

COMMERCIAL COMMUNICATIONS

The Journal of Advertising and Marketing Policy and Practice in the European Community
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The need for country of origin control

Paul Waterschoot, Director, DG XV

The very high level of response that has been generated by the Green Paper on Commercial Communications from a broad range of users, suppliers, carriers and receivers of commercial communication services demonstrates the usefulness of the Commission's initiative to start a debate in this domain. This is well reflected in the increasing interest shown in this newsletter. Furthermore, to date the European Parliament and notably the lead Economic and Monetary Affairs committee has given a positive reaction to the proposals made in the Green Paper. The wide range of this debate must be welcomed since the richer the debate, the better will be the suggestions for improving our policy proposals.

Of those who have responded, a number of consumer interests have suggested that country of origin control and the principle of proportionality are not essential to the construction of a European regulatory framework which will protect the rights of their members. They underline the trade-off between establishing the Internal Market and ensuring effective consumer protection.

As the current issue of this newsletter demonstrates, this is not a unanimous view held by all consumer or public health related organisations. Nevertheless, it is sufficiently widespread to cause concern amongst those of us seeking to construct a regulatory framework in Europe that allows our citizens and consumers to benefit on the one hand from the five freedoms of the Internal Market whilst on the other having their rights effectively protected when they undertake cross-border trade. The Commission is of the opinion that the Internal Market and effective consumer and public health protection are complementary objectives and even mutually enforce each other.

The key question is whether or not there exists a contradiction between the Internal Market policy objective driven by the notion of country of origin control (often referred to as the 'one stop shop') and those of ensuring effective consumer and public health protection. If Internal Market principles are effectively applied, which is the key objective of the Commercial Communications Green paper, then there will be a natural movement towards more similar effective rules at national level which are objectively developed on the basis of a thorough understanding of the risks and benefits arising from such services.

The application of the proportionality test will allow assessment of exactly which restrictions are necessary in order to effectively protect the consumer and, as a result, identify their need to be harmonised at Community level. The whole point of Internal Market harmonisation is to ensure that a recognised consumer or other general interest objective is effectively regulated at the European level such that the Internal Market freedoms en-

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shrined in the Treaty can be exercised. Such harmonisation is a response to a previously identified national trade restriction which is justified precisely because it is proportional in meeting its recognised objective.

In other words, the proportionality of the restriction in the country of destination signals that there is inefficient consumer protection in the country of origin and therefore that harmonisation is required to impose the required level of protection throughout the Community such that the market can be trusted and therefore operate efficiently.

It follows that the organisations calling for country of destination control while at the same time dismissing the need to apply the principle of proportionality are in fact giving a vote of no confidence to the Commission as regards its assessment of the proportionality of national restrictions or a lack of confidence in the way that other Member States apply their rules. They are implying that, too often, the restrictions are challenged and that the rate of inefficient application of rules in other Member States is not taken into account. This ill-founded belief was one of the reasons why the Green paper was launched. Our objective was to develop a more transparent and objective proportionality assessment for the benefit of both consumer protection and the free circulation of commercial communication services.

The last issue of the newsletter explained why the proposed proportionality assessment methodology based on the economic chain analysis effectively assesses the true impact on consumer and other public interests of regulatory measures that *de facto* seek to influence market behaviour in order to meet their valid objectives. However, a far more widespread debate, including that within the European Parliament, will be required and we therefore encourage further discussions in this field.

In that context I would wish to ask participants in this important debate to reflect on the following key issues. First, of what use is country of destination control when trade cannot be technically restricted at a border (for example in the area of electronic commerce) and when the offending party is established in another country? Secondly, certain parties are arguing that Member States with more stringent/restrictive consumer protection norms should be allowed to create obstacles to the circulation of services from other Member States without being subject to the application of the proportionality test. Is this not illogical? If the measures in such Member States are indeed more effective then there is no reason why they would not be considered proportional by the Court of Justice; there is therefore no reason to 'protect' against the application of the proportionality test those Member States. Indeed, steps should be taken to allow them to make their case for setting the European standard for the Internal Market. Finally, if it is considered that the Commission is not given the possibility to improve the application of the proportionality test both with regard to Member States measures and its own future proposals, then it would imply that the Commission should rely purely on Court rulings to set its agenda in this and other fields. The current problems with the infringement procedure, the time delays associated with it and the resulting legal uncertainty would imply that this agenda would be set by those that have time and financial resources on their side i.e. large powerful business concerns. Is such an eventuality really in the interests of consumers?

I welcome the manner in which this Green Paper has launched an important debate on the principle of proportionality, the scope of which is far wider than commercial communications. Constructing an Internal Market to the benefit of all is a process of consensus; it is evident that those who suggest that there is a conflict between Community objectives deny the possibility of such a consensus. I hope that these few words will encourage all those who have responded to the Green Paper to engage in a constructive dialogue in order to meet our mutually consistent goal of maximising the welfare of European citizens.

Editorial

This issue of the newsletter represents a significant development in the debate about the Green Paper on Commercial Communications. It is clear that some consumer groups have certain reservations about the approach the Commission has adopted and a number of them are published here.

Whether most of these reservations are due to a misunderstanding of the Commission's purpose will clearly be subject to further discussion. There can be no doubt, however, that adequate consumer protection is essential to the development of any regulatory framework which could gain widespread acceptance and instil the confidence required. As a consequence, we have appointed an editor with specific responsibilities for covering consumer issues on a regular basis.

Some consumer groups have questioned the application of the principle of proportionality in relation to commercial communications and have further objected to the principle of country of origin control. The Commission, for its part, points out in our cover article that both of these principles are vital to ensure proper protection to the consumer.

It cannot be denied that both principles are at the heart of the Green Paper. As pointed out by Jessica Larive at a recent meeting in Brussels, it seems, therefore, all the more regrettable that the principle of proportionality has not been applied to a number of complaints recently brought before the Commission. Are we to conclude, when measures are introduced, that there are certain public interest criteria which may be invoked in justification and to which the question of proportionality may not apply? As ever, readers are invited to submit their views.

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Consumer protection

An essential priority for cross-border commercial communications

We publish here an account of the response to the Green Paper submitted by the Bureau Européen des Unions de Consommateurs (BEUC)

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The articles which follow cover in more detail some of the objections raised by consumer groups to the Green Paper on commercial communications which were first highlighted in the last issue. It seems appropriate to start with a review of the position adopted by BEUC, the Bureau Européen des Unions de Consommateurs.

Essentially, BEUC considers the scope of the Green Paper too limited and urges that it should be extended to include packaging. Furthermore, the Bureau argues that the approach assumes the increase in commercial communications to be good and regards regulations as barriers. In doing so there is little attention paid to those who receive commercial communications and inadequate importance given to regulation (including self-regulation) as a means of affording them protection.

Significantly, BEUC questions the legal analysis upon which the Green Paper is based, arguing that 'commercial communications in themselves are not services in the sense of Article 59'. In addition, it is felt that there is exaggerated importance ascribed in Community Law to the principles of mutual recognition and home country control.

The Bureau also finds unacceptable that the proposed committee would be open to professionals but not to representatives of other interested parties.

Cultural differences remain a far more significant barrier to the development of cross-border commercial communications than differences in regulation, BEUC argues. Nor do these differences in regulation represent the main obstacle to consumers seeking effective redress in cross-border disputes. 'What is lacking is an adequate framework for protection..., a procedural

problem that would remain even if regulations were identical everywhere.'

The Green Paper fails to frame a coherent approach to commercial communications in relation to 'different policy objectives'. BEUC is concerned that, whilst the Green Paper worries about the impact of other policies on commercial communications, it fails to recognise how policies on commercial communications can have detrimental effects on other policy areas, in particular on Consumer Policy.

Turning to consider the points of action proposed by the Commission, the Bureau restates that the underlying assumption seems to be that all national rules are 'protectionist in intention and/or effect'. BEUC rejects the assessment methodology and the monitoring committee, arguing that the criteria suggested are not 'objective', since recipients of commercial communications are not even considered in the 'chain-reaction'. Further, as the proposed notification system seems to wish to 'help diffuse the pressure to regulate', it represents to BEUC an unacceptable encroachment on the principle of subsidiarity and 'the principle of minimum harmonisation explicitly recognised in the Treaty'.

The Bureau also finds unacceptable that the proposed committee would be open to professionals (i.e. self-regulators) but not to representatives of other interested parties, such as consumer organisations or the European Parliament.

In conclusion, the position of BEUC is that it seems remarkable that the commercial communications sector is singled out in this way for special treatment. Why not have, the Bureau asks, a similar committee for every other important sector?

BEUC's analysis gives rise to a number of specific calls for action upon the Commission:

- It wants the Commission to review the central analysis in the Green Paper

and provide for one focused on a better balance between market-opening objectives and the maintenance of standards and to affect a balance between home and host country control.

- It urges the Commission to proceed no further with its proposed assessment methodology or the formation of a committee.
- It requests 'urgently' a proposal for a Directive on commercial communications and children.
- It calls for the development of 'an overall framework for regulating unfair marketing practices'.
- Existing regulations should be reviewed to take account of new technology.
- Improvements need to be introduced both to the Misleading Advertising Directive and the Broadcasting Directive from a consumer perspective.
- The proposed Directive to harmonise the ban on tobacco advertising should be adopted.
- Legislation should be introduced to cover food and health claims.
- Particular attention should be given to the effects of sponsorship.
- The Commission should focus its efforts on effective enforcement, particularly in cross-border cases.
- The Commission should encourage schemes to bring information about case-law into the public domain.
- No future work should be conducted which undermined 'existing protective

standards, or their development in Member States.'

- Packaging needs to be included in the future definition of commercial communications.

This summary represents the analysis and main conclusions of BEUC's response to the Green Paper. In order to promote debate, it is necessary to look more closely at the arguments developed in BEUC's document.

Obstacles to Article 59?

As has already been stated, BEUC questions the extent to which the Green Paper emphasises Article 59 of the Treaty. Drawing on the case-law established in *Keck* and *Alpine Investment*, it argues that 'there is in fact no reason to think that the Court would make a different reasoning for services rather than goods'. The basic premise of the Green Paper is regarded as 'shaky'.

Packaging needs to be included in the future definition of commercial communications.

'The Green Paper confuses the distinction between the services and goods promoted by the commercial communication, and the services offered by a supplier to a user of commercial communications. It should have been made much clearer that restrictions on commercial communications may be obstacles to the free provision of the services or the free circulation of the goods advertised for, but are not as such obstacles to the freedom of suppliers of commercial communications to provide their services in the sense of Article 59.

'It follows from this distinction that not all restrictions on commercial communications fall within the scope of Article 59. Restrictions on advertising for services must be assessed under Article

59, but restrictions on advertising for goods must be assessed under Article 30 exclusively. The Court made this point clearly in several cases: GB-INNO-BM, Yves Rocher, Mars, etc.

The purpose of Article 30 of the Treaty is to facilitate cross-border exchanges within the Community, and not to promote the free exercise of economic activity within Member States.

'The Green Paper completely understates the importance of the *Keck* decision in this regard. This decision of the Court has placed very stringent conditions on the applicability of Article 30 to restrictions on commercial communications, placing the emphasis on the presence or not in favour of national products in the effects of the national rule under review, and making a distinction between regulations concerning the goods being sold, and regulations concerning not the products but the act of selling as such. A law restricting "certain selling arrangements", rather than imposing technical requirements directly for the products sold, is not an obstacle to the free circulation of goods as protected by Article 30, as long as it affects equally national products and those coming from other Member States. This decision, in other words, makes it clear that the purpose of article 30 of the Treaty is to facilitate cross-border exchanges within the Community, and not to promote the free exercise of economic activity within Member States. The "free circulation of goods" refers to circulation unhindered by national borders, not to unhindered circulation in absolute terms. This has now become settled case-law and has been the basis of several further decisions.'

Mutual recognition and home country control

One of the BEUC's fundamental objections to the Green Paper is the weight given to the principles of mutual recognition and home country control. Their own summary of their position is reproduced here in full.

'In our view it is wrong to give so much weight to home country control for the following reasons:

- It would not be acceptable to the citizens of the EU. There is no possibility that most EU citizens would willingly accept the abandonment, on a wide scale, of their own national standards in favour of the national standards of another Member State in such sensitive areas as, for example, advertising directed to children.
- It would be contrary to the provisions of the Treaty. The Treaty clearly allows, under the principle of minimum harmonisation, for the possibility of host country control. Apart from a few passing references, the Green Paper ignores the implication of this fact and makes no attempt to develop principles to try to reconcile home country with host country control or other important principles.
- It would be contrary to the principle of subsidiarity, which was promoted as a principle which would allow a greater degree of discretion and freedom of action to individual Member States. This necessarily implies a greater degree of freedom for Member States in proper cases to maintain or introduce national measures. Subsidiarity, deregulation and mutual recognition are separate concepts which should not be confused.

'We do not argue for the general application of the principle of host country con-

trol; to do so would be as simplistic as we think the Green Paper to be on the issue of home country control. The two principles need to be reconciled, in the context of other principles and objectives such as the completion of the Single Market, the principle of non-discrimination, high levels of consumer protection, respect for national cultures and traditions, minimal harmonisation, subsidiarity, etc. It is enormously difficult to reconcile these different principles and objectives and we criticise the Green Paper for its simplistic approach. In this context, the proposed assessment procedure is fundamentally flawed because it elevates home country control to the level of an over-riding principle, and purports to allow any other principle only to the extent that it would be "proportional" to do so. This approach is not consistent with the Treaty or with case-law (as, for example, in *Keck*).

Commercial communications to children

BEUC places a great deal of emphasis on the extent to which the Green Paper fails to recognise the sensitivities associated with commercial communications and children. The Bureau goes so far as to say it demonstrates that the authors are 'utterly out of touch with, and remote from, the actual feelings of parents and citizens throughout the Community.' It contends that there is no evidence of any desire from parents for more advertising or sponsorship of children's programmes. On the other hand, BEUC states there is plenty of concern about such issues as the sheer volume of commercial communications directed at children and the effect of sponsorship on programme content.

Many of BEUC's conclusions are drawn from the report on advertising and children they conducted with the Dutch consumer affairs organisation, the Consumentenbond (see page 11). Having identified a number

of problems, the Bureau sets out its recommendations.

'The existence of different and even diverging national rules is indeed a problem in this area. It represents not only a source of considerable legal insecurity for the providers of commercial communications that must take all these rules into account, but also a huge obstacle to effective enforcement of rules protecting children. Action at the Community level would be very desirable and necessary. But it would be an enormous setback if this action was effectively equivalent to overall deregulation, as would be the case if the principle of "home country control" was generalised to all forms of commercial communications. This is typically an area in which, more than ever, the Commission needs to remember that Article 129a of the Treaty obliges it to provide a "high level of protection" to consumers, particularly the youngest and most vulnerable ones.

But it would be an enormous setback if this action was effectively equivalent to overall deregulation, as would be the case if the principle of "home country control" was generalised to all forms of commercial communications.

Therefore, BEUC recommends the following actions at EU level:

- The EU should introduce a horizontal piece of legislation to protect children in relation to all forms of marketing practices, whatever the medium, and covering all products and services. In particular the legislation should place restrictions on certain practices (notably in-school marketing and direct marketing).
- Member States must have more freedom than envisaged in the Green Paper to establish and maintain standards on

their own territories in relation to children and marketing practices, according to their own cultures and traditions, and must be able to secure recognition of these standards by other Member States and the EU.

- Monitoring and enforcement of the rules covering children and marketing practices must be improved by introducing sharper sanctions, improving complaints procedures, improving the availability of information on case-law in this area and by establishing an independent European observatory to monitor developments in the children's marketplace.
- Information and education campaigns should be introduced in the Member States, with the support of the Commission, to educate children to allow them to recognise commercial messages and make their own decisions, and to alert parents and teachers to the issues.
- Research should be commissioned into the combined effects of commercial pressure on children, but this research must be independent and not sponsored by commercial interests.'

BEUC's conclusion

'Consumers, it is said, would benefit from a greater choice of products, lower prices and better information for their choices.

The Single Market in this area cannot succeed if the price is an alignment of all countries to the least restrictive rules.

'This is true, but consumers are likely to be much more directly concerned about a loss of protection against the negative aspects of commercial communications than about the improved choice from their proliferation. There is much

more concern about the intrusiveness of commercial communications, the lack of control, the effect on children, on privacy, etc. - in particular, with the advent of the Information Society - than about a lack of "information" to make good consumption choices. "Information" is already plentiful and the biggest concern is its quality and the ability to choose whether to receive it or not.

'The Single Market in this area cannot succeed if the price is an alignment of all countries to the least restrictive rules. Lifting the differences between restrictions altogether is not what consumers expect of a Europe that claims to want to be close to its citizens.

'The problem is that the Commission starts from the wrong end here. The question should not be how to reconcile the protection of consumers with the primary aim of facilitating life for users/suppliers/carriers of commercial communications; it should be how to reconcile the economic interests of the supply-side with the primary aim of fulfilling the needs of consumers.

'Improved revenues for the industry at the cost of a lower protection for the consumer will not be a victory, and "improved information" will certainly compensate for the negative aspects of the increase in commercial communications. The Commission, in the Working Document, points to the United States to show that there is still room in Europe for a growth of this market (advertising expenditure is much higher there). Is that really the model the Commission wants for Europe in this area? The omnipresence of commercial communications in every aspect of daily life in the US is both a contributor to and a consequence of American culture. It is no criticism of the US to point out that there is no reason why Europe should choose the same values.'

Cross-border communications

A summary of the views of the Luxembourg Union of Consumers

The response given by the Union Luxembourgeoise des Consommateurs, or ULC (i.e. the Luxembourg Union of Consumers) to the Green Paper concludes as follows. 'We fear that the underlying approach of the Green Paper sacrifices consumer protection in favour of excessive freedom for commercial communications, contrary to the legal traditions of the majority of Member States and without being sanctioned by the case law developed by the European Court of Justice (ECJ) of the European Communities. We say yes to the updating of regulations covering commercial practices, which ought to be implemented from within Member States. On the other hand we say no to a policy of deregulation (or negative integration) imposed by the European Commission.'

This conclusion derived from an analysis, which could not be reproduced in full in this edition of *Commercial Communications*, but which can be summarised as follows :

Objective of the Commission

- The principal objective of the Green Paper is to strive for a 'common conception of the role of commercial communications', in order to limit as much as possible regulatory restrictions affecting companies. The primary objective is to achieve the greatest possible freedom for commercial communications, as for instance summarised in the section on new on-line services in the Green Paper. The ULC cannot accept that the functioning of the internal market should be defined in terms of 'maximising commercial freedom', whilst other policy considerations, notably those relating to the protection of consumers, are seen more as obstacles. That said, the ULC agrees with the idea of updating regulations covering commercial practices.

- The ULC has for a long time been pressing the Luxembourg authorities for an in-depth discussion of direct and door to door selling..., so as to achieve greater legal certainty. In this respect, the Green Paper has

come at an opportune moment and its proposal for criteria to allow the better assessment of the proportionality of existing measures and new initiatives is welcomed. It would, however, be unacceptable and contrary to the ECJ's consistent case law for Brussels to impose deregulatory measures, without working into these a bias in favour of harmonising legislation.

The scope of the Green Paper

- Regarding the new definition, very broad according to the ULC, of 'commercial communications', the ECJ has fairly recently introduced, following the case of 'Keck and Mithouard'¹, another definition, that of 'sales methods', in order to limit the application of Article 30 of the Treaty. Nonetheless, the definitions of 'sales methods' and of 'commercial communications' are largely identical. However, by this decision, the ECJ has responded that Article 30 provides for the liberalisation of intra-Community exchanges, but is not a provision aimed more generally at promoting the unrestricted exercise of commercial activity within each Member State. Yet a study of the Green Paper would suggest that the Commission is pursuing precisely this much wider liberalising objective.

- A clearer distinction needs to be drawn between harmonised and non-harmonised areas in order to remind Member States that they can introduce legislation in the absence of harmonisation.

Consumer protection

- The Green Paper takes the effort to examine the point of view of consumers, which the ULC applauds. It refers notably, in this context, to Article 129A of the Treaty, relating to the protection of consumers.

- The need to deepen international regulatory co-operation to ensure effective protection for consumers must be made a current pre-occupation, to be implemented as efficiently as possible, notably through using the network of governmental experts

¹ Decision of 24/11/93, cases C-267 and C-268/91.

on issues of commercial cross-border practices, already put in place by the OECD and in which the Commission already participates.

- The real problem, in cases where compensation is demanded by consumers who have suffered damages, is not that of different national regulations, but of a lack of efficient and rapid co-operation between regulatory authorities in different Member States. The Commission moreover is aware of this - the proposal for a Directive relating to the discontinuance of actions in the area of the protection of consumer interests, adopted on 24 January 1996, is the best proof of this. Curiously, the present Green Paper does not mention it. However, an essential counterweight to steps towards greater flexibility and increased mutual recognition of national rules must be the adoption of effective punitive measures on illegal commercial practices.

- As explained in the Green Paper, the growth in services resulting from the 'information society' represent as many advantages for consumers as dangers (near real-time inter-activity, for example). The ULC understands the Commission's decision in favour of regulating Internet services by the country of origin. However, the Green Paper does not tackle the consequences which flow from this. It is thus desirable that strong co-operation between regulatory authorities is promoted by the European Commission, especially within regional contexts such as experienced by the ULC, where cross-border flows are common. The states of origin of commercial communications should be legally bound to monitor closely commercial activities aimed at other Member States, especially in border regions.

An assessment of the specific areas of Community action

- The preliminary examination by the Green Paper of different national regulatory restrictions (misleading advertising, price

advertising (reductions, deep discounting etc.),...) leads one to believe that the preservation of general interest objectives is the main aim of these restrictions and that the assessment of the proportionality of different measures will be done case by case. In the ULC's opinion, the strength of a restriction depends above all on the legitimacy of the objective pursued by the measure in question. The most vulnerable consumers would thus be better protected from ill-informed purchasing decisions.

Methods of assessing the proportionality of Community and national measures

- The Commission proposes that the critical examination of commercial regulations should be based on a case by case assessment of national or Community measures, an approach with which the ULC agrees in principle. However, the practical consequences of certain assessment methods leads one to the conclusion that the Commission is advocating nothing less than a deregulatory spiral ('negative integration').

- The creation of a committee for commercial communications, which is uniquely made up of representatives of Member States, if necessary accompanied by representatives of self-regulatory bodies (clearly members of the profession), does not leave any scope for consumer associations to take an active part. This is unacceptable to the ULC. Moreover, the aims and procedures of this committee remain very vague. It would appear to be more a 'forum' than a consultative committee or even a regulatory committee.

Commercial communications to children

For marketers it has become less attractive to reach children through media such as television, radio and print. Other advertising and marketing techniques are being applied and advertising is now part of an integrated marketing mix.

It should be noted that the techniques themselves are in fact not new. What is new about it is their application with regard to children. In addition, all of these techniques are deployed at the same time, enabling marketers to reach children in many different ways. As a result, advertising is ubiquitous: children are confronted with it everywhere - on television, in magazines, through the mail box, at the sports club, in their bedroom, while playing games, when enjoying breakfast and on their way to school. Even schools have become a silent partner in advertising to children.

Since it has become almost impossible for children to escape from it, the commercial pressure on them is increasing. Furthermore, along with this increasing commercial pressure on children, a trend towards more covert advertising manifests itself. Many messages are 'hidden', appearing to be a kids' club, an entertaining movie, a school lesson, a game or a puzzle. Often children will not even notice that advertising is being directed at them, integrated as it is into general media output. Indeed, advertising has become part of the fabric of children's lives.

The increasing commercial pressure on children together with the trend towards 'hidden' advertising pose a challenge for consumer organisations, policy makers and educators alike. In addition, in the commercial messages which companies direct at children cultural differences are gradually fading away. In different countries of the European Union similar messages and advertising techniques can be found. So, the challenge

may be considered a European one.

The developments mentioned above give rise to the question whether extra measures in the field of children and advertising are needed with regard to both information/education and regulation. Before addressing this question it is necessary to determine what is known about the relationship between children and advertising from existing research. We need to assess children's understanding of advertising and the influence and effects advertising may have on them.

Advertising and Children - the research

Since the 1970s the relationship between children and advertising has been heavily researched. The bulk of it has concentrated on TV advertising and its direct effects on children. It appears that because of their cognitive limitations children understand commercials very differently from adults.

Until the age of 6 to 8 most children distinguish between TV advertising and programmes on the basis of salient perceptual characteristics - commercials tend to be shorter and louder.

The increasing commercial pressure on children together with the trend towards 'hidden' advertising pose a challenge for consumer organisations, policy makers and educators alike.

However, there is more to it; advertising and programmes are made with different intentions. First and foremost commercials are meant to persuade people to buy. Only when children are able to understand the purpose of advertising are they in a position to develop a critical attitude to it. The ability to understand the purpose of advertising is generally considered one of the most important prerequisites for children to be able to approach

This article summarises a report produced by the Dutch consumer affairs organisation (Consumentenbond) and the BEUC

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it from a questioning perspective. This, however, requires extra, relatively sophisticated, skills which develop as the child grows older. A complete understanding of TV advertising does not develop until after the age of 12. This seems to be even more the case when it comes to more covert forms of advertising such as advertorials and competitions.

More independent research into the relationship between children and advertising is needed. Not only should such research be extended to other (newer) forms of advertising - the integrated marketing mix - but also more long-term effects should be included. After all, we still do not know what will be the effect of the accumulation of the commercial output.

Although research may provide us with greater knowledge as to the effects of advertising on children, it should be stressed that above all the question of children and advertising must be seen as a question of ethics and morality, a question that has to do with our view of children and their needs in society.

Children do not constitute fully-fledged market participants. They are, to use the words of McNeal, 'the most unsophisticated of all consumers; they have the least and therefore want the most. Consequently they are in a perfect position to be taken.' Therefore, one should acknowledge children, just as marketers do in order to market to them profitably, as 'special people in their own right' and not as 'mini-adults' (McNeal).

One could speak of a yawning gap in the regulations of 'new' advertising and marketing techniques directed at children, both at a national and European level.

In the same way, one could argue that regulations protecting adults with regard to advertising do not suffice; special rules for children are needed. This is especially so given the use of covert advertising

techniques to children. This demonstrates the failure of marketers to play fair and invites regulation.

In addition, children need to be educated about the purpose of advertising. The more they know about it, the more possible it becomes to read it in an objective way. Indeed, here lies a special task for educators. Yet, it appears that the opportunities for educators, and parents in particular, to help children become advertising literate are severely limited in terms of skills, time and knowledge. Moreover, a lot of advertising towards children is hidden from the parents' view. This implies that educators need assistance which could take the form of specific regulation with regard to advertising and children.

The existing regulatory framework

Mainly because of the Television without Frontiers Directive, which has been implemented in the overall majority of the EU Member States, whether in relation to legislation, self-regulatory codes or both, television advertising is central to the regulations concerning advertising and children.

In addition to the directive, some States have introduced stricter regulations with regard to TV advertising directed at children. Other advertising and marketing practices which are increasingly being applied with respect to children, such as advertising through schools, direct mail and children's clubs, have hardly been subjected to EU regulation. Moreover, although almost every Member State has regulated some aspect of these 'new' techniques, no country has regulated them comprehensively. Hence, one could speak of a yawning gap in the regulations of 'new' advertising and marketing techniques directed at children, both at a national and European level.

In the field of tobacco and alcohol advertising directed towards children there seems to exist a more or less uniform approach; in all Member States specific regulations apply. With regard to other products or services of interest to children, such as toys, sweets and confectionery, regulations are not at all uniform. Whereas some states have introduced fairly specific rules for the advertising of toys and sweets, others have no rules at all. It should be mentioned that the various regulatory initiatives do not cover the cross-border dimension of advertising to children. This implies that it is not possible for individual Member States to enforce the national regulations in the case of 'foreign' advertisers violating these.

As it is inherent to the legal tradition and culture of the various Member States and examples cannot be taken out of their context, it is difficult to pin down one particular regulatory framework which works in a satisfactory way. While taking the legal tradition and context into account, it seems that the framework in the Nordic countries as well as the self-regulatory system as evolved in countries like Ireland, the United Kingdom and The Netherlands seem to work adequately. Neither of these frameworks, however, has resolved the problems related to the cross-border dimension of advertising towards children.

Recommendations

1. Broadening the scope of commercial communications

Given that advertising and marketing practices take so many different shapes, it seems useful to broaden the scope and use the term commercial communications to cover all advertising and marketing practices.

2. Introducing a principle of 'degressive' protection

Children of different age categories have different needs of protection. A complete understanding of advertising, and therefore a critical and questioning attitude to it, does not seem to develop until the age of 12. In view of this, all consumer organisations find it important to have rather severe restrictions with regard to commercial communications directed at children of 12 and under. For youngsters between 13 and 18 regulations can be less protective. Therefore, a principle of 'degressive' protection could be introduced.

All consumer organisations find it important to have rather severe restrictions with regard to commercial communications directed at children of 12 and under.

3. Broadening the scope of child protection

In the light of the different approaches in the various regulations to the notion of advertising towards children, it would be preferable to clearly state that the general principles identified in order to protect children should be respected for any type of advertising likely to be seen or heard by children, even where it is not especially targeted at them. In addition, the advertisements that specifically target children should be submitted to more restrictive provisions.

4. Introducing the cross border dimension

The cross-border dimension should be introduced in the regulations with regard to commercial communications directed at children. In the current situation there exists considerable legal insecurity as national regulations are not binding upon advertising originating from another

EU Member State. Therefore, community measures should be taken, either to adopt provisions to protect children against advertising at the highest possible level of consumer protection, or, where compromises have to be reached, to allow the Member State at which the advertising is aimed to apply its stricter rules also to those advertisements that originate in a less restrictive country ('receiving country control').

It seems desirable to introduce at Community level a horizontal provision that takes account of children as a special category and which covers all products and services and all forms of commercial communications directed towards children, whatever the medium (including new media such as the Internet).

5. Introducing a horizontal instrument

Only very few rules exist on a horizontal basis to protect children in advertising. Most legislative initiatives are focused on TV advertising. It seems desirable to introduce at Community level a horizontal provision that takes account of children as a special category and which covers all products and services and all forms of commercial communications directed towards children, whatever the medium (including new media such as the Internet). This provision - which may well take the form of a European directive - should contain the main principles of child protection against unfair and misleading commercial practices. In addition this directive could include restrictions with regard to certain forms of commercial communications, or restrictions (e.g., such as timing restrictions) to specific 'sensitive' products eg tobacco, alcohol, toys and food. For restrictions with regard to certain media or

forms of commercial communications one could think of a ban on direct e-mailing to children or restricting in-school marketing by allowing it only when it complies with a special code drawn up by government.

6. Improving enforcement

Enforcement of the principles applicable in the area of children and advertising is much too poor. Sanctions need to be sharpened in order to ensure that regulations are being complied with. In this respect, the introduction of a general pre-vetting procedure (or 'pre-copy advice' procedure) could be helpful, as it could be argued that advertising to children is a very 'sensitive' area. A pre-vetting procedure is in any case appropriate for all TV commercials. For press advertising pre-vetting could be recommended for certain sensitive areas, such as tobacco, alcohol and slimming adverts. In addition, it might be desirable to extend the responsibility to the media which publish the advertising. These media then would be forced to verify *a priori* whether the advertising they carry is misleading in character.

Complaints procedures, an essential element of enforcement in all EU Member States, also need improvement. Not only should individual consumers be made aware of their possibility to file complaints, also the procedure itself should be made more transparent.

The general principles stated in legislation and in self-regulation to protect children in advertising have been applied in several individual cases. However, in many Member States, except for the ones in the Nordic region, these cases are only rarely made public and it would be very interesting to provide, on an official basis, information on the criteria used by national enforcement bodies in the application of the general principles. This information would make

it possible to establish more detailed data bases which would then allow for:

- the refining of the general principles in the light of the case-law;
- the exchange of information between enforcement bodies and the emergence of common concepts of misleadingness and unfairness at EU level,
- more legal security for advertisers and consumer representatives as to the exact meaning and scope of the general principles.

7. Improving monitoring

The developments in the field of commercial communications directed towards children move so swiftly that consumer organisations, due to limited time and resources, cannot keep up the pace to monitor them effectively. This monitoring is further complicated by the fact that many of these commercial messages (in-school marketing, direct mail) are hidden from consumers organisations' view. Furthermore, the commercial communication practices directed at children are comparable in the various EU Member States. Therefore, it is needed to establish a European observatory (European Information System) from the consumer's side. This observatory should not only be tasked with monitoring the children's market, but should also initiate research and disseminate information both to consumer organisations and consumers. Furthermore, the observatory could be entrusted with monitoring whether the existing regulations with regard to commercial communications directed at children are still adequate in view of the developments in the children's market.

8. More research needed

As the borders between commercial communications and other communication output are becoming more and more diffuse and commercial messages reach children in many different ways, it may well be that the greatest influence lies in the cumulative effect that this overall output can be taken to have. Yet, little is known about the combined influence and effects of commercial communications on children. Hence, additional research is needed. It should address issues like the potential threats of the increasing commercial pressure on children, and their understanding of 'new' and more covert advertising and marketing practices such as advertorials and in-school marketing. It should be noted, however, that research needs to be independent and preferably to take place within a European framework.

As the borders between commercial communications and other communication output are becoming more and more diffuse and commercial messages reach children in many different ways, it may well be that the greatest influence lies in the cumulative that this overall output can be taken to have.

9. Empowering young consumers

The commercial pressure on children is increasing. At the same time there is a trend towards more covert forms of commercial communications. In view of these developments it is essential that young consumers are empowered too, not only by adequate regulations in respect of children, but also by informing and educating them and their parents about the developments in commercial communications. In their communication with children, consumer organisations could make use of new technologies.

Resolutions of the lead Committee of the European Parliament

As reported in the last issue of *Commercial Communications*, the lead committee of the European Parliament (the Committee on Economic and Monetary Affairs and on Industrial Policy) produced an initial report on the Commission's Green Paper on commercial communications. Reports on the opinions of the Committee on the Environment, Public Health and Consumer Protection and the Committee on Legal Affairs and Citizen's Rights are published elsewhere in this issue.

Having received further representations, the lead Committee subsequently revised its draft opinion and proposed a number of resolutions, which we reproduce here in full. These resolutions were subject to further amendments. A vote on this final, integrated, report was taken in the lead Committee in the beginning of June. The final stage of the Parliamentary process, the decision whether to adopt the report, will be taken in plenary session in mid-July.

The resolutions

The lead Committee:

1 Welcomes the Green Paper, but considers that the Commission's proposals must be reinforced in order to reach the intended goal;

2 Asks the Commission to publish in its announced follow-up communication the definition of a proportionality assessment methodology, which includes strict time limits for decisions, is based on existing jurisprudence and explains how it is applicable to existing legislation at national

and Community level, self-regulatory codes and new legislative proposals;

3 Calls for the establishment of a tripartite committee consisting equally of Member States' representatives, industry representatives and consumer organisations and asks to be consulted on its rules of procedure;

4 Requests the Commission to ensure that the proceedings of the Committee on the proposed proportionality assessment be fully transparent and further to ensure that the Committee consults thoroughly with complaining parties, meets regularly, operates according to strict time limits, publishes its results and considers all complaints lodged with the Commission; the Committee shall report to the European Parliament;

5 Calls on the commercial communications sector to ensure that its national and European self-regulatory procedures are publicly available, published and transparent, and that individual consumers can complain easily, without cost to themselves and in expectation of a prompt and satisfactory response; encourages the industries involved to include in the self-regulatory codes the principles of country of origin, mutual recognition and proportionality and to introduce minimum standards of consumer protection;

6 Calls on consumer organisations to make full use of all enforcement mechanisms to protect the interests of consumers in the single market, including the infringement procedure, the forthcoming committee on proportionality and all national bodies responsible for overseeing commercial communication;

7 Calls on the Commission, consumer organisations and industry to consider

(The Committee) calls on consumer organisations to make full use of all enforcement mechanisms to protect the interests of consumers in the single market

strengthening already existing self-regulatory complaints procedures, such as that of the EASA; the ICC Guidelines on Interactive Marketing Communications should also be fully accounted for;

8 Calls on the Commission to present in the follow-up communication a full inventory of existing barriers to free circulation of the commercial communications services;

9 Asks the Commission to undertake a comprehensive study of the economic relevance of the commercial communications sector to the Single Market;

10 Stresses the need for a data bank of Community and national legislation in the area of commercial communications and for the immediate creation of a single European contact point which should, as a first priority, supply the European Parliament with a full overview and analysis of existing self-regulatory codes in the Member States;

11 Calls on the Commission to consider a SLIM (Simpler Legislation in the Internal Market) analysis of the sector;

12 Calls on the Commission to study the obstacles to multi-level marketing, brand diversification, packaging and sponsoring in the European Union and to assess the need for legislation to guarantee the Single Market in these growing forms of commercial communication;

13 Underlines the need to safeguard the development of Internet, electronic commerce and related new media services, and to consider similar utilisation of the commercial communication legal and self-regulatory instruments;

14 Is of the opinion that the Commission

is not making full use of its existing powers; insists that Articles 63 and 169 are applied systematically;

15 Is of the opinion that the Council should consider expanding the application of the proposed Directive on a Regulatory Transparency Mechanism on new services to cover also commercial communications;

(The Committee) asks for the introduction of a Council decision to enable possible infringement proceedings to be heard in the Court of First Instance.

16 Requests that the Commission reports back to the European Parliament on possible initiatives to improve the Treaty infringement procedures to ensure that these are transparent, operate to strict time limits and offer proper provision for appeal with equal access to all interested parties;

17 Asks for the introduction of a Council decision to enable possible infringement proceedings to be heard in the Court of First Instance¹;

18 Instructs the Commission and Council to make the necessary allocations in the budget to implement the proportionality methodology and to ensure effective application of the infringement procedure; adequate resources must be accorded in terms of funding and manpower;

19 Instructs its President to forward this resolution to the Council and to the Commission, as well as the industries and consumer organisations concerned.

¹ This is in line with Parliament's Resolution on the role of the Court of Justice, see OJ C 269, 4.10.93, p.156.

The report of the Environment Committee

The draft opinion of the Committee on the Environment, Public Health and Consumer Protection was presented to the lead Committee at the end of February.

The opinion was originally drafted by rapporteur Mr Lehne and is, in general terms, critical of the approach adopted by the Commission. By concentrating almost exclusively on commercial communications as an area of economic activity, the Commission has produced a Green Paper which 'fails to deal with issues of concern to consumers, such as the effects of commercial communications on children.'

Further, little attention has been paid to the importance of regulation in protecting consumer interests and the Green Paper is criticised for failing to approach commercial communications in a coherent manner, particularly where they 'do not respect established national standards'. The report states that the central analysis of the Green Paper needs to be reviewed, affecting a better balance between 'market opening objectives' and the need to maintain and improve standards and 'on the need to achieve a balance between home and host country control'.

The Committee welcomes the initiative in that it acknowledges the need for coherent policy in the development of advertising law. It is deemed particularly welcome as in the past many initiatives have represented a series of 'piecemeal measures'.

In the Committee's view, the increasing volume of cross-border transactions requires a proper balance between the free flow of information and consumer protection.

In the Committee's view, the increasing volume of cross-border transactions requires a proper balance between the free flow of information and consumer protection. It concludes that within Eu-

rope 'consumers should be confronted with a maximum degree of harmonisation in the field of advertising'. Equally, it welcomes the possible liberalisation of certain restrictions which act against the consumer and cites the 'ban on discounts or the ban on free gifts'.

However, this point of view is qualified as the text stresses how any harmonisation of advertising law must respect the subsidiarity principle. The report states that 'national provisions that protect consumers, establish their rights or promote their interests must not be challenged as barriers to the Single Market.' It goes on to suggest that 'only advertising provisions that regularly affect the consumer in the Internal Market should be harmonised'.

Conclusions

The Committee came to a number of conclusions:

- It calls for specific measures to protect children and to regulate 'unfair marketing practices on-line'.
- There needs to be a more detailed assessment of the effects of commercial communications on children, on the implications for privacy and the mechanisms for effective cross-border redress.
- The method proposed by the Commission seems to emphasise the need to remove barriers to the suppliers of commercial communications and pays little attention to the recipients, the consumer. As a consequence the consumer's central role in the 'commercial communications chain' is ignored and the Commission needs to reconsider the proposed assessment methodology to take account of this.
- Whilst acknowledging 'a coherent approach to policy making is in the interests of consumers', it calls on the Com-

mission to recognise that the coordination proposed in this area should be integrated into 'a broader framework of action relating to the information society'.

- The proposal to set up a central contact point is considered 'valuable'. However, if the Commission's proposals are to be set in the context of the information society, they will need to take account of all the interests involved. To ensure a high level of consumer protection which protects 'cultural diversity', the framework within which the contact point is established should be developed at an 'inter-service level'.

- In attempting to achieve coherence in commercial communications, the basic principle to be followed should be to 'retain rules based on national cultural differences'.

- Cultural diversity requires that the Commission should not seek to undermine the level of protection deemed necessary by any Member State in certain particular areas: 'commercial communications to children; restrictions on commercial communications for reasons related to societal values; commercial communications for pharmaceuticals; commercial communications for financial services; commercial communications for alcoholic beverages and commercial communications for tobacco products.

- The Commission's own research suggests that the main difficulties in the development of a single market in commercial communications are cultural in origin. Consequently, the Commission should assess proportionality with particular regard to combining market opening objectives with the maintenance and improvement of standards. It should also recognise the need to affect a balance between home and host country control. There is further a need to acknowledge the benefits of 'an

appropriate blend of legislation and self-regulation which reflects the cultural differences of the Member States'.

- In its forthcoming Green Paper on food policy, the Commission should consider restrictions on the commercial communications related to food products.

In attempting to achieve coherence in commercial communications, the basic principle to be followed should be to 'retain rules based on national cultural differences'.

- There should be restrictive advertising legislation at Community level in relation to tobacco products which have the same damaging health consequences 'regardless of national traditions'. It is to be hoped that the Council speedily adopt a directive affecting a ban.

- The Commission should include packaging in any future definition of commercial communications.

- There should be an overall framework developed by the Commission 'for regulating unfair marketing practices'.

- The consultative committee proposed in the Green Paper is welcomed. The committee should include consumer representation. It should be transparent, publish the minutes and agendas of its meetings and 'report on a regular basis to the European Parliament'.

- The Consumer Affairs Council should hold a discussion on the issues arising out of the Green Paper.

- Any future work should 'not undermine existing standards or their development in the Member States'.

The report of the Legal Affairs Committee

The Committee on Legal Affairs and Citizens' Rights (rapporteur Julio Añoveros Trías de Bes) has invited the lead Committee to incorporate the following conclusions into its report:

The Committee:

- 1 (Acknowledges) the legal basis governing commercial communications is Article 100a, which entails the application of Articles 59, 56, 30 and 36 of the Treaty.
- 2 Considers that commercial communications should not be regarded merely as a sector of economic activity. Clear and transparent guidelines at European level would make a significant contribution to making the Internal Market a reality.
- 3 Believes that there is a need to limit the scope of what is understood by commercial communications and the concept of service provider.
- 4 Believes that certain liberal professions, because of their involvement in tasks which serve the public interest, because of the special relationship which they maintain with their clients or because they are unable to guarantee the desired result, merit specific rules, determined by their own professional code of ethics, in the area of commercial communications.
- 5 Believes that the 'country of origin' principle cannot be the general basis for action.
- 6 Considers that, to avoid the legal uncertainty resulting from the casuistic application of the proportionality principle, secondary legislation might be required to remove some of the identified obstacles pursuant to Articles 30 and 59 of the EC Treaty and to guarantee a high level of protection for consumers, young people and other public interests.
- 7 Considers that a suitable vehicle for such guidelines could be a communication adopted with a view to the completion of the Internal Market, which could have a multi-disciplinary approach, since commercial communications affect the Commission's industrial policy, competition policy, public sector policy, audio-visual policy, cultural policy and in particular consumer protection and health. An assessment should be made of the implications of the principle of subsidiarity and the above-mentioned areas of action with regard to national legislation.
- 8 Considers that, although the proposed method for evaluating the proportionality is a sound one, the legal scope thereof needs to be determined and it must be combined with an assessment of other policies as well. This method must not serve as an excuse for the Commission not to apply Article 155 of the Treaty effectively and, in the event of an infringement of Community law, not to bring those responsible before the Court of Justice.
- 9 Believes that, when drawing up its communication on commercial communications, the Commission should examine the principles deriving from secondary legislation in this sector and also takes into account the following points:
 - a) Any future rules governing the commercial communications sector must also take into account the legal aspects of the use of various types of communications in the Union by firms from third countries and the use of commercial communications by Union firms in third countries, as these aspects are of enormous importance in the information society;
 - b) Future Community legislation on commercial communications must take account of the legal and administrative solutions which have already been used to regulate this sector.
- 10 (Believes) the Commission must establish the legal nature and scope of the committee which it proposes to set up to ensure proper implementation of the proportionality principle. However, we believe it essential for the committee to include representatives of the commercial communications sector, consumers and the European Parliament.
- 11 Believes that the proportionality assessment procedure should under no circumstances entail an extension of the normal deadline by which the Commission takes its decisions.

Advertising pre-testing; will Europe follow America's lead?

The greatest problem that has always afflicted advertising is the waste that it entails. Almost a hundred years ago, two leading advertisers in two different countries, William Hesketh Lever and John Wanamaker, made the statement - apparently independently of one another - that half their advertising was wasted but they did not know which half. This aphorism has become folklore; yet no advertising practitioners during the intervening century have made much attempt to improve matters at a macro level. The intense conservatism of the advertising industry has ensured that the obvious waste is regarded with complacency and indifference.

This is all perfectly clear from the research I have carried out in both the United States and Germany. This is based on the pure single-source technique and it demonstrates unambiguously that the situation has indeed not improved much throughout the past century¹. The main discoveries I made can easily be described. My top-line findings were that 70 percent of campaigns in twelve major fast moving consumer goods (fmcg) categories produced an immediate effect on sales, large or small; and that 46 percent of campaigns generated a long-term effect in addition to a short-term one. 'Long-term' represents an influence on market share over the course of a year. Long-term can also mean periods much longer than a year, so that a year-end effect is more precisely described as a first order of long-term effect.

These figures are based on an optimistic view of effectiveness. If we set tougher standards, the figures drop by about half, to 35 percent for short-term and 25 percent for the first order of long-term effect.

If these rather sober estimates represent anything like a general picture - and data published by Colin McDonald in the United Kingdom actually confirm that they do - the advertising industry should regard them as profoundly disturbing². They are much worse even than Lever's and Wanamaker's

guesses. My estimates of overall effectiveness mean a waste of resources that can be measured in scores or even hundreds of billions of dollars spent on campaigns that do not work or work only partially.

How can anyone dispute the need to improve matters? It is not enough to devote attention exclusively to generating stronger campaigns - an endeavour to which agencies have always given their best efforts: but efforts that have obviously not been good enough. More importantly, we must pay serious attention to finding reliable tools to identify beforehand what is likely to work so that media budgets can be spent with some reliable degree of effectiveness. This is an activity about which agencies have been notably less enthusiastic.

One reason why agencies have dragged their feet over pre-testing is that they have always had theoretical reservations about the various research techniques; reservations that should be respected, although agencies can be faulted for their unwillingness to try and solve the technical problems they identify. But a second - and more significant and pervasive - reason for agencies' refusal to embrace pre-testing systems is a deep-seated fear that these represent a threat to creative autonomy. Pre-testing is widely perceived as a weapon available to clients to use to dictate to their agencies, and even browbeat them.

My estimates of overall effectiveness mean a waste of resources that can be measured in scores or even hundreds of billions of dollars spent on campaigns that do not work or work only partially.

This article is concerned exclusively with methods devised to forecast the marketplace performance of campaigns. Such techniques are invariably quantitative. For thirty years in the United States (and for a slightly shorter period in Europe), agencies

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1. John Philip Jones, *When Ads Work. New Proof that Advertising Triggers Sales* (New York: Simon & Schuster - Lexington Books, 1995). Also John Philip Jones, *When Ads Work. The German Version* (Frankfurt am Main: Gesamtverband Werbeagenturen, 1995).

2. Colin McDonald, 'How Frequently Should We Advertise?' *Admap*, July/August 1996, 22-25.

have made fairly productive use of qualitative research for guiding creative work. But even the most enthusiastic protagonists of such research would not claim that it can be used reliably for predictive purposes. It is used for something different, mostly to detect problems of communication and impact. Qualitative methods will therefore be discussed only briefly here.

Pre/post preference testing

The research methods to which this article is devoted can be described as pre/post preference testing. The proprietary name for the research on which I shall be reporting is the ARS Persuasion^R technique. The commercial to be tested is screened in a 'laboratory' setting (a theatre) as part of an entertainment program (which includes other unrelated commercials). Two 'market-basket' lotteries take place, one before the program and another one afterwards. The ARS Persuasion^R measure represents the difference in the preference for the advertised brand in the lottery before the program and the preference after exposure to the advertising. This difference is assumed to be 'the net effect of retention and attraction as a result of the advertising stimulus'³. It purports to measure the immediate short-term effect of an advertisement - an effect that in the marketplace would generally be manifested in sales.

European advertising practitioners with long memories will immediately call to mind the name Horace Schwerin. Indeed ARS Persuasion^R testing is the Schwerin technique in its contemporary form.

Schwerin research was once widely employed in Britain. It was introduced at the time of the launch of commercial television in the mid-1950s, and was extremely popular in the mid-1960s, a period when one of the major television contractors allowed a rebate from their card rates on the understanding that the saving would be used to fund Schwerin testing of the cam-

paigns that were to be screened. Schwerin became so influential that major clients decided which commercials to run virtually exclusively on the basis of their Schwerin scores⁴.

However, by the end of the 1960s, this use of Schwerin research had come to an end. Indeed Schwerin was effectively discredited and the Schwerin organisation had ceased operations in the United Kingdom. I believe that this was all the delayed result of an extremely unfavourable paper written by Jack Fothergill and Andrew Ehrenberg which had been published in August 1965⁵.

The Fothergill-Ehrenberg paper was a response to an article by Robert D. Buzzell which attempted to show a correlation between Schwerin scores and the marketplace performance of the advertising campaigns that had been tested⁶.

The Fothergill-Ehrenberg paper effectively destroyed Buzzell's optimistic conclusions about the Schwerin technique, and with it the British advertising community's belief in this system. Perhaps I should say that it destroyed clients' belief in Schwerin; agencies had been highly sceptical (and where possible resistant) from the beginning, and the Fothergill-Ehrenberg paper did nothing more than stimulate their Schadenfreude.

The remarkable feature of Buzzell's paper was that it was colossally flawed, for reasons other than those given by Fothergill and Ehrenberg. Buzzell attempted to measure the short-term effect of advertising from sales audits conducted at four-month intervals. From what we know today of the evaluation of short-term effects, it is clear that we ideally need to measure sales at four-day (or perhaps, seven-day) intervals. There was no way that Buzzell, with the auditing system available to him, could have measured any short-term effects at all. The Fothergill-Ehrenberg paper does not refer even once to this decisive deficiency.

Fothergill and Ehrenberg used their

³ Lee M. Byers and Mark D. Gleason, 'Using Measurement for More Effective Advertising', *Admap*, May 1993, 31-35.

⁴ Personal experience from the mid-1960s, when I was an account representative in J. Walter Thompson, London. I worked on Unilever business and I observed how Schwerin research was used by this client (and by others) to make the decisions about which advertisements to run.

⁵ J.E. Fothergill and A.S.C. Ehrenberg, 'On the Schwerin Analysis of Advertising Effectiveness', *Journal of Marketing Research*, August 1965, 298-306.

⁶ Robert D. Buzzell, 'Predicting short-term Changes in Market Share as a Function of Marketing Strategy', *Journal of Marketing Research*, August 1964, 27-31.

technical virtuosity to destroy Buzzell's attempt to demonstrate Schwerin's predictive powers. But since Buzzell did not employ the right tools for the job, Fothergill and Ehrenberg successfully attacked Buzzell without damaging the Schwerin system itself. Schwerin continued to operate with reasonable success in the United States despite its demise in Britain.

An organisation called research systems corporation (recently renamed rsc THE QUALITY MEASUREMENT COMPANY) acquired the equity of the Schwerin organisation and registered the description ARS Persuasion^R measure for its pre/post preference technique (ARS being an acronym for Advertising Research System). rsc has become extremely successful and built a powerful client base - itself evidence that an important collection of sophisticated and influential American advertisers have faith in the predictive value of the ARS Persuasion^R technique. In America, rsc alone carries out 2,000 tests per annum, and there are also three competitive organisations in the business (although their methods are not, in my opinion, quite as good as rsc's).

The company has done more than sell its service. rsc has invested its own funds in improving its methods and conducting other types of 'research into research'. The data published in this article are practical illustrations of rsc's commitment to validating and improving their system with a view to maximising its value to the advertising profession.

When my book *When Ads Work. New Proof that Advertising Triggers Sales*⁷ appeared in the spring of 1995, rsc approached me and arranged a series of meetings. Two features of my research - my conclusions that advertising is capable of a powerful but selective short-term effect, and that this effect can be achieved by a single advertisement exposure - were harmonious with the findings and underlying theory behind ARS Persuasion^R testing. rsc immediately seized

on these points and I agreed that we both stood on common ground.

rsc eventually commissioned me to evaluate the evidence on the ability of the ARS Persuasion^R measure to predict commercial effectiveness, and I accepted this job on the strict understanding that rsc would exercise no sanction over what I would write, except in matters of fact and confidentiality. I was frankly sceptical until I began to scrutinise the evidence - and to appreciate rsc's enthusiasm to demonstrate the validity of their work. The result was a report entitled *Getting It Right The First Time. Can We Eliminate Ineffective Advertising Before It Is Run?* This was published in the United Kingdom in 1996⁸.

The top 30 percent of American campaigns are significantly more effective in generating immediate sales than the top 30 percent of campaigns in either Germany or Britain.

As an aside, the pure single-source research I have already mentioned in this article shows both resemblances and differences between its three countries of origin, the United States, Germany and Britain. One striking similarity is that in all three countries, the proportion of campaigns which have no short-term effect at all is the same: approximately 30 percent. Yet at the opposite extreme of the most effective campaigns, the United States scores much better than either of the other two countries. The top 30 percent of American campaigns are significantly more effective in generating immediate sales than the top 30 percent of campaigns in either Germany or Britain.

This difference immediately raises the question of whether it is related to the more effective use of advertising pre-testing in America. Quantitative pre-testing of all types is practiced far more widely in the United States than in Europe.

⁷ See note 1.

⁸ John Philip Jones, *Getting It Right The First Time. Can We Eliminate Ineffective Advertising Before It Is Run?* (Henley-on-Thames, UK: Admap Publications, 1996).

Evaluation of the rsc System

The theoretical objections to pre/post preference testing are only relevant in two circumstances - when the system can be shown not to be predictive, and where there are omissions from what it provides. In my evaluation of rsc's work I examined briefly two criticisms endemic to the research itself : (a) supposed problems with the sampling; and (b) the issue of whether consumers respond to a single advertisement exposure. I also looked, in more detail, into gaps : (c) the special situation of large brands; and (d) the uses of open-ended qualitative data. In summary, I found little substance in (a) and (b), although (c) and (d) deserve - and receive - more extended discussion in my monograph. (In this article I also look at another matter - the reliability of the research system to measure emotional as well as rational copy.)

In my work with rsc, I have concentrated mainly on the evidence of the predictive capability of their technique. If it can be demonstrated that the device is capable of predicting success or failure in a reasonable majority of circumstances, then the objections endemic to the technique itself become substantially irrelevant. This is the main reason I have not become embroiled with the theoretical pros and cons of criticisms (a) and (b).

Assembling a battery of cases to address the all-important question of predictability was a laborious procedure. I set rigorous standards in selecting the examples.

First, there had to be accurate measurement of short-term sales effects, which meant that the cases had to be confined in the main to those in which sales were measured by scanner research. The result was that large numbers of cases based on bi-monthly audit data had to be omitted.

Second, I took great pains to review the remaining cases for statistical contamina-

tions, notably those relating to price or price promotions.

Third, when I used groups or collections of cases, I reviewed the complete collections in their entirety, confirming that all the appropriate cases were included (i.e., that the successes had not simply been skimmed off and the remainder ignored).

Of the enormous number of cases available to rsc, the organisation provided over 800 cases for which in-market sales results were available. In these, the data seemed *prima facie* to be both pure and 'reasonable' (i.e., did not contradict commonsense). However, I excluded many of these cases on the grounds of confidentiality, or because of the three conditions mentioned above.

174 cases remained. They fall into seven groups and are summarised below. When this corpus of evidence has been built up to 500 cases I shall publish it in a book.

1. Campbell's Prego spaghetti sauce is a very interesting longitudinal case which gives full consideration to the contribution to sales of a range of marketplace contaminations - factors other than the creative content of the campaign. The power of the creative content is effectively predicted by the ARS Persuasion^R scores; this is shown to be strong enough to outweigh the various non-creative contaminations affecting sales.
2. SmithKline-Beecham's Citrucel laxative is another longitudinal case. It demonstrates the ability of powerful creative (also forecast by the ARS Persuasion^R scores) both to boost volume sales and to support increased unit price.
3. A collection of 37 split-cable tests monitored by Information Resources Inc. (IRI) demonstrates a strong relationship between ARS Persuasion^R scores and marketplace sales, but a weak relationship between advertising expenditure alone and sales. The best results come from heavy expenditure put behind strong copy - a result that accords well with my pure single-source re-

search from Germany⁹.

4. 28 new brands show a clear correlation between the size of the ARS Persuasion^R score and consumer trial rates.

5. An important group of 97 miscellaneous cases - a group that is being added to all the time - demonstrates a very good fit between the ARS Persuasion^R scores and immediate market share changes. There is a reasonably good statistical relationship between the size of the score and the size of the resulting sales effect.

6. 7 split-cable copy tests demonstrate a clear relationship between the relative ARS Persuasion^R scores of the alternative ads and their sales performance in the marketplace.

7. 3 named longitudinal cases demonstrating the ability of the ARS Persuasion^R scores to forecast sales effectiveness won David Ogilvy awards sponsored by the Advertising Research Foundation. These examine three major American brands: Warner - Lambert's Celestial Seasonings herbal tea, Goodyear Aquatred tires, and Kraft General Foods' Oscar Mayer Lunchables.

Readers will appreciate that items 1, 2 and 7 described selected individual cases, and that items 3, 4, 5 and 6 were total census collections, representing in total 169 of the 174 brands I reviewed.

This battery of evidence provides excellent endorsement of the ARS Persuasion^R scores' ability to predict the direction of sales, and good endorsement of their ability to predict the magnitude of resultant sales change. These conclusions should not be regarded as trivial or unreliable. Nor should they be looked on as an attempt by me to sell the research method. I am a disinterested observer. But I have little doubt in my mind that the system has enormous potential for improving advertising's track record. Even if the technique produces occasionally incorrect predictions, the success rate from using it will be greatly better than the present dismal level of success described in the early part of this paper.

I think that the device is capable of helping the advertising industry towards a far higher rate of effectiveness than it manages to achieve at present. ⁹ See note 1.

I am working with rsc to add to these data on a continuous basis. There are however three specific aspects of the method which deserve special consideration and discussion with the advertising community and additional 'research into research' - which rsc is willing to carry out. The first aspect is the special importance of large brands.

Large brands

In comparison with small brands, large brands tend to show small volume growth but are more profitable because of their higher consumer prices and relatively lower advertising budgets (i.e. measured by share of sales value). There is a widespread belief, particularly in Britain, that the ARS Persuasion^R scores are less predictive in the case of large than with small brands, partly because these scores are thought to forecast penetration growth rather than purchase frequency growth (a dynamic of large brands of especial importance).

rsc have extensive experience of large brands, and the average ARS Persuasion^R scores are indeed slightly lower for large than for small brands - a reflection of the way in which large brands make progress without dramatic sales increases. (There is a remarkable fit between the rsc findings and the data from my own pure single-source research on various aspects of the marketing performance of large brands.)

The 97 miscellaneous cases mentioned above include 33 large brands. These show a good agreement between the size of the ARS Persuasion^R score and the sales output. The size of the score is predictive of the size of the sales result. This conclusion suggests strongly that the ARS Persuasion^R scores predict both purchase frequency and penetration growth. Nevertheless, the ARS Persuasion^R scores need to be interpreted

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with especial care in the case of large brands. Although rsc has devised systems to help with this, the link between the ARS Persuasion^R score and operational recommendations - 'go' or 'no go' - may be more complex for large than for small brands. The scores need careful judgement in their interpretation.

An important finding for large brands is that the size of the ARS Persuasion^R score necessary to maintain constant sales is slightly higher than the figure for the 97 brands as a group. This 'stable sales' level is an implicit demonstration of the fact that the advertising for large brands operates defensively, i.e. it must be persuasive in order to maintain constant sales volume. The persuasiveness of the advertising contributes to the profitability of large brands, although it does not boost volume dramatically.

Emotional versus rational copy

The second aspect deserving special consideration is whether the ARS Persuasion^R scores can forecast the sales effects of emotional copy as well as factual copy. A content analysis was carried out of the 97 miscellaneous cases mentioned above. These broke down into 56 examples of predominantly rational copy and 41 cases of partly or substantially emotional copy. The scatter plot for the two groups of cases is virtually identical. The emotional versus rational conflict seems to be a red herring.

The advertising industry in the US has many fewer doubts about the system than is the case in Europe.

Open-ended diagnostics

The third aspect deserving fuller consideration is the ability of the rsc system to generate open-ended diagnostics. This is a broader question than it appears, and concerns the advertising industry's beliefs in how advertising works. rsc believes that it can contribute to this debate by opening a

dialogue with advertisers and - most importantly - with agencies, to compare experience and evidence of how advertising works in terms of consumer psychology.

It is in this context that diagnostic information can be employed as feedback to generate and improve creative ideas. rsc is poised to explore this whole matter further if advertising agencies in the United States and Europe can be persuaded to co-operate. The heart of the problem that needs to be addressed is the creative process itself. Although rsc has made great headway in understanding the strategy and refreshment stages of the advertising process, there is need for more understanding of this process as a whole. The advertising industry knows too little about the all-important creative aspects. rsc is eager to push forward this frontier of knowledge. If agencies are willing to co-operate with rsc in this enterprise, the organisation is optimistic about the possibilities of real synergy.

Summarising what I have said in this article, I have little doubt that quantitative pre-testing - and in particular the ARS Persuasion^R system that I have examined in much detail - has enormous potential for reducing the uncertainties of advertising decision making. I am certainly far less sceptical of the system than I was when I started to examine the evidence. But it is also fair to say that the advertising industry in the United States has many fewer doubts about the system than is the case in Europe. I should personally like to see European practitioners forgetting their prejudices. Much would be gained if they were persuaded to approach the whole debate in a positive and above all experimental fashion. There have been many cases in the past when American experience has led the way to improved efficiency and better performance in European advertising. I believe that pre-post preference testing could be another example of this same traffic in ideas.

Lottery Advertising

beyond the borders of the Internal Market

Lotteries are a particular form of economic activity and Member States ought to be permitted to limit competition. That is the point of view of an Advocate General of the European Court of Justice, whose task is to pass independent and objective judgement.

I start this contribution with this reference because I am well aware that monopolies are probably far from popular among readers of a journal concerned with 'free marketing'. I want to make it clear from the start that the AELLE (Association Européene des Loteries et Lotos d'Etats) is not just another group of old-style monopolists hanging on to their outdated prerogatives. There are very good, objective reasons to limit commercial freedom in the lottery sector. Those same reasons justify a limitation of cross-border lottery activities and cross-border commercial communications concerning lotteries.

Lotteries are a particular form of economic activity

Lotteries are an economic activity: the lottery organiser sells a gaming service and the consumer pays a price for it (the price of the lottery ticket). This, however, is where the parallel with other economic activities ends.

In the legal systems of all Member States lotteries are in principle prohibited. Essentially, it is not regarded as good for society that an unproductive element such as sheer luck should, to a considerable extent, decide the distribution of wealth. Secondly, unlimited lottery activity could cause very serious social problems as pathological gamblers tend to bet much more than they (and their families) can afford. Thirdly, lotteries involve a high risk of fraud and abuse for criminal activities such as money laundering.

However, there are in all Member States, to a greater or lesser extent, exceptions to this prohibition. The main histori-

cal reason is that a complete ban has proved to be ineffective. The desire to gamble is an element of human nature and a complete ban results in illegal gambling that is, by definition, uncontrolled and thus enhances the risks referred to earlier. Member States realised that a better way to control these risks was to allow, by exception, certain games. In this way the demand for illegal games would be reduced and the unwanted societal consequences could be avoided by subjecting the legal games to very strict State control.

The first, and less important, category of exceptions relates to small scale, local lotteries, set up to support initiatives of a general, cultural, charitable or social nature. The second category relates to large scale lotteries operated either directly by the public authorities, by a public enterprise, or by a private company licensed under very strict conditions.

Both types of exceptions have in common that the profits made by the entity operating the lottery are intended for the public benefit and not for private enrichment. The underlying idea is that, if certain unwanted activities must be allowed to avoid worse consequences, the profits resulting therefrom should be used to the public benefit.

The current situation in all the Member States is that the bulk of revenue from gambling is used for philanthropic or charitable purposes, or, in the case of some of the large-scale lotteries, goes directly to the State exchequer. In short: all Member States have strict limitations on lottery activities:

- to control and limit the supply of gambling on their territory;
- to ensure that the revenues of lotteries are used for the public benefit;

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President
AELLE
(Association
Européene des
Loteries et Lotos
d'Etats)

The objectives pursued by Member States' regulation cannot be reconciled with a free movement of lottery services in the EU.

If it were to be decided that tickets from lotteries legally organised in one Member State had to be accepted in all other Member States, it would no longer be possible to safeguard the two acknowledged public policy objectives. There would no longer be a limitation of supply at Member State level. There would only be a limitation at European level, consisting of the combined limited supply in all 15 Member States. This total supply could be offered anywhere in the EU and would be controlled by nobody.

Moreover a ticket of the authorised lottery of Member State A, sold in Member State B will benefit public-interest purposes in Member State A and not the public-interest purposes of the Member State where it is sold. This is not the type of cross border competition that the EU wants to stimulate. The objective of free movement and free competition within the EU is to stimulate prosperity in Europe by allowing the appropriate allocation of resources and economies of scale. This is not relevant with regard to lotteries.

The objective of free movement and free competition within the EU is to stimulate prosperity in Europe by allowing the appropriate allocation of resources and economies of scale. This is not relevant with regard to lotteries.

There is also the question of the famous proportionality test applied to any restriction of free movement or free competition in the EU. The AELLE is convinced that the lottery regulations of the Member States comply with this test. No reasonable alternative exists that would make it possible to combine free move-

ment and free competition of lottery products with the effective safeguarding of the objectives mentioned above.

Commercial communication concerning lotteries

Commercial communications concerning lotteries is an issue that is at least as peculiar as the lottery sector itself. In the first place, in the lottery sector it is sometimes very difficult to distinguish between a commercial communication (the promotion of the lottery service) and the offer (which is part of the service activity itself).

Lottery services can very easily be organised at a distance. For a player to participate it is not necessary to be physically present in the same place as the organiser of the lottery. The player can order his ticket through mail, or by telephone or fax. He can receive his lottery ticket by mail or fax, and in the near future through electronic media such as the Internet. Payments can be made through bank or credit card transfers.

The most difficult part of such a 'remote' lottery service is for the organiser to get in touch with the player. This is where commercial communications come in. These will be used not only to promote the lottery but also to make the offer. The commercial communication will often contain an order form the player can complete and mail to the lottery organiser or a telephone or fax number through which the player can establish contact. This is the type of technique used by persons trying to sell lottery products from a lottery licensed in one Member State in other Member States. Since all Member States prohibit offering lotteries that are not licensed in that Member State, this type of commercial communications will also be prohibited.

The second problem in the relationship between lotteries and commercial communications in the Internal Market is

that, according to some, it is contradictory that Member States allow the promotion of their own State lotteries. It is argued that a State cannot prohibit lotteries as socially undesirable whilst allowing active promotion of the lotteries that raise money for public funding. The AELLE, however, is convinced that this issue should be approached in a more subtle way.

I have already mentioned that the public authorities in the Member States decided to allow state controlled lotteries as a way to channel the urge to gamble away from illegal (and thus uncontrolled) gambling and to ensure that the benefits of lottery activities would be used for the public benefit. If this approach is to work, the State controlled lotteries must be able to provide an attractive alternative to illegal gambling.

In that respect it must not be forgotten that the chance of winning is not the only element that makes a lottery attractive. A lottery is a game and games are supposed to be fun. This relates to what in a previous issue of this Journal was referred to as 'the non-material aspects of consumer satisfaction'. If the latter were not important for gambling, casinos would be housed in large concrete halls with neon lighting. This is certainly not the case.

For lotteries too it is important to create a pleasant atmosphere. Since lotteries do not take place in a specific location, this atmosphere must be created through commercial communications. In that respect it must not be forgotten that, since in state controlled lotteries the stakes are generally low, the chances of winning are equally low. If the 'marketing mix' of State controlled lotteries is to remain competitive *vis-à-vis* illegal gambling they need to develop a commercial communications strategy. These commercial communications are not allowed for State controlled

lotteries from other Member States because Member States, as explained before, must be given the opportunity to block the lottery products themselves. If these lottery products may be prohibited then it is only logical that the commercial communications through which offers are made to the public, should also be prohibited.

It is argued that a State cannot prohibit lotteries as socially undesirable whilst allowing active promotion of the lotteries that raise money for public funding. The AELLE, however, is convinced that this issue should be approached in a more subtle way.

A third difficulty between commercial communications and the strictly regulated lottery sector relates to the carriers. What happens if a newspaper sold throughout Europe contains a commercial communication concerning a lottery of one of the Member States? Member States must be able to block lottery products from other Member States and, consequently, also the commercial communications relating to those lotteries. Does this mean that Member States must also be allowed to block the distribution of a journal or a television programme that contains these commercial communications?

Here it seems appropriate, in respect of the proportionality principle, to make a distinction between commercial communications that provide the possibility to take up an offer and those which only promote a lottery. Classic commercial communications concerning lotteries, in which the lottery of a Member State (A) wants to promote its products to its own citizens, will normally not contain order forms, or phone or fax numbers through which the consumer can get in touch with the lottery operator. In their own Member States these lotteries have a well devel-

oped and sophisticated distribution network that is more consumer friendly than mail order or its electronic variant.

It will only be those intermediaries wanting to sell lottery products from Member State A into other countries who will publish commercial communications that go beyond simple promotion and constitute a real offer. For that reason, and in the light of the proportionality test, the AELLE would suggest that Member States must be allowed to block the distribution of carriers that contain the second type of commercial communications, but not the first.

In this way, the carriers distributed in more than one Member State would not be obliged to refuse any commercial communication concerning lotteries. In order not to endanger their cross-border distribution, it would be sufficient for them to refuse those commercial communications that go beyond promotion by indicating ways to conclude the transaction.

Conclusion: what type of intervention is necessary?

The AELLE believes that, in view of the subsidiarity principle, the most appropriate level to regulate lotteries is that of the Member States. Nevertheless, a limited intervention at European level would be very useful to create clarity in this area. This might be especially relevant for the carriers.

In this way, the carriers distributed in more than one Member State would not be obliged to refuse any commercial communication concerning lotteries.

The AELLE is convinced that, under the current state of the law, Member States can prohibit the distribution of carriers that contain certain types of commercial communications concerning lotteries. It might be extremely unpleasant for a

carrier to discover that this distribution is suddenly, and unexpectedly, blocked. It would certainly be better for everybody if things could be clearly spelled out in advance. It is probably not necessary to regulate all this in a directive. It would probably be sufficient to deal with the issue in a Commission communication on the application of the basic Treaty principles to this problem.

In one of the previous issues of this Journal it was suggested that much more attention had to be paid to the possibility of self-regulation at European level. Self-regulation might indeed provide a very valuable alternative, but this should be organised in very close cooperation between all the parties concerned, including the Commission. This is necessary because it is essential to avoid that same Commission finding any self-regulatory agreement to constitute an infringement of EU-competition law.

Whatever the approach preferred, the AELLE and its members are certainly willing to cooperate to find the most appropriate solution which will also be the most 'proportionate'.

The AELLE (Association Européenne des Loteries et Lotos d'Etats) is the European association of State lotteries. It groups State lotteries of the EU Member States as well as the lotteries of Iceland, Switzerland, Turkey, Cyprus, Malta, Gibraltar, Poland, Hungary, Czech Republic, Romania, Bulgaria, Slovakia, Estonia, Latvia, Lithuania, Belarus, Ukraine, Russia, Kazakhstan, Bosnia-Herzegovina, Serbia and the former Yugoslavian Republic of Macedonia.

Reflections on the Green Paper

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There follow a few reflections on the Commission's Green Paper on Commercial Communications.

1. The Green Paper is only an analysis with suggested solutions

The Green Paper 'Commercial Communications in the Internal Market', like other surveys of the same kind, is only a basis for discussion, not a binding - and certainly not a legally binding - basis for the Commission's future work and proposals. In it the Commission presents the *de facto* legal bases from which it believes it can start in the sphere of commercial communication in the Single Market and the possible solutions it envisages. It is neither more nor less than an analysis of the *status quo*, a stocktaking with suggested solutions.

2. Only the analysis can be wrong or incomplete, not the agenda

Since the Green Paper is only a stocktaking with suggested solutions, it cannot fail or miscarry; it can only depict the *status quo* inaccurately or incompletely. This is why it was given to interested circles for discussion, so that they could point to any errors or omissions they thought it contained and supply any missing facts. Discussion of whether the Commission is drawing the right conclusions from its stocktaking seems, therefore, to be premature at present. The objection that the proposals are too abstract and bureaucratic and do not set any priorities is wide of the mark therefore.

3. Different legal provisions on commercial communication in the Member States may influence the market

That different legal provisions on economic activity influence the Single Market cannot be seriously denied by anybody. The need to adapt a sales promotion measure, for example, to the particular legal conditions of the German market means that the advertiser (a British firm, say) spends time and money which it would not have to spend if the legal parameters were the same. This in turn means a loss of efficiency and hence a competitive disadvantage compared with firms in economies where there are no such obstacles.

4. The stocktaking could have thrown more light on the actual situation and its economic aspects

The stocktaking in the Green Paper could have made it more difficult for many critics if it had thrown more light on the economic consequences of regulatory barriers. It would have certainly taken the wind out of those critics' sails, too, if the analysis had also shown that a firm can lose a considerable amount of turnover if it does not win new customers or retain old ones with certain advertising methods such as promotional gifts or offers.

This aspect could and should have been gone into more thoroughly. Individual regulatory barriers should have been examined meticulously to show what practical and financial effects they have on firms, jobs and national and international competitiveness. There would then have been no need to argue at all about those regulatory barriers which have no, or no

serious, effects in this respect. These effects are something that the market participants who have been invited to give their views can now tell the Commission about in detail, on the basis of their practical experience; they can supply the missing data at 'first hand'. The point of a Green Paper after all is ('only') to provide the basis for, and to stimulate, a discussion.

An aspect which should have been investigated further is how far regulatory barriers are based on national cultures. It would have been interesting to learn whether, psychologically, the Italian consumer has a different conception of, say, promotional gifts and offers to the Germans or British and, if so - which is very doubtful - whether this justifies the maintenance of regulatory barriers. The German Free Gifts Order (*Zugabeverordnung*) and Law on Discounts (*Rabattgesetz*) have their origin, at any rate, not in the special mentality of the German consumer but simply in the intention of the German legislator in the 1930s to protect the retail trade and small businesses against the abuses of the time.

The origin of the discussion about shop opening hours in Germany does not lie in the German consumer's wish not to be allowed to go shopping after 6.30 pm, but in concrete labour market and economic policy reasons. Thus, if one examines the regulatory barriers cited in the Green Paper, it turns out that only the least significant are actually based on the mentality of the population concerned and not on tangible economic interests. In most cases, this emotional argument is only superficial.

5. There is only legal subsidiarity, not economic or psychological subsidiarity

The subsidiarity argument in Article 3 is exclusively legal. If the national authorities are fundamentally unable to regulate a situation appropriately, the EU must do so within the limits of its legal competence and responsibilities. The EC Treaty rightly does not provide for any 'economic' or 'psychological' subsidiarity: it is concerned to abolish barriers in order to create a single European market. This market, it should be said in passing, does not just have economic roots but is designed primarily to secure peace.

Moreover, there can be no question that the consideration given to national peculiarities in the EU Treaty is not explicitly and comprehensively regulated. That these peculiarities in the legally admissible framework are sufficiently observed by the Community authorities is ensured by the Court of Justice, and by the national psyche, since an advertising measure which runs counter to the national psyche will be counterproductive and the consumer's response to it will be dismissive.

6. Methods

It is the job of the EU to elaborate standards, which then have to be implemented in the Member States. Whether and by what means those standards are implemented is ultimately a political decision. To proceed on a case-by-case basis is not possible for the Commission and the EU simply for technical reasons. Why should a technique which has so far proved itself in other areas not work in this sphere as well. To demand 'a single European Act'

would be unrealistic, even if it is undoubtedly the most effective solution in the legal sense.

The path adopted with a view to finding a solution to this problem is definitely the right one, because it is the only one. How can a solution be worked out except by analysing the current situation, its causes and background. Such an analysis must make clear whether change is appropriate and necessary or not. That it is in the case of commercial communication in Europe, and for a great variety of reasons, cannot seriously be doubted. If all participants are equally convinced of this, there must be discussion about how this goal can be achieved. This must be done with care, taking all relevant aspects into account, but without losing sight of the goal. Whoever does not agree with the goal must not hide his position, however, behind criticism of the right path.

7. Individual questions

The Green Paper devotes due space to the possibilities of voluntary self-regulation. If and where national self-regulation systems can achieve the goal set out in a directive in the same way, they can and should be applied. Where, however, this is not the case - which would probably be in the majority of the Member States - there must be a standard in the form of a directive. Reference to the European Advertising Standard Alliance is inappropriate, since the latter, on its own admission even, is designed only to produce ethical standards and not to solve disputes. Considerable doubts must be raised, too, about whether it can understand questions of community-wide advertising (law) since its staff is purely national.

In my opinion, it has so far failed

to demonstrate its capacity to form community-wide advertising law standards.

That a 'committee' can play an important role is not to be doubted. One condition, though, is that it must actually be European and staffed with European specialists. The specific practical experience of such a committee could be useful to the Commission in the preparation of directives.

Unfortunately, the Green Paper examination of the legal aspects of the 'new communication media' is only very superficial and lacks the necessary emphasis. For a variety of reasons this is very much to be regretted. While the technical and economic development of these media forges ahead, the discussion of the legal consequences has only just begun. The lack of a legal framework, however, will also restrict economic development, since firms active in this sphere need legal certainty for their business investments.

Given the global nature of the medium, the discussion will also have to be conducted not just throughout the Community but worldwide. Europe must quickly form a sound, and as far as possible unanimous, opinion on these questions, so that it will not just take part in the discussion but perhaps even influence it decisively.

The author is editor of the 'Handbuch des Werberechts (advertising law) in den Mitgliedstaaten der EG, Österreich, Schweiz und USA', the second edition of which will appear this year under the title 'Handbuch des Werberechts in der EU, Schweiz, Finnland und USA'. He co-edited the book 'Advertising Law in Europe and North America' and is founder and manager of the European Advertising Lawyers Association EEIG.

The article contains the author's personal views.

Television advertising - the protection and the respect of children

The EGTA (European Group of Television Advertising) has been very anxious to practically assess the degree of protection nowadays afforded to children in the field of television advertising. In order to do this, it has recently carried out a survey of all provisions relating to advertising aimed at children applied by its members established in the European Union.

For each provision, the members were also asked to specify the provisions' origin: 'Television without Frontiers' Directive (3 October 1989); national legislation; self-regulatory code; licence obligations (specific state contractual obligations); restrictions imposed by the TV channel itself.

The EGTA considers three conclusions could be drawn from this enquiry:

1 There is a common core of provisions which are applied by all the EGTA members (see below) and this proves that children are granted very effective protection which often goes unrecognised. This is characterised by the members' concern not to mislead or manipulate children. The provisions tend, rather, to make them responsible consumers by not treating them as children. Other measures are implied by ethical considerations and concerns relating to physical safety, health and hygiene.

2 By analysing the origin of this common core, it can be seen that 43% of the provisions stem from self-discipline (self-regulatory codes or restrictions that the channels impose upon themselves), aside from the restrictions imposed by the 'Television without Frontiers' Directive.

It is worth noting that these provisions are now respected precisely because the channels have adopted them freely and apply them of their own volition.

3 Numerous measures have not been included in the 'lowest common denominator' because they differ from one country to another; their analysis shows the effectiveness of self-discipline which, for example, allows Northern and Southern European

countries to translate their cultural differences into specific provisions that no legal provisions, made at the European level, would be able to guarantee.

In order to assess the relevance of the provisions listed, it is interesting to compare them with the results of the recent study made by the ITC (the UK Independent Television Commission) on TV sponsorship of children's programmes, although the EGTA survey is broader since it covers both commercial advertising and TV sponsorship. It can be noted that most parents' and children's wishes expressed in the study carried out by ITC Research are covered by the provisions currently in force on the channels which are members of the EGTA, such as the fact that:

- advertisements do not encourage children to pester their parents to make them buy what they want;
- advertisements for alcoholic beverages are not targeted towards children;
- the revenue from advertising aimed at children is reinvested in children's programmes (a wish also expressed by children);
- there is a clear distinction between advertisements and programmes; 'product placement' is banned in children's programmes;
- sponsors may not influence the programme content and the broadcaster's editorial integrity must be respected.

Children would also like to be considered as responsible decision-makers; they do not feel as though they are being manipulated by the TV sponsorship of their programmes.

Through this study, the EGTA would like to help to objectify a discussion which is all too often marked with demagoguery or prejudices and which is only centred on one particular aspect of the problem. On the contrary, the EGTA members believe that the problems raised by advertising aimed at children must once again be put

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An investment in the order of ECU 175 million from only 15 channels would be jeopardised if restrictive measures were imposed on television advertising aimed at children.

into their global context.

On the economic level, therefore, sight should not be lost of the positive impact that revenue from advertising aimed at children has on the European audiovisual industry. In a previous survey, the EGTA highlighted this fundamental role by demonstrating that 95% of the revenue of 15 channels, or ECU 228 million, from advertising aimed at children was reinvested in the acquisition of TV rights and home productions of children's programmes. 76% was invested in the European audiovisual industry (acquisition of rights and home productions).

In other words, an investment in the order of ECU 175 million from only 15 channels would be jeopardised if restrictive measures were imposed on television advertising aimed at children.

Finally, so that protective measures are effective, there must still be a coherence between the different restrictions imposed on the ways through which advertising can reach children. In this respect, television, which is without doubt a victim of its own success, today finds itself hemmed in on various levels by numerous regulations (other than those listed) which are disproportionate to the ends in view and which may lead to a proliferation of regulations imposed on the medium. The danger is in hampering the free movement of commercial communication without even making it possible to attain the objectives desired.

Results of the survey

There follows a list of provisions applied by the EGTA members. The provisions in italic are taken from the 'Television without Frontiers' Directive. It should be noted that a large proportion of these provisions are applied on a voluntary basis by the companies concerned.

Duration

- *Children's programmes, when their programmed duration is less than 30 minutes,*

shall not be interrupted by advertisements.

Misleadingness

- *Television advertising shall not directly exhort minors to buy a product or a service by exploiting their inexperience and credulity.*
- *Surreptitious advertising shall be prohibited.*
- If there is any likelihood of advertisements being confused [by children] with editorial or programme material, they should be clearly labelled 'advertisement' or identified in an equally effective manner.
- Advertisements for toys, games and other products of interest to children must not be misleading insofar as the capabilities and qualities are concerned, taking into account the child's immaturity of judgement and experience.
- No unreasonable expectation of performance of toys and games may be stimulated by, for example, the excessive use of imaginary backgrounds or special effects.
- In any demonstration it must be made clear whether the toy can move independently or through manual operation.
- The true size of the product must be easy to judge, preferably by showing it in relation to some common object against which it can be judged.
- A product which is part of a series should be clearly indicated as such, as should the method of acquiring the series.

Superstition

- Advertisements should not play on superstition.

Direct appeal

- Commercials for products intended for children may not include direct appeals to children such as 'buy', 'you will get' or 'you will experience', etc.
- Advertisements should not contain direct requests for purchase or consumption addressed to children.

Parental respect

- *Television advertising shall not exploit the special trust minors place in parents, teach-*

ers or other persons.

- *Television advertising shall not directly encourage minors to persuade their parents or others to purchase the goods or services being advertised.*

- Advertisements should not undermine parental authority, responsibility, judgement or tastes, taking into account current social values.

- Advertisements and promotions aimed at children should not actively encourage them to make a nuisance of themselves to parents or others.

Appeals To loyalty

- No advertisement may imply that unless children themselves buy or encourage other people to buy a product or service they will be failing in some duty or lacking in loyalty.

Inferiority

- No advertisement may lead children to believe that if they do not have or use the product or service advertised they will be inferior in some way to other children or liable to be held in contempt or ridicule.

Direct response

- No advertisement may invite children to purchase products by mail or telephone.

Safety

- *Television advertising shall not encourage behaviour prejudicial to health or safety.*

- *Television advertising shall not unreasonably show minors in dangerous situations.*

- Children must not be seen leaning out of windows, climbing or tunnelling dangerously, or playing irresponsibly in or near water.

- Children must not be shown using matches or any gas, petrol, paraffin, mechanical or mains-powered appliance which could lead to them sustaining burns, electrical shock or other injuries.

- Small children must not be shown climbing up to high shelves or reaching up to take things from a table above their heads.

- Medicines, disinfectants, antiseptic and caustic or poisonous substances must not be shown within reach of children without close parental supervision, nor may children be shown using these products in any way.

- Advertisements should not present any misconduct by which persons may be endangered as worthy of imitation or approval.

- No advertisement may encourage children to enter strange places or to converse with strangers (for example, in an effort to collect coupons, wrappers, labels, etc.).

Toy guns

- Advertising of toys imitating guns or advertising likely to induce violent, racist or xenophobic behaviour is forbidden.

Road safety

- Children must not be shown stepping carelessly off the pavement or crossing the road without due care.

- When crossing busy streets, children must be seen to use pedestrian crossings.

Health and hygiene

(Advertisements for medicines etc.)

- Children must not be shown self-administering medicines, vitamins or other dietary supplements.

Diet

- Advertisements for confectionery or snack foods must not suggest that such products may be substituted for balanced meals.

Alcohol

- *Television advertising for alcoholic beverages may not be specifically aimed at minors or, in particular, depict minors consuming these beverages.*

- Advertisements may not suggest that the consumption of alcoholic beverages is a sign of maturity, or that not drinking alcoholic beverages is a sign of immaturity.

- Advertisements for alcoholic beverages must not be transmitted during children's programmes or in the advertisement breaks immediately before or after them.

- Advertisements may not picture people giving the impression that they consumed alcoholic beverages as minors.

- Advertisements may not picture youth idols, who themselves aim at a young public, drinking alcohol or setting out to do so.

Moral Issues

- *Television advertising shall not cause moral or physical detriment to minors.*

- *Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include programmes which might seriously impair the physical, mental or moral development of minors, in particular those that involve pornography or gratuitous violence. This provision shall extend to other programmes which are likely to impair the physical, mental or moral development of minors, except where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts.*

- *Member States shall ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality.*

- Advertisements which contain material that could frighten or cause distress to children must be subject to appropriate restrictions on times of transmission designed to minimise the risk that children in the relevant age group will see them.

- Advertisements must not portray children in a sexually provocative manner.

- Advertisements should not contain anything which might lead to or lend support to acts of violence.

- Trailers for 15 or 18 rated films must not be shown in or around children's programmes and, depending on content, may require more rigorous timing restrictions.

- Advertisements should not without justifiable reason play on fear.

- Advertisements should not appear to condone actions that might contravene gen-

erally accepted national standards of social behaviour.

Gambling

- Advertisements for casino games may not be specifically directed at minors.

- No minor may be pictured in advertisements for casino games.

Observance Of Laws And Regulations

- Advertisements should not appear to condone actions that might contravene the law.

Children Appearing In Advertisements

- Children must not be used to give formalised personal testimony, nor may they make significant comments in relation to any product or service the characteristics of which they cannot be expected to have direct knowledge.

Price

- When parts, accessories or batteries which a child might reasonably suppose to be part of a normal purchase are available only at extra cost, this must be made clear.

Competitions And Promotions

- Advertisements with references to competitions should not exaggerate the value of prizes and the chances of winning.

- Promotions should contain a prominent closing date and clearly explain the number and type of any additional proofs of purchase needed to participate.

Distinction between programmes and advertising

- *Television advertising shall be readily recognisable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means.*

- *The content and scheduling of sponsored children's programmes may in no circumstances be influenced by the sponsor in such a way as to affect the responsibility and editorial independence of the broadcaster in respect of programmes.*