politics and economics in a responsible democracy. Deregulation is never justified in cases where the market is thereby rendered dysfunctional or otherwise permanently damaged. The deal - between the free market and social responsibility - is mutually beneficial. It ensures that both can work in practice and not just in theory.

The EU equivalent of the adage that there is no such thing as a free lunch is that deregulation must pay for its privilege by agreeing binding and common rules for consumer protection - as the Maastricht Treaty has recognized. This is as true of commercial communications as of any other service sector. Key sections of the original TWF Directive contained conditions and restrictions on TV advertising which represented the *quid pro quo* for the achievement of the significant benefit - to both producer and consumer - of a barrier-free single broadcasting market.

However, the commercial communication sector does not yet benefit from the existence of a single market, despite the implementation of the original TWF Direc-



Lionel Stanbrook

The real difficulty about this is that there is no accepted definition of what subsidiarity actually means, and none seems to be forthcoming

There seems always to be at least one good reason to introduce barriers to trade within the European Union

tive. There has been little resolution of the difficulties notified by the Commission in respect of national implementation, and certainly no guarantee that these difficulties will not proliferate in regard to the new Directive. The prospects are not good. One is almost even forced to conclude that the Member States appear collectively to have concluded that the precedent set by the original TWF Directive was a mistake and that responsibility for broadcasting policy should now be wrested back from the Commission.

National barriers remain significant and damaging. The lack of a European market holds back the European media and delays the development of a strong framework for the development of new media opportunities. It is vital to resist the blandishment of the protectionist approach, especially when it gets falsely dignified by the justification of subsidiarity.

A free-for-all was and is in nobody's interests. The European Union is not suitable ground for the testing of exclusive political theories - liberal, conservative, socialist or federal (the next popular vote in each Member State generally applies corrective common sense to any such experiment). However, while a political consensus looked easy to obtain amongst a Community of Six, it was less and less easy for a Community of Nine, Ten and then Twelve. With the recent entry of Austria, Finland and Sweden, all with determined and established commitments to statutory consumer policy which involve restrictions of publicity (although Sweden still has precious little experience of commercial television), the not-yet-established single market in commercial communications looks further away than ever.

And yet on the face of it this is not an 'enlargement problem'. The French Government, no less, has proposed a solemn and binding declaration that free movement and mutual recognition are less im-

portant priorities than health policy or consumer protection. This obvious attempt to justify the advertising bans for alcohol and tobacco will be defeated, it is to be hoped, but the Council's preliminary deliberations on the new TWF Directive have not been particularly hopeful in respect of mutual recognition.

There seems always to be at least one good reason to introduce barriers to trade within the European Union and, despite the hype and shock of the new, those who keep jumping up for paternalism and protection are often to be found among the original Six (and Nine).

The Broadcasting Directive review has clarified one detail: the Swedish Government appears relaxed at the prospect of children being corrupted by obscenity and depravity but is quite clearly hung up by the effect on children of commercial communications, even those devised by home-grown companies. To say the least, this would not be the order of priority in other parts of the European Union, and perhaps especially the UK.

But should control remain at European level? Should the common ordinance be exclusively European and not include the possibility of recourse to national restrictions? The answer is yes, yes and yes - as long as the ordinance is an utterly permissive one, with restrictions only at European level. The drift towards the repatriation of policy in this area must be stopped, unless we all want to watch American retreads stretching into broadcasting eternity.

After a few years of settling and squabbling, there might then at last be the opportunity for a globally competitive television industry in Europe - based on cultural licence, a single market and the recognition and respect of common and minimum rules, standards and values that go to make up this formidable European culture.

And there'll still be an off-button on the TV set.

Cross-Border TV - Advertising Restrictions and Television without Frontiers

David Brown
Consultant
Flextech

For Europe's broadcasters the debate over the review of the 1989 Television Without Frontiers (TWF) Directive is a vitally important one. Pan-European broadcasters and those planning to extend their services across the Community's frontiers have watched with dismay as politicians in the European Parliament put down amendment after amendment to the Commission's proposals, the effects of which would be to block such services.

Many of these amendments to the Directive run counter to the objectives and principles of the Directive itself. The TWF legislation was first put forward by the Commission as part of the wider general objective of creating a single European market. The Directive was the manifestation of the single market policy applied to television services and its primary aim was to encourage a single market for broadcasting.

The advance of new technology in the 1980s, particularly in its application to satellite broadcasting, led to an increase in transfrontier broadcasting. The Commission wanted to ensure a free market in broadcasting services throughout the Community by introducing basic common regulation and a single licence for broadcasters based on national treatment.

The European Parliament's Culture Committee had other ideas, however. Many of its proposals effectively switch jurisdiction to the country of reception rather than the country of origin from which the programming is broadcast. If such a system were introduced, pan-European broadcasting would no longer be viable and there would be no single European market for broadcasting services.

To go back to the original 1989 Directive, the primary objective of this legislation was to provide a framework for a single European broadcasting market. This is clear from Article 2 of Chapter II.

Paragraph 2 of Article 2 states:

'Member States shall ensure freedom of reception and shall not restrict retransmission on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by this Directive...'

True, this liberal or free market approach was watered down to some extent in the 1989 Directive by Article 4 requiring European programme quotas, but this was added at a late stage and was not included in the Commission's 1984 Green Paper, *Television Without Frontiers*. Agreement on this restriction in the Council was only possible after the 'where practicable' let-out clause was included in Article 4.

The Culture Committee's proposals turned the Directive on its head and make it a charter for national restriction rather than for European broadcasting. Not only did the committee want to force the Council and the Commission to drop the let-out clause in Article 4, it also wanted to introduce new national controls, particularly on advertising.

Part of the problem is that advertising is a relatively soft political target and restrictions on advertising are often dressed up as consumer protection. There are often powerful lobbies behind such restrictions, keen to protect their own self-interest, but which use consumer protection arguments because they know that these have popular appeal.

Advertising is, in fact, the lifeblood of the television industry. In the UK, for example, it represents by far the greatest source of funding for broadcasting and programme making, exceeding the TV licence fee and subscription income combined.

If Member States are to be allowed to introduce national restrictions on advertising it will not just make pan-European

The Culture Committee's proposals turned the Directive on its head and make it a charter for national restriction rather than for European broadcasting

television impossible and thwart a single European market in broadcasting, it will also undermine programme production as this is dependent on advertising revenues.

The immediate issue is children's advertising. Several MEPs have argued strongly in favour of restrictions on advertising to children as has the Swedish Government. In Sweden, all advertising to children under the age of 12 is banned and Stockholm wants to be able to stop satellite channels broadcasting into Sweden from carrying such advertising.

There are two issues here. One is whether or not a Member State should be allowed to introduce national controls on broadcasters transmitting from other countries and to other countries. Under the present rules, Stockholm can stop a broadcaster that has set up outside its jurisdiction only to escape Swedish regulation (under Article 2.3) and it can also suspend retransmissions if a television broadcast infringes Article 22 which deals with the protection of minors (Article 2.2.a). But it cannot restrict a broadcaster that is transmitting to other countries as well as Sweden and is not directed exclusively at Sweden or has been established outside the country only to avoid Swedish regulation.

As already noted, if Sweden were to be allowed to introduce national restrictions on all broadcasters transmitting from outside, then this would destroy the concept of a single European market for broadcasting based on a single licence from one Member State.

The other issue is whether or not children are particularly vulnerable to advertising and therefore need further protection other than that already provided by Article 22. The Swedish Government clearly thinks that they are, but no reliable research has yet shown that advertising does have a harmful impact

on children. Indeed, studies commissioned by the Advertising Association in the UK not only point to serious flaws in much of the research purported to demonstrate that children's advertising is damaging, but also suggest that most parents do not believe such advertising to be harmful.

According to the Advertising Association, a ban on advertising to children would reduce revenues to European broadcasters by at least ECU 2 billion. The effect of this would be to reduce drastically the money spent on children's programming and could lead to the closing down of thematic children's channels. Both broadcasters and programme producers would therefore suffer, as would children themselves.

Advertising also generally helps the marketplace to function effectively and thus encourages competition. This leads to better consumer choice, more product innovation and lower prices. According to the Advertising Association, toys in Scandinavia are, for example, up to 50% more expensive and choice is much more limited. Is this really consumer protection?

Few, if any, broadcasters would argue with the need for some control in order to protect minors and consumers. Basic rules covering misleading, subliminal and surreptitious advertising, as well as the protection of minors, are already included in the TWF Directive and these requirements are generally not opposed by broadcasters.

But, once Member States are allowed to introduce their own national rules on advertising or on the protection of consumers and minors, the main objective of the Television Directive, to create a single European market for broadcasting services, is defeated. Pan-European broadcasting would then become virtually impossible.

Promoting sales across Borders

A Practical Guide

Eege Klop
President
European Federation
of Sales Promotion

Within the framework of the open European market, many companies and their respective agencies have focused on pan-European marketing and communications strategies for their brands. The major reasons for this have been the cross-border effects of media (i.e. MTV, Eurosport) and the economy of scale effects on production and marketing costs.

More and more products and services are perceived and experienced by the consumer as pan-European or global brands. Lifestyle brands like Marlboro, Pepsi, Levi's, Swatch and Johnny Walker are targeting their communications to younger people with promotions. These not only increase sales, but also develop the brand image.

Products like computers, software, audio & video equipment and accessories are positioned the same across Europe and offer ample opportunities for pan-European promotional strategies. So, too, do services which have a pan-European appeal, such as airlines, hotel and leisure, credit cards and sporting facilities. The exploitation of the sponsorship opportunities afforded by the Olympic Games, the European Soccer championship or the Rolling Stones' Voodoo Lounge tour are a clear example of pan-European or even global promotions associated with these events.

This urge for centrally developed strategies highlighted the need for pan-European promotional campaigns. It was at this point that the life of marketers and their agencies became more difficult. Since sales promotion is a temporary extension of the product offer to realise more sales, it is first and foremost a tactical instrument. By their very nature, tactical instruments need to be able to react quickly and should not require long lead times.

Furthermore, sales promotional offers

are most often communicated in-store. The different retail distribution structures give rise to a variety of opportunities for such in-store promotions across Europe. At the same time, there are considerable legal differences in what techniques are permitted and especially what techniques are permitted across all Member States (See chart, page 28).

At first glance there appear only three sales promotion techniques across Europe: collector devices, in-store demonstrations and self-liquidating premiums.

However, there is a second category which we call the 'under certain conditions' category. On-pack promotions, branded offers, reusable packs, in-pack premiums, multi-purchase offers, free mail-ins, competitions and share-outs may be used when certain conditions are met. These conditions relate to the value of the premium in relation to the cost of the product, or to the conditions for participation in a competition or to the economic value of a prize to be won.

As a consequence, the concept and technique of the promotion may be used across Europe, but slight adaptations to the content and conditions need to be made in relation to each country. As this needs to be checked with local lawyers, lead time to market becomes longer. This problem of long lead times conflicts, of course, with the fundamental purpose of sales promotion as a tactical instrument. In addition, interpretation of some of the conditions changes over time and, based on previous jurisdiction, some things which had been characterized as 'not to do' are now regarded as 'ifs'.

In order, then, to develop successful pan-European promotional campaigns, the concept needs to be checked at an early stage with specialist lawyers. If the concept is not within the required legal parameters, then it must be established how the campaign is to be adapted.

After finalizing the concept, the copy needs to be checked carefully to ensure that the wording in the local language is acceptable. The result is then a pan-European campaign which not only achieves results, but, more importantly, does not put the company's relationship with the consumer at risk.

Checklist for a pan-European promotion

Concept:

- * Don't project your local habits, attitude or humour as being European
- * Keep the concept simple

Techniques:

* First check the proposed techniques with the EFSP overview (see chart below).

* If a technique is not allowed, use another one.

These checks should be carried out either with local agencies or specialist lawyers or, preferably, both.

When the concept has been developed, the final copy should be worked through in English and final checks made. If any part of the execution raises problems, the local representative should be asked to present alternatives.

Which Promotions are permitted in which Member States?									
Promotion	UK	NL	B	SP	IR	IT	F	G	DK
On-Pack promotions	✓	✓	?	✓	✓	✓	?	✓	✓
Banded Offers	✓	?	?	✓	✓	✓	?	✓	✓
In-pack premiums	✓	?	?	✓	✓	✓	?	?	?
Multi-purchase offers	✓	?	?	✓	✓	✓	?	✓	✓
Extra product	✓	✓	✓	✓	✓	✓	?	✗	✓
Free product	✓	?	✓	✓	✓	✓	✓	✗	?
Reusable/other use pack	✓	✓	✓	✓	✓	✓	✓	?	✓
Free mail-ins	✓	✓	?	✓	✓	✓	?	✓	✓
With purchase premiums	✓	?	?	✓	✓	✓	?	✗	?
Cross-product offers	✓	✓	✗	✓	✓	✓	?	✓	✓
Collector devices	✓	✓	✓	✓	✓	✓	✓	✓	✓
Competitions	✓	?	?	✓	✓	?	✓	✓	?
Self-liquidating premiums	✓	✓	✓	✓	✓	✓	✓	✓	✓
Free draws	✓	✗	?	✓	✓	✓	✓	✓	✓
Share outs	✓	✓	?	✓	✓	?	?	✓	?
Sweepstake/lottery	?	✗	?	✓	✗	?	?	✓	✗
Money off vouchers	✓	✓	✓	✓	✓	✓	✓	?	✓
Money off next purchase	✓	✓	✓	✓	✓	✓	✓	✗	✓
Cash backs	✓	✓	✓	✓	✓		✓	✗	✓
In store demos	✓	✓	✓	✓	✓	✓	✓	✓	✓

Self-Regulation of Commercial Communications

G.J. Ribbink
Lawyer
Geerling Advocaten

The Supreme Court of Canada ruled that, although the Tobacco Products Control Act is within the legislative power of Parliament, major sections of the Act are inconsistent with freedom of expression as guaranteed by Canada's Charter of Rights and Freedom and are therefore invalid. 'The law was not reasonable' or 'demonstrably justified in a free and democratic society', a requirement set forth in the Charter. Justice McLachlin said that the Canadian government had not established that only a full prohibition of advertising would enable it to achieve its objective, a reduction in tobacco consumption.

In my opinion, commercial speech is protected in Canada in the same way as in the European Union. The most recent jurisprudence concerning article 10 of the European Treaty of Human Rights is comparable with the interpretation of the relevant articles in the Charter of Canada. The European Parliament and the European Commission would have the same problem with a tobacco advertising ban in 'satisfying the obligation to show that the law was a minimal impairment of freedom of expression', to use the wording of Justice McLachlin.

The European Union in Maastricht agreed to stimulate again, conforming with the new text of the Treaty, the 'free circulation of products and services' in Europe. Industry must be stimulated, employment must be developed and all regulation should put these considerations first.

Advertising is an important element for a free economy. European regulation of advertising must help the free trade of goods and services. Everybody in the European advertising industry is interested in the publication of the results of the questionnaire of the European Commission concerning any 'future' regulation of commercial communications. The European Commission must make a

choice between regulation by law or by self-regulation.

One could argue that it is not the European Commission as such which has to make this choice because it is not its responsibility to decide for Member States how to regulate European law. If a Member State prefers self-regulation to regulation by law, she is free to do so as long as the result is the same. Not only must the content of the law be the same as that of self-regulation, but also the control on the regulation and the sanctions.

Take for example Dutch self-regulation of pharmaceutical advertising. The Dutch government 'translated' the European directive in Dutch law, delegating the 'agreed' preventive control on all pharmaceutical advertising in all media to the self-regulatory body of the industry. In the field of general norms, like misleading advertising and the obligation to make a clear distinction between commercial and non-commercial publications, and in many other product and services advertising categories like tobacco, alcohol, direct marketing, lotteries, advertising to children, comparative advertising, sweepstakes and health claims, Dutch self-regulation is accepted by the government, media, advertisers and agencies.

Cooperation between all those groups must be well organized. How does the system bind a 'minority' to self-regulation? The solution in the case of preventative control of pharmaceutical advertising is simple: one cannot advertise in the media without written consent of the self-regulatory authority. In other cases, the self-regulatory body can also publish a judgement concerning parties not directly involved in the self-regulation. In consequence, the authority of the judgements of the self-regulating authority is considerable. The self-regulation body can, in cooperation with the media, forbid radio - or TV- commercials.

Advertising is an important element for a free economy. European regulation of advertising must help the free trade of goods and services

This implies minimal directives, if it can be proved, in applying the proportionality principle, that such minimal regulation is effective

Cooperation with the 'national' consumer organization is a very important element in the Dutch self-regulatory system. Strict codes, accepted by the media, advertisers and agencies are useful for the protection of consumers. Consumers have recourse quickly to a judgement of the self-regulatory body.

The threat of legislation stimulates the various parties to accept self-regulation. The government realizes that, with the cooperation of industry and consumer organizations, the effectiveness, costs and acceptability of self-regulatory codes give better protection to the public than regulation by law. In a democracy, law-making costs time and money. The government thus accepts deregulation as a principle.

It is sometimes argued that the penalties of self-regulation are not as strong as the penalties in regulation by law. Effective laws are accepted if they are good laws and penalties only "stimulate" this acceptance. Governments have no longer enough money and people to control the thousands of laws associated with a modern developed society.

The European Commission must be practical and accept cultural differences between the Member States, including the field of advertising. This implies minimal directives, if it can be proved, in applying the proportionality principle, that such minimal regulation is effective. With the system of subsidiarity the European Commission could then give the freedom to the member-states to make their choice between law and self-regulation. Each member state could accept the system of regulation she deems most appropriate and effective.

Naturally, it would be very narrow-minded to think that the Dutch mentality and/or culture would be acceptable in other countries. It is then a question if, in other European countries, the will to accept responsibility as an Industry vis-a-vis

social behaviour is the same. However, free circulation of goods and services is a basic principle of the European Union. This implies that the question of 'regulation-deregulation-self-regulation' seems to be too important to ignore.

I want to make clear my conviction that freedom of commercial speech must be the base of advertising regulation. Start with this principle and put it to the Industry - media, advertisers and agencies - and try to make clear to the Member States that this freedom is only acceptable if they accept their own responsibility. The background of advertising legal products and services is the right of consumers to receive information via advertising and make their own choice.

As Justice McLachlin said, 'Smoking is legal activity yet consumers are deprived of an important means of learning about product availability to suit their preferences and to compare brand content with an aim to reducing the risk to their health'. It must be understood that this article is not about tobacco advertising as such but how the well-chosen, understandable, modern language of Justice McLachlin taught me more about advertising regulation than anybody did before.

Self-regulation can help to solve the problem of the balance between freedom of commercial speech and consumer protection. I conclude with the wisdom of Justice McLachlin: 'The task (to determine justification) is not easily discharged, and may require the courts to confront the tide of popular public opinion. But that has always been the price of maintaining constitutional rights. No matter how important Parliament's goal may seem, if the State has not demonstrated that the means by which it seeks to achieve its goal are reasonable and proportionate to the infringement of rights, then the law must perforce fail.'

Advertising Self-Regulation A Consumer Perspective

Jim Murray
Secretary-General
Bureau Européen des Unions
de Consommateurs (BEUC)

In recent years more attention has been given to the possible benefits, or alleged benefits, of 'self-regulation', as distinct from directives, laws and other forms of legal regulation. For example, the guidelines on subsidiarity agreed at the Edinburgh Summit state, *inter alia*, that consideration should also be given, where appropriate, to the use of 'voluntary Codes of Conduct'.

There are a number of reasons why self-regulation has become more important in policy discussion in recent years. It is heavily promoted by industry and in times of recession the views of industry are often given more weight. There is also a certain mood of deregulation, in the sense of a feeling that there are too many laws and regulations (although it does not follow from this that self-regulation is necessarily better).

Self-regulation has perhaps developed most in relation to advertising. In many Member States there are advertising self-regulatory systems and an attempt is now being made to establish a union-wide network through the European Advertising Standards Alliance (EASA). However, self-regulation is by no means confined to the advertising sector.

BEUC, the European Consumers' Organization, has given much consideration to self-regulation as an instrument of policy.

We use the term self-regulation here to refer to a wide range of codes, standards or systems of control which are not legislative measures, which are usually administered by industry representatives (sometimes with the involvement of others, such as consumer organizations) and which are often put forward as an expression or indication of an industry's own commitment to maintain or improve standards. Self-regulatory systems have developed in many different ways on the initiative of industry, on prompting by

regulators, in dialogue with consumer organizations, in response to a threat of legislation and so forth.

Reservations about self-regulation

Many claims are made as to the benefits or alleged benefits of self-regulation. BEUC would not dismiss all of these claims but we maintain a certain scepticism on the subject. In particular, we have the following reservations about self-regulation :

1. Self-regulation may only work with those who are prepared to observe reasonable standards, and in industries which are relatively well organized. In many sectors a disproportionate amount of consumer problems are linked to a minority of the operators in that sector and this minority are the ones who are least likely to be caught by self-regulation.

2. Self-regulation may apply industry standards and not consumer standards. An industry perception of what constitutes a misleading advertisement, for example, may be different from a consumer perception.

3. Self-regulation works best at times when there is an external and imminent threat of legislation. It has not been realistic in the past to maintain such a threat on a continuous basis.

4. The penalties for breach of self-regulatory rules may not correspond with public perception of what is a just or proper punishment, or of what is an efficient deterrent.

5. Self-regulation confers no rights on consumers and offers little, if any, opportunity for appeal or redress to a consumer dissatisfied with the operation of the system.

6. The operation of self-regulation depends in large measure on the culture in which it operates. It is unlikely that the relative success of self-regulation in some

An industry perception of what constitutes a misleading advertisement, for example, may be different from a consumer perception

Little attention is given to the question of looking at the possibility of an interrelationship between legal regulation and self-regulation

Member States can be repeated in other Member States where there has not been a similar tradition. Similarly, the fact that self-regulation is relatively successful in some sectors (e.g., advertising) does not mean that the same success can be repeated in other sectors.

7. Self-regulation is often presented as a substitute or alternative where there is a lack of political will for legal regulation. Little attention is given to the question of looking at the possibility of an interrelationship between legal regulation and self-regulation.

Policy principles

Our policy on self-regulation is as follows

1. Our attitude to self-regulation is open and pragmatic - we will judge it by its results.

2. We reject any general claims that self-regulation is inherently better than legal regulation.

a) Legal systems have some important characteristics which self-regulatory systems do not and cannot have, such as the greater possibilities of coercion, the better expression of the democratic will, etc. etc.

b) Self-regulation is not necessarily more efficient or more flexible than legal regulation

3. Considered as a purely private activity, industry is entirely free to develop systems of self-regulation (for marketing purposes, for example) provided they do not break any laws. However, when self-regulatory systems claim to achieve certain social or political goals or to fulfil certain public functions, they must be guided by certain principles.

4. The ultimate responsibility for setting standards must always remain with democratically accountable public authorities, whether at national or Community level. There may be cases where these public authorities should delegate certain tasks to self-regulatory bodies but

they must never abdicate their responsibilities for the setting and maintaining of standards.

5. Standards must be set by an open, transparent and public process.

6. To ensure that public responsibility is maintained and to ensure that public authorities do not abdicate (as distinct from delegate) their functions, legislation is necessary, at least on a framework basis.

7. Legislation providing a framework for self-regulation should provide for the possibility of legal intervention in specific cases if the self-regulatory system does not seem to be working in those cases. Self-regulatory systems must therefore be subject to a continuous incentive to perform the tasks they have been given and not subject merely to a threat of legislation every few years.

8. The operation of self-regulatory systems must display the same qualities of openness, transparency and fairness that is properly expected from legal systems.

9. Wherever it exists, self-regulation must take account of the Single Market, i.e. it should be non-discriminatory (but should not necessarily have to exist in precisely the same form throughout the Single Market).

We believe that the Green Paper on Commercial Communications should be the first step towards reaching agreement on an overall framework for regulating unfair marketing practices. This framework should take the form of a binding legal instrument, which sets out general principles in relation to fair and unfair marketing practices and which would provide a means whereby these principles can be applied (by way of development of detailed rules where necessary) to different types of marketing practices now and in the future. Priority should be given to ensuring effective enforcement, particularly in cross-border cases.