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The law of advertising and advertising law

Prof. Dr. Edzard Schmidt-Jortzig, German Minister of Justice

As the subject chosen for me to address by the Federal Association of the German advertising industry suggests - "Law of Advertising and Advertising Law" -, the association considers that advertising law and the law of advertising stand in opposition to each other.

This is understandable, as the advertising business is bound to see any regulation of its creativity and initiative as an unwelcome constraint: advertising alone provides products with a face and a name. Advertising is thus a key to the opening up of new markets: it provides information, is suggestive, inspires needs and, not least, it entertains.

Consequently, advertising is not only one of the crucial catalysts in Germany's economy, it also represents a flourishing industry in its own right. Hardly any other industry has shown such continuous growth against the economic trends of recent years. The introduction of a legal framework is therefore perceived to be rather unhelpful and to slow down the momentum for economic recovery. Nevertheless, a legal framework is necessary, and it is precisely because advertising is becoming increasingly ubiquitous, dynamic and inventive, but also more and more aggressive, that a legal framework designed to prevent malpractice is required. This framework must not, however, stifle creative and innovative efforts. Instead it must be flexible enough to adapt to the ever changing realities in advertising and business.

The role of the legislator

This requires a legislator who intervenes only where advertising has an adverse effect on the interest of other competitors; where consumers are misled or harmed, or where advertising disregards key public interests. The self restraint which the legislator exercises in this way is laid down in the German Constitution which spells out and guarantees the freedoms of the advertising industry. Not only is advertising subject to the fundamental right of professional liberty in accordance with Article 12 of the federal basic law, it is also deemed to be protected by Article 5 of the basic law governing the freedom of expression. Each 'single' legislator is thus charged with the task of marking out the boundaries of advertising law as defined by his national Constitution whilst at the same time asking whether legal restrictions on advertising are necessary and appropriate. The better the 'extra'-legal protection mechanisms of a country work, the more likely the answer to this question will be no.

In Germany, the advertising community set up the German Advertising Council - 'Deutscher Werberat' - i.e. a self-regulatory organisation which operates with an extremely high rate of success; far more than 90% of advertising measures criticised by the German Advertising Council are subsequently withdrawn. However, even highly efficient instruments of self-

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regulation cannot wholly discharge the legislator from his duty to regulate the market process, as self-regulation only works if it is exercised within a sound legal framework.

Reforms to the German law

It is therefore in the interests of legal certainty that the legislator is required to provide firm guidelines, at the least. In Germany, this step was taken 100 years ago when the German law against unfair trading practices ('UWG') was introduced. A characteristic feature of this law are two blanket clauses according to which advertising practices are banned if they are either *contra bonos mores* or misleading. Together with a large number of other rules containing 'specific' advertising provisions for individual product areas, the German law against unfair trading practices has meant that both the advertising sector itself and consumers enjoy a high level of protection from malpractice in advertising.

However, both the legislator and the courts in Germany have gradually increased the requirements to such a high level that the German legal framework governing advertising is nearly unquestioned as the most restrictive in Europe. This, I believe, is quite an ambiguous honour. In fact, it has been repeatedly suggested in the past few years that the German legislation on advertising be relaxed.

The momentum for thoughts on reforming the German system resulted, inter alia, from several rulings by the European Court of Justice declaring parts of the German law on unfair trading practices to be contrary to community law. The so-called 'small amendment' to the German law against unfair trading practices dated 1994 constitutes a first step towards the de-regulation of the German legislation on competition and advertising. The amendment provided for a lifting of the ban on public advertising in connection with quantitative restrictions, as well as of the ban on advertising involving price comparisons.

It was under the influence of these reforming efforts that, in early 1995, the German Ministry of Justice commissioned a study group with the task of investigating the need for reform of the German law against unfair trading practices. The German advertising community made a constructive contribution to the deliberations of this group. The study group has now submitted its final report calling for a careful revision of the German law. The recommended changes are to be implemented as soon as an amendment of the law against unfair trading practices becomes necessary for other reasons. Such a reason is likely to arise soon, once the European Directive on comparative advertising is adopted and has to be transposed into national law.

The Single Market

I have mentioned the European Court of Justice and the European legislator; these two institutions are exerting an ever increasing influence on our national law, thus limiting member states' potential for legal development. This does not just entail disadvantages, however, as the productive discussions on legal policies brought about as a result of European developments often have a positive bearing on the development of our laws.

This brings us gradually closer to a key objective of European Union i.e. the Single Market which ensures the free circulation of goods, people, services and capital. It is particularly in this respect that it is impossible to overestimate the importance of advertising and hence of advertising law. The Single Market presupposes the inter-penetration of national markets, and in

this respect it is advertising which opens up other markets within the EU to national products from other Member States.

The need for harmonisation

In order for advertising to be able to fulfil this integrative function in as unrestricted a way as possible, it is placed under the protection of the freedom of goods and services as provided for in the EC Treaty. However, advertising cannot remain wholly without restriction, not even in a Single Market. In the European market, just as in national markets, the interests of advertisers have to be balanced out against those of competitors, consumers and the general public.

There exists as yet no European legal framework on advertising, except perhaps in rudimentary form. To this extent, advertising is still almost exclusively regulated by national laws.

In extreme cases, a company therefore might have to comply with 15 national legal frameworks as well as with a number of unrelated community regulations before it can set about launching a community-wide advertising campaign. Moreover, the differences between individual legal frameworks are substantial, particularly where advertising law is concerned. It is difficult to imagine a greater obstacle to community-wide advertising.

National legal frameworks therefore have to be harmonised as a matter of urgency. Yet, however necessary legal harmonisation in advertising law may be, it is also a difficult business. More than in other areas, existing national differences reflect the cultural, social and economic differences between Members States which have to be taken into account.

The EU's potential for legal development is therefore limited in several respects. Like national legislators, the EU has to make sure that its provisions are appropriate to the purpose in mind and that they respect the fundamental rights of advertisers. Furthermore, just as Member States have to consider European influences, the EU has to take into account the legislative power of Member States. To this extent the European legislator is tied by the power transferred onto him, as well as by the principles of subsidiarity and proportionality, all of which limit his room for manoeuvre.

The European Court of Justice

In this complex network of competences and differing interests, it is the European Court of Justice which has acted as defender of the Single Market towards the Member States; thus also influencing German advertising law. Since its ruling in the *Keck* case in 1993, however, it has partly withdrawn from this role, although it is too early to draw firm conclusions as to the consequences this will have on German advertising law. Allow me to explain this as follows.

Initially, the European Court of Justice had a very broad understanding of the freedoms of movement. Thus the movement of goods included not only discriminations against foreign goods, but also any restriction - even of an indirect nature - on inter-community trade. This also applied to the national advertising laws of Member States insofar as the differences between them prevented community-wide advertising campaigns.

Whether or not provisions protecting the consumer are necessary is decided by the ECJ, with the 'reasonable consumer' as its guiding principle. This principle is purely normative and is designed to establish a balance between consumer protection on the one hand and market freedoms on the other. The consumer is not to be placed under any kind of tutelage but is to be given comprehensive information so that he/she can participate in the market process as an equal partner.

I personally quite sympathise with this approach, as it places German competition law under some pressure to justify itself and to deregulate. Difficulties arise mainly in respect of the bans on misleading advertising, which in German law are traditionally measured not against the yardstick of a 'reasonable' consumer but rather that of a 'fleeting' consumer, which is a more stringent yardstick. The ECJ has ruled in several cases that the

strict criteria applied by German legislation are contrary to community law.

However, in its ruling in the *Keck* case, as mentioned above, the European Court of Justice has qualified its position - seemingly influenced by the principle of subsidiarity which is now enshrined in the EC Treaty. The ECJ now only checks those provisions for adherence to the principle of freedom of goods which concern the composition, description, design or labelling of goods in some manner i.e., only those provisions which are geared to the product itself. By contrast, national provisions which constitute mere 'sales modalities' are, on principle, no longer checked for adherence to community law. Yet these 'sales modalities' include most national advertising rules. The ECJ has thus reduced the scope of community checks, thereby also curbing European influences on national legal systems.

It remains to be seen what the consequences of this ruling will be. Still, it remains an incentive for us to critically survey the German legislation on competition and advertising in order to ascertain whether it is indeed over-regulated. When the German law against unfair trading practices is next reformed we will have to ask ourselves whether the 'reasonable' consumer as yardstick has to be inscribed in the blanket ban on misleading advertising as provided for in Article 3 of the German law against unfair trading practices, or whether the necessary adjustments to what kind of consumer should be the guiding principle in advertising law should not be left up to German legislation.

The role of the Commission

However much the ECJ may provide national legislation with a fresh impetus, it cannot replace the European legislator. Wherever there is a lack of community-wide provisions the ECJ can only put up barriers, without being able to fill the gaps created in national legislations as a result of this lack and establish community-wide and consistent norms of protection. The EU legislator alone is appointed to fulfil this task. Unfortunately, it has not yet managed to perform the difficult balancing act of negotiating between the interests of market players, the Member States' room for manoeuvre and the requirements of the Single Market.

Initial attempts at a comprehensive adjustment of the law against unfair competition were hardly successful. It was not until the Directive on Misleading Advertising in 1984 that part of this area was finally regulated. Although it was stated in the opening paragraphs of this directive that unfair and comparative advertising were to be dealt with in a second stage, this was only actually realised in respect of comparative advertising. Following years of negotiations, a directive on this subject is now about to be adopted.

The directive proposal adopts a rather liberal approach by obliging Member States to allow comparative advertising, provided that certain conditions are fulfilled. However, these conditions are set out in a highly rigid catalogue of criteria limiting the kinds of comparisons which may be made and which consumers might, with some justification, wish to make. Thus, goods bearing a designation of origin may only be compared with goods bearing the same designation of origin. French champagne may therefore not be compared to German vintage sparkling wine, just as mineral water originating from one location may not be compared to that from another location. Goods of this kind are thus practically protected from comparative advertising for no apparent reason.

Quite apart from this, it is above all the general approach adopted by the directive which is problematic. Again, the directive only picks out and analyses in detail one partial aspect of advertising law. In all other respects we are still left with a community-wide patchwork of provisions on advertising which lacks all-embracing aspects from which consistent European guidelines may be developed.

Such kind of legal harmonisation cannot be satisfactory. Detailed provisions which merely follow the path of least resistance do not promote the interests of the Single Market. Instead, they destroy patterns which have been formed in Member States' legislations over a long period of time, without putting anything in their place. What we need instead is

a consistent approach which offers legal certainty to the advertising community but which also gives room to breathe. Unfortunately, the European Commission has not yet indicated how it envisages the future of European advertising law. In its Green Paper on Commercial Communications in the Single Market, published last year, it announced that it intends to develop its policy on advertising law more strongly along the lines of the Single Market requirements. However, it has omitted to specify exactly how this is to be achieved.

The need for clear guidelines

I believe that the European Union can only establish a satisfactory equilibrium between European and national interests in advertising law by providing guidelines along which a consistent legal framework on advertising can be developed. Such guiding principles could be established by means of blanket clauses, like those already in use in German competition law.

There are convincing arguments in favour of introducing such blanket clauses. They respect the manifold restrictions to which the European legislator is subjected. They provide the advertising industry with enough freedom without, however, losing sight of the interests of other market players. They provide room for self-regulatory mechanisms yet do not leave them a clear field. And, finally, they enable Member States to initially regulate advertising law according to their own national ideas - in line with the principle of subsidiarity - without posing a threat to the Single Market objective.

Moreover, the ECJ could supervise the functioning of blanket clauses thus forestalling national exceptions, which are not in the interest of the Single Market. In doing so it could generate community-wide criteria without at the same time having to consistently evaluate all forms of advertising within the European Union. Thus it would, for example, remain open whether, say, advertising by phone in the private sector - which the German Court of Justice considers a breach of Article 1 of the German law against unfair trading practices but which is often considered admissible in other EU member states - should be considered admissible or inadmissible in the EU as a whole. For as long as the views held by individual Member States and, above all, the expectations of consumers and other market players on this question continue to be at odds, the current practice of differing evaluations will probably have to continue.

Conclusion

Allow me to conclude by summarising my key arguments as follows:

1. Advertising needs a flexible legal framework, both at European and at national level.

2. In principle, German national law provides an adequate legal framework which must however be adapted, continuously and increasingly, to developments within Europe. Yet European influences should not merely be seen as restricting the scope of Member States, as they also constitute important stimuli for the future development of German national legislation which, in many cases, result in laws being relaxed and deregulated - and is therefore certainly in the interests of the German advertising community.

3. Unfortunately, European influences so far have largely been concerned with questions of detail whereas the European Commission has as yet failed to provide a comprehensive concept for provisions on advertising legislation.

4. This is where blanket clauses might produce relief, by providing guidelines and ensuring that the Member States' potential for legal development and European influences do not remain at odds with each other.

5. I for one will welcome such a move and will push for it to be implemented, as I believe that creative multiplicity is not only a characteristic feature of advertising , but also one of the strengths of Europe.

This text is drawn from a speech delivered by the German Minister of Justice Prof Dr Edzard Schmidt-Jortzig, on the occasion of 'Plenum der Werbung '97' held on 14 May 1997 in Bonn, Germany

Resolution on the Commission Green Paper on Commercial Communications in the Internal Market (COM(96)0192 - C4-0365/96)

We publish here the Resolution recently adopted by the European Parliament, which includes those amendments adopted in Strasbourg and voted upon. For marketing practitioners, this may appear forbidding, but it is essential to understand that each of these amendments is giving an indication to the Commission of those issues to which it will be required to respond in its forthcoming Communication. Naturally, these issues are the ones which *Commercial Communications* will be following closely and readers' opinions are welcomed.

The European Parliament,

- having regard to the Commission Green Paper (COM(96)0192 - C4-0365/96),

- having regard to Articles 59, 56, 30 and 36 of the EC Treaty,

- having regard to Articles 128 (culture), 129 (public health), 129a (consumer protection), 130 (industrial policy) and 85 (competition policy) of the EC Treaty,

- having regard to the eight cases dealt with by the Court of Justice of the European Communities since 1973 in the field of commercial communications,

- having regard to the Television without Frontiers Directive 89/552/EEC, notably its Articles 10-21 (television and sponsorship) and more specifically those concerning advertising of tobacco (Article 13), pharmaceuticals (Article 14), alcohol (Article 15), children's advertising (Article 16) and protection of minors (Article 22)([1]),

- having regard to the Misleading Advertising Directive 84/450/EEC([2]); the Directive on Advertising for medicinal products for human use 92/28/EEC([3]); the Data Protection Directive 95/46/EC([4]); the Directive on Labelling, Presentation and Advertising for Foodstuffs for sale to the ultimate consumer 79/112/EEC([5]); the Directive on coordination of laws, regulations and administrative provisions relating to direct life insurance 92/96/EEC([6]); the Commission recommendation on codes of practice for the protection of consumers in respect of contracts negotiated at a distance (distance selling) 92/295/EEC([7]),

- having regard to its resolution of 20 February 1997 on the Commission Communication on Priorities for Consumer Policy 1996-1998([8]), in particular its paragraphs 5 (distance selling and comparative advertising); 6, 8 and 9 (implementation of European law); 10 (redress); 11 (time-frame); 22 (information); 23 (transparency),

- having regard to the Commission Green Paper on the protection of minors and human dignity in audio-visual and information services (COM(96)0483 - C4-0621/96),

- having regard to its resolution of 24 April 1997 on the Commission Communication on illegal and harmful content on the Internet([9]),

- having regard to the extensive consultation performed by the Commission in preparation of this Green Paper and the underlying studies,

- having regard to the possibility for every European citizen to use the services of the Ombudsman and the Committee on Petitions of the European Parliament to seek redress,

- having regard to the report of the Committee on Economic and Monetary Affairs and Industrial Policy and the opinions of the Committee on the Environment, Public Health and Consumer Protection, the Committee on Culture, Youth, Education and the Media and the Committee on Legal Affairs and Citizens' Rights (A4-0219/97),

A. whereas it is essential that the European Commission applies its right of ini-

[1] OJ L 298, 17.10.1989, p. 23.

[2] OJ L 250, 19.9.1984, p. 17.

[3] OJ L 113, 30.4.1992, p. 13.

[4] OJ L 281, 23.11.1995, p. 31.

[5] OJ L 33, 8.2.1979, p. 1.

[6] OJ L 360, 9.12.1992, p. 1.

[7] OJ L 156, 10.6.1992, p. 21.

[8] OJ C 85, 17.3.1997, p.133.

[9] Minutes of that Sitting, Part II, Item 11.

tiative to fulfil the obligation laid down in Article 63 of the Treaty in due respect of the principle of subsidiarity and the broader goals of the Treaty,

B. whereas the persons and businesses providing commercial communication services should benefit from Article 59 of the Treaty since such services are remunerated and may be provided across frontiers, while taking due account of cultural differences,

C. whereas the Internal Market for commercial communications is currently not functioning in a satisfactory manner, as 99% of those consulted providing commercial communication services identified potential trade barriers linked to disparities in national regulations and cultural differences,

D. whereas commercial communications should not be regarded merely as a sector of economic activity; whereas clear and transparent guidelines at European level would contribute significantly towards achieving the internal market,

E. whereas there is a need to promote the development of cross-border commercial communication services which have a direct bearing on the free circulation of goods, offer enormous job creation potential and have a fundamental role to play in the on-going development of electronic commerce,

F. whereas the Green Paper fails to deal with important issues of concern to consumers; whereas in particular the need to protect the most vulnerable, such as children, has increased significantly over the last few years and continues to grow unrestricted at a rapid pace, also as a result of the growth of new technologies;

G. whereas Articles F and K2 of the EU Treaty refer explicitly to the European Convention for the Protection of Human Rights and Fundamental Freedoms, whose Article 10(1) stipulates that 'everyone has the right to freedom of expression',

H. whereas examples of commercial communications should not offend religious feelings or contain any incitement to hatred on the grounds of religion, race, sex or nationality,

I. whereas commercial communications should not be a threat to mental or physical health and should not cause offence;

J. whereas the principle of subsidiarity should also apply in this sphere of activity, which means that measures may be enforced by self-regulation, but whereas Community-wide regulation is sometimes necessary,

K. whereas application of the principle of proportionality is essential to ensure that Community law is applied effectively,

L. whereas the Commission rightly states that restrictions imposed at national or European level need to be justified in terms of their proportionality and compatibility with the general interest objectives recognized in the Treaty concerning consumer protection, culture, health and other matters of public interest,

M. whereas in the area of commercial communications some liberal professions deserve to be subject to a special regulation governed by their own ethical code, whilst complying strictly with the provisions of the Treaty, in view of their participation in duties of public interest, the particular relationship they maintain with their clients or the fact that they are unable

to guarantee the results desired,

N. whereas the infringement procedure under Article 169 of the EC Treaty in the area of commercial communications, as in other areas, does not currently work in an efficient and satisfactory way, although it could be an efficient and effective instrument for enforcing the consistency and proper implementation of the law,

O. whereas significant benefits to consumers are already apparent in terms of choice and quality of goods and services now available in Member States from all over the European Union, although the single market still has a long way to go before completion,

P. whereas it is of importance that consumers' access to justice and redress is ensured in cross-border communications; whereas there is still considerable work to be done to ensure that consumers have not only access to justice across borders, but access to proper, effective cross-border complaints procedures both nationally and throughout the European Union,

Q. whereas EC Treaty objectives as set out, inter alia, in Articles 100a and 129a require that the EU attain a high level of consumer protection, and that consumers and/or their representatives should be consulted and fully involved in all steps towards achieving the objectives of the Treaty; whereas both the Commission directorates-general responsible for the internal market and consumer protection, as well as consumer organizations, should play an integral role in the overall appraisal of policy-making in the commercial communications field,

R. whereas the encouragement of cultural diversity is both essential and an aim of the Treaty; whereas therefore differences between national rules and regulations in commercial communication have to be tolerated to a great extent on condition that they are proportional and non-discriminatory towards crossborder commercial communication,

1. Welcomes the Green Paper, but considers that the Commission's proposals must be reinforced in order to reach the intended goal;
2. Calls for effective application of the rules laid down by the Treaty and derived law in the field of the internal market, so as to ensure that public interests are protected;
3. Calls for more effective application of the principle of country of origin, to ensure that frontiers and barriers between the Member States are abolished and that the national authorities' protection of public interests is not confined entirely within their frontiers;
4. Considers, nevertheless, that allowance must be made for the social and cultural differences between the Member States as regards commercial communications in the Community area;
5. Believes that there is a need to delimit the scope of what is understood by commercial communications and the concept of service provider;
6. 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;
7. Calls, in this respect, on the Commission to assess due proportionality with an approach based on:

(a) the need to combine market opening objectives with the maintenance and

improvement of high standards;

(b) the need for an appropriate blend of legislation and self-regulation which reflects the cultural differences of the Member States;

8. Supports the approach proposed in the Green Paper of assessing whether the restrictive measures are proportionate to their intended purpose, as this will make it possible to ensure that the area without frontiers operates effectively and provide better protection for objectives of public interest, such as consumer protection, public health protection, the protection of intellectual and commercial property and the protection of privacy;

9. Calls for the establishment of a tripartite committee made up of equal numbers of representatives of Member States, industry and consumer organizations, and asks to be consulted on its rules of procedure;

10. Calls on the Commission to establish the legal nature and scope of the committee which it proposes to set up to ensure proper implementation of the proportionality principle; considers it essential to include in this committee representatives from the commercial communications sector, consumers and the European Parliament;

11. Calls on the Commission to ensure that the proceedings of the Committee regarding the proposed proportionality assessment are fully transparent and further to ensure that the Committee consults thoroughly with the complaining parties, meets regularly, operates according to strict time limits, publishes its results, considers all complaints lodged with the Commission and reports to the European Parliament;

12. Believes that the proportionality assessment procedure should under no circumstances entail an extension of the normal deadline by which the Commission takes its decisions;

13. 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;

14. Considers that international codes such as those laid down by the International Chamber of Commerce (ICC) should be studied by the Commission when, having applied the proportionality principle, there is a clear need for a harmonizing proposal; and that the ICC should finalize its Guidelines on Interactive Marketing Communications;

15. Calls on the Commission, consumer organizations and industry to consider strengthening already existing self-regulatory complaints procedures, such as that of the European Advertising Standards Alliance (EASA);

16. Considers that it would be desirable for the national codes of conduct to be applied in such a way as to involve mutual recognition; considers that this phenomenon may lead to the drafting of codes of conduct at European level, always provided that they do not affect free competition within the internal market;

17. Calls on the European and national authorities to create an environment which allows consumer organizations 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;

18. Calls on the Commission to present in

the follow-up Communication a full inventory of existing barriers to free circulation of commercial communications services;

19. Asks the Commission to undertake a comprehensive study of the economic relevance of the commercial communications sector to the single market;

20. Stresses the need for a data bank with Community and national legislation in the area of commercial communications and for the immediate creation of a single European contact point which should be established in the context of a clearly defined framework of information and policy-making that incorporates all of the interests involved; the contact point should, as a first priority, supply the European Parliament with a full overview and analysis of existing self-regulatory codes in the Member States; in order to ensure a high level of consumer protection that respects cultural diversity this framework should be developed at an interservice level;

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

22. 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;

23. Approves the Commission's proposal that sponsorship should be considered one of the priority areas in the analysis of the sectors referred to in the Green Paper and requests the Commission to reflect in particular on:

(a) the differing regulations applying to sponsorship of an event and the televising thereof,

(b) the fiscal implications (for example differences in deductibility of the costs of patronage),

(c) a strategy for encouraging and recognising patronage and sponsorship for projects on a European scale and

(d) ways to improve information on the financing options that enable cultural initiatives to be developed in the Member States;

24. Underlines the need to safeguard the development of Internet, electronic commerce and related new media services, to create consumer confidence in the new services and to consider similar utilization of the legal and self-regulatory instruments of the commercial communications sector; calls on the Commission to propose a framework of rules on dishonest marketing methods;

25. Calls on the Commission to come forward with a more detailed assessment of the effects of commercial communications on children, their impact on privacy and the mechanisms through which consumer cross-border complaints should be addressed; and furthermore calls on the Commission to formulate proposals on the protection of minors and human dignity in audio-visual and information services following its Green Paper on that subject (COM(96)0483 - C4-0621/96) and on illegal and harmful content on the Internet following Parliament's resolution of 24 April 1997 on that subject([10]); stresses that national legislation on the protection of children, which has been considered proportionate following the assessment methodology, should not be weakened;

26. Is of the opinion that the Commission is not making full use of its existing powers; insists that Articles 63 and 169 of the EC Treaty must be applied systematically;

27. Is of the opinion that the Council should consider expanding the application of the proposed Directive on Regulatory Transparency Mechanism on new services to cover also Commercial Communications;

[10] Minutes of that Sitting, Part II, Item 11.

28. Requests that the Commission report 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 interest parties;
29. Asks for the introduction of a Council decision to enable possible infringement proceedings to be heard in the Court of First Instance([11]);
30. Considers that, although the proposed method for evaluating the proportionality principle 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; in particular, 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;
31. 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 take into account the following points:

(a) any future rules governing the commercial communications sector must 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;

32. Calls on the Internal Market Council, as the Council responsible, to encourage the Consumer Affairs Council, the Telecommunications Council and the Social Affairs Council to hold a discussion on the issues arising out of this Green Paper;
33. Calls on the Commission, once the issues of principle and procedure raised by the Green Paper have been determined, to consider the question of their application to restrictions on commercial communications in the different sectors, including telecommunications, financial services, food, etc;
34. Deems necessary that allocations are made in the budget to implement the proportionality methodology and to ensure effective application of the infringement procedure; adequate resources must be made available in terms of funding and manpower;
35. Instructs its President to forward this resolution to the Council and to the Commission, as well as the industries and consumer organizations concerned.

[11] This is in line with Parliament's Resolution of 16 September 1993 on the role of the Court of Justice in the development of the European Community's constitutional system (OJ C 268, 4.10.1993, p. 156).

Comparative advertising and the consumer

The role of advertising has been recognised by the Community as essential in ensuring the smooth running of the Single Market, which, with the free circulation of goods, services, capital and people, will significantly increase the variety of products and services offered by producers.[1]

This is a principle acknowledged by the Commission, although not without qualification. Even though commercial communications are usually the responsibility of DG XV, this does not always extend to a certain number of very specific concerns in this area of policy. For instance, TV advertising is covered by the framework of the 'Television without frontiers' Directive, for which DG X (Information) is responsible. And the same goes for a particular form of advertising, comparative advertising, on which a future Directive is to be issued which originates from DG XXIV.

A Directorate General which has opted for a policy of protecting consumers

Whilst many are asking the question as to what a 'high level of consumer protection' (article 100A of the Treaty of Rome and 129A of the Maastricht Treaty) ought to mean, it is common knowledge that the European Commission has set up a Directorate General called 'Consumer policy and health protection', which focuses on this issue. At first it was only one Directorate - the 'Consumer Policy Division' - but with a Director General at its head, the Dane Karl Barlebo-Larsen. With consumer policy touching on so many areas and arousing so many emotions, this service quickly expanded to become DG XXIV.

Free from external influences, its only objective is to ensure, in the most effective way possible, the protection of the citizens of the 15 Member States of the EU.

DG XXIV is at present responsible for comparative advertising. To be more precise, this form of advertising (which is controversial at present) is being legislated on by the Commission with the introduction of amendments to the Directive on Misleading Advertising. The draft Directive is thus titled: 'Amended proposal for a Directive of the European Parliament and the Council, amending Directive 84/450/EEC on Misleading Advertising, in order to include comparative advertising'.

Why is DG XXIV responsible for comparative advertising ?

DG XXIV is responsible for the comparative advertising brief precisely because it flows directly from the Directive on Misleading Advertising, with which it has always been involved. The explanation is simple : when in 1975 the Commission set up a preliminary programme on consumer protection, four basic rights for consumers were set out. Of these, even at this early stage, two directly dealt with advertising.

In the first place, the right of the consumer to the protection of his economic interests established an essential principle: 'advertising must not mislead the consumer'. Secondly, the right to sufficient information was acknowledged as the general principle of advertising. Once the right not to be misled was recognised for citizens as consumers, it followed from this that the Commission should ask DG XXIV to focus its efforts, at a legislative level, on what it considered to be a legitimate principle.

As a consequence one has a view of advertising seen through the perspective of the

DG XXIV is responsible for the comparative advertising brief precisely because it flows directly from the Directive on Misleading Advertising, with which it has always been involved.

[1] Source : Consumer information programme - 10 May 1993 - edited by the Consumer Policy Directorate (former DG XXIV)

consumer. In the same manner, the issues of unfair advertising and comparative advertising still remained to be resolved, and the Council wished to act. However, when the Council came to discuss unfair advertising, it came to nothing because the required unanimity was not achieved at that time. The Netherlands and the United Kingdom argued that it was impossible to define what unfair advertising was and failed to agree as to how to legislate on the subject.

Equally unexpected was the position jointly adopted by Belgium and Luxembourg, who voted in favour of the proposal even though their legislation specifically banned comparative advertising.

Even when the Council, after an agreement on the 1984 Directive (Misleading Advertising), succeeded in introducing preambles on unfair advertising and comparative advertising, the deadlock over unfair advertising was not broken. The only references to it were in norms flowing from the so called 'Television without Frontiers' Directive.

As far as information received by EU citizens comparing different goods or services was concerned, the Commission saw it as an absolute necessity to intervene and harmonise the regulations of the fifteen Member States, especially as some of them, such as Finland and Sweden, already allowed this form of commercial communications.

The logical decision was therefore to let DG XXIV continue dealing with this form of advertising, within the wider context of misleading advertising. However, DG XV, which more broadly harmonises rules on advertising, also remained involved in the work.

Not always the path imagined

Some would argue that this amended proposal on misleading advertising, dealing with comparative advertising, could have been adopted sooner. This may never have been the case, however, since ideas do not always follow the same logic. When opinions were sought, those of the Economic and Social Affairs Committee were quickly received and some amendments were suggested.

However, progress in the European Parliament and the Council evolved differently because Member States put forward a variety of opinions and these were not always those one might have expected.

In fact, when the Council of Ministers came to the point of agreeing a common position, a formal step in the legislative process in the adoption of a Directive, Finland and Sweden, along with Germany, surprised everyone by voting against - whereas in fact both these Scandinavian countries allow that particular form of advertising at a national level. Subsequently, in a Conciliation Committee, Finland changed its position ; but this shows how fragile the position of a State can be and how valuable sufficient time for reflection can be, providing it does not drag on for ever.

Equally unexpected was the position jointly adopted by Belgium and Luxembourg, who voted in favour of the proposal even though their legislation specifically banned comparative advertising. European consumers may wonder what a law stands for.

At the present moment, agreement within the Conciliation Committee (almost the last step in the adoption of a Directive), has enabled a certain number of amendments from the European Parliament to be accepted and the final draft of the Directive will probably be adopted during a forthcoming Council meeting in the autumn of this year. Member States have 30 months to implement it in their national legislation - so it will be introduced on the eve of the 21st century.

Comparative advertising and consumer policy

To acknowledge that advertising forms part of a right to information is one thing. To authorise comparative advertising is another. The Commission gave itself time to reflect in depth on the issue, between 1984, the date of the Directive on Misleading Advertising, and 1991, when it presented its proposal on comparative advertising. Its conclusion was as follows : to allow such information, but subject to certain conditions, which ought also to take into account the amendments of the European Parliament and the Economic and Social Affairs Committee. These can be summarised in three points, which shed light on the orientation of the policy on consumer protection :

1. The scope of the text was reduced : a number of issues tackled in the proposal were limited in order to adhere to the criteria established in the document submitted during the Edinburgh European Council. The main change was the deletion of measures relating to comparative tests.

2. Comparative advertising was subject to strict restrictions. It also takes into account, at the demand of the Parliament and the Economic and Social Affairs Committee, those circumstances when products and services are offered on special promotion or for a time limited period. The aim here being to make clear the full circumstances at the time when the information is released.

3. The link to advertising of certain sectors ought to be obvious : namely, those regulations specifically dealing with medical, tobacco and food products.

Commercial Communications has attempted to reproduce here the story of work, carried out by a Directorate General, dealing with one aspect of advertising. Our newsletter has shown the direction taken by a Directive whose main focus, namely advertising, is normally dealt with by DGXV. The Commission, for clear reasons, as explained in this article, instead voluntarily decided to allocate this matter to the Directorate General which had the responsibility of protecting the 'target' of these messages : the consumer.

Even if the direction taken by the Commission, in the field of commercial communications, is not always that wished for by some, the Commission has recognised, through its policy on consumer protection, the informational role of advertising. In order to protect the citizens of the Union, everything possible ought to be done to ensure that the rights of consumers are not impeded.

Commercial Communications can only wish for better collaboration between the Directorates General, as evidenced by the disappointment of Ken Collins, Chairman of the Committee on the Environment, Public Health and Consumer Protection, who wrote in INFO-C[2], the bulletin of DG XXIV : 'In the precise case of consumer protection, there in fact exist difficulties in the relationships between the Community institutions, just as they exist equally between the Directorates General of the Commission and, let's be frank, the committees of the European Parliament. Consumer policy is not solely within the domain of DG XXIV. It also touches on other areas such as agriculture, industry, energy, trade and more. But unfortunately I do not think that the co-operation between the Directorates General of the Commission are adequate to cope with this reality'.

'Unfortunately I do not think that the co-operation between the Directorates General of the Commission are adequate to cope with this reality'.

[2] Source : INFO-C, Volume II, No. 2, April 1997, page 6. DG XXIV of the European Commission.

Advertising to children: the ethical argument

Peter Waterman
Chairman
Toy Industries of Europe (TIE)

It is widely believed that advertising to children, especially by television, is in some way unethical and should be severely limited or banned for that reason. Most recently, in the June edition of *Commercial Communications* the Dutch Consumentenbond and BEUC states that 'above all, the question of children and advertising must be seen as a question of ethics and morality ...', although in common with all other adherents of this view, they did not say precisely why. Instead, they advance what has become known as the 'standard argument', which generalises from assumptions and makes no effort to analyse the real ethical implications.

For the Toy Industries of Europe (TIE), a trade association which represents 80% of the European Union toy and game business, this 'ethical' objection to a key part of its members' marketing activities has become critically important. Two European Union Member States, Sweden and Greece, have invoked the 'moral argument' to justify bans on television advertising to children and of toys which, prima facie, appear to be contrary to European Union Treaty provisions (Article 30 and 59) and the Broadcasting Directive. In considering the TIE's complaint against the Greek ban, in particular, it is understood that at least some European Commissioners may have been sympathetic to the view that there is a sustainable ethical objection to television advertising to children.

In effect, therefore, the means by which children learn about products is itself said to be unethical, by virtue of children's inability to arm themselves against advertising messages through knowledge of commercial purpose.

Accordingly, it may help to clarify the nature of the argument and to show that, properly considered, there is no reason to suppose that advertising toys to children is morally objectionable.

The standard argument

For at least two decades the standard 'ethical' argument against television advertising to children, originated by US academics, has been essentially unchanged. It is contended that children below certain ages (probably between 8 and 12) cannot understand the 'commercial purpose' of advertising. It is therefore said to follow that these young children are necessarily deceived by such advertising, which is therefore unethical.

The argument was recently stated publicly by a Swedish diplomat in the following terms:

'We do not think it is morally acceptable to use such a powerful advertising medium as artillery against children. It is used to cheat young children who are not able to understand exactly what is happening.' *Source: European Voice, November 16th-22nd, 1995*

In March 1996 the Swedish Consumer Ombudsman stated the same argument slightly differently:

'it is only around or after the age of 12 that we can be more certain that most children have developed a more complete understanding of the purpose of advertising. Therefore it is not fair play - and consequently not morally acceptable - to create advertising in order to influence children. This is the main rationale for the Swedish ban .....' *Source: Commercial Communications, March 1996*

In effect, therefore, the means by which children learn about products is itself said to be unethical, by virtue of children's inability to arm themselves against advertising messages through knowledge of commercial purpose. It is important to note that nothing is said about ends de-

spite the preoccupation of ethics with eventual moral consequences.

Professor John Rossiter of University of Columbia, in an essay on television advertising and children (1983), discussed the importance of the distinction between ends and means in this context as follows: *(emphasis added)*

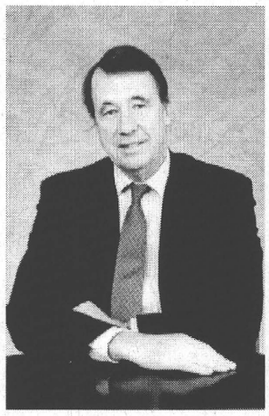
'The unfair means category, in the absence of unfair ends, has always seemed to me to be an indefensible basis for imposing policy. My own inclination is towards Bertrand Russell's (1954) ethical principle that nothing should be censored unless it can be demonstrated to have consequences that are harmful to others. This viewpoint would make it incumbent on self-regulating agencies to demonstrate that children's level of understanding of advertising or inability to defend against persuasive techniques has empirical consequences that we can measure and evaluate. In the absence of these consequences, censorship - in the form of restrictions, bans or whatever - seems pointless. Note that I am proposing a critical task for research to demonstrate that given means cause given ends, and for value judgements, to decide the ethical status of the ends. The paramount value judgement, however, is whether means should be considered if they cannot be demonstrated to have consequences.'

Despite the amount of time that has elapsed since Rossiter's challenge (14 years), we know of no research that demonstrates harmful consequences from television advertising to children - and the TIE has made a special effort, with the help of academics, to scrutinise all of the research that has been done.

The consequence of television advertising to children

In the context of Professor Rossiter's distinction and the view that is shared by the TIE that what is important in the ethical argument, especially for public policy making purposes, is consequences, the following considerations seem to be persuasive.

1. It is abundantly clear that television advertising is not the only form of communication by which children under the age of 12 may be deceived. In some senses, it is probable that all young children are deceived in some way by all sophisticated, adult originated forms of communication. It is equally clear that we do not as a matter of practice consider such accidental deception, which is a necessary outcome of children's inexperience, to be ethically objectionable when, as is generally the case, it has no negative consequences. It is hard to see why, therefore, television advertising should be singled out as unethical if only the means are considered.



Peter Waterman

This viewpoint would make it incumbent on self-regulating agencies to demonstrate that children's level of understanding of advertising or inability to defend against persuasive techniques has empirical consequences that we can measure and evaluate.

2. If we look at the consequences of television advertising of products to children then it appears that there is no ethical case to answer. Virtually all significant products advertised to children, which they may request as a result of seeing television advertising, are purchased for them by adults. As a result, the ends are entirely under the control of those responsible for the care and upbringing of the children concerned. Under these circumstances there is nothing to suggest that even were children unaware of commercial purpose they would be obliged to behave in a way inconsistent with their

own best interests. In other words, recognising that television advertising and its commercial purpose is simply a means there is no necessary or likely outcome which makes these means ethically challengeable.

3. However, to the extent that research can be used to penetrate this subject, it is surprisingly clear that awareness or lack of awareness of commercial purpose has no effect on children's evaluation of products advertised. Research which has been done shows that knowledge or lack of knowledge of commercial purpose is not a determinant in choice of products - in other words, children are not deterred from selecting products by knowledge of commercial purpose or encouraged to select them by lack of such knowledge

Thus, 'commercial purpose' appears to be largely an irrelevance in the world of young children - unsurprisingly so when it is recognised that the concept of commercial purpose is in reality a legalistic construct, only of interest to relatively sophisticated adults

4. Moreover, even if 'commercial purpose' were taken to be an infallible touch stone in determining the current acceptability of television advertising to children, it appears that children down to the age of 3 are able to detect it. Research is often quoted to show that commercial purpose is not detectable by children much below the age of 10, but this 'research' is based on verbal questioning of a sophistication often unattainable by the child subjects. Results obtained from behavioural research show that when children are not confused by sophisticated verbal concepts, they can confirm their understanding of commercial purpose at a very young age - probably down to 3.

It is submitted that below the age of 3 children are totally under the tutelage and guidance of guardians and parents and that therefore the issue is immaterial.

For these reasons it appears that the charge that television advertising of toys to children is in some way unethical is false. We see that the belief that there is an ethical problem is founded on absence of proper analysis, failure to attend to the facts and a misunderstanding of the research data. To the extent that the ethical argument is the only apparently coherent justification offered for sustaining or proposing unusual or onerous restrictions on television advertising, it may well be that such restrictions are without proper public policy foundation, or, as we would say in EU terms, lacking in proportionality.

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Self-regulation and the Single Market

Dr Oliver Gray
Director-General
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Advertising
Standards Alliance

The European Advertising Standards Alliance was closely involved with other advertising organisations at European level in the preparatory discussions for the Green Paper and has made two formal submissions. The Alliance has always been supportive of the Commission's initiative in producing a Green Paper to establish its basic approach on commercial communications. This article considers several aspects of the Green Paper from the point of view of advertising self- regulation.

Promoting self-regulation

The Alliance was setup in 1992 mainly in response to a challenge from the European Commission 'with regard to the handling of cross-border complaints in the Single Market. It now represents the views of 23 self-regulatory bodies in 20 European countries. These self-regulatory bodies are responsible for the application of the national self-regulatory codes and principles, which advertisers, agencies and media put in place to ensure that advertising is legal, decent, honest and truthful, prepared with a due sense of social responsibility and respect for the principles of fair competition. The Alliance's members are involved in the handling and resolution of complaints as well as promoting standards of best practice, thus ensuring a high level of consumer protection. It is important to emphasise that the Alliance is not a self-regulatory authority at European level, neither is its task to produce Community-wide standards, whether legal or self-regulatory.

The Alliance and several of its national members are actively assisting in the setting up of systems of self-regulation in other countries. It has helped establish or develop systems in Luxembourg, the Czech and Slovak Republics, Slovenia, Hungary and, most recently, Poland. Work is also currently wider way in Russia, Croatia and Lithuania. In June the Alliance published its *'Guide to Self-regulation'* to assist in this process, particularly in Central and Eastern Europe.

Handling cross-border complaints

The Alliance currently coordinates the handling of cross-border complaints, most of them from consumers, according to the country of origin principle enshrined in the Broadcasting Directive i.e. the rules applied are those of the county of origin of the medium in which the advertisement appeared.

Since 1992, the Alliance has coordinated through its members the handling, free of charge for consumers, of some 175 cross border cases, the results of which are regularly published in its newsletter *Alliance Update.* Contrary to views expressed in the June issue of *Commercial Communications,* (Peter Schotthöfer, *Reflections on the Green Paper*) the Alliance is very actively involved, through its members, in both the maintenance of high standards and the handling of cross-border complaints (in line with the country of origin principle described in the Green Paper as the Commission's preferred approach in commercial communications.

The Alliance and several of its national members are actively assisting in the setting up of systems of self-regulation in other countries.

The country of origin principle has been also suggested for new media and we are currently examining ways in which it could be effectively enforced with the help of the ICC guidelines on interactive media. We are keen to encourage a responsible approach in this area and share the general concern to ensure special care in advertising to children.

Mutual Recognition vs Cultural Diversity

The principle of proportionality - an important theme in the Green Paper - is not an alien one for advertising self-regulators as they encounter it on a daily basis in the application and revision of self-regulatory rules.

Pan-European campaigns notwithstanding there is no such thing as a 'Single Euro-consumer', and the vast majority of advertising campaigns are carefully adjusted to take account of national differences.

The Commission must maintain the principles of subsidiarity and mutual recognition in its approach to this area. Advertising is likely to remain heavily influenced by the cultural, economic and social conditions of each country, because consumers value these differences in their habits, tastes and customs, a point which emerged clearly from the consumers' response in the June issue of *Commercial Communications.* Pan-European campaigns notwithstanding there is no such thing as a 'Single Euro-consumer', and the vast majority of advertising campaigns are carefully adjusted to take account of national differences. For the same reasons, national self-regulation is influenced by each country's legal, cultural and commercial traditions. It is not the structure of the system that counts, but its effectiveness.

The very fact that the Alliance exists and brings national self-regulators together on a regular basis, demonstrates the willingness of its members to pursue a common goal. Our activities, such as surveys, workshops and Board meetings, which are held in rotation between member countries, create a greater understanding of each others' self-regulatory systems. This in its turn encourages Alliance members to make adjustments to their own national systems. The majority of its members responded individually to the Green Paper and many have organised national conferences over the past two years. There should be no doubts about the ability of the Alliance's national members to understand matters of concern at European level.

The Alliance strongly urges the Commission to recognise the importance of national regulatory systems, as well as the activities of the Alliance and its members in encouraging best practice across Europe. We were disappointed at the sparse coverage of self-regulation in the Green Paper, a point also made by consumer groups in the June issue of *Commercial Communications* and of the handling of cross-border complaints by the Alliance and its members. Although we note the comment by Dr Zourek of DG XV contained in his informal address to the industry forum, held last February at Corsendonk Priory in Belgium, that 'it is not for the Commission to start legislating for self-regulation', we would nevertheless have hoped for at least as much recognition in the Green Paper of the role of self-regulation as is to be found in the latest version of the Comparative Advertising Directive. The Alliance hopes that the follow up to the Green Paper will acknowledge the success of self-regulatory bodies in each member state in ensuring that advertising is legal, decent, honest and truthful.

Response to the Challenge

We took to heart the Commission's invitation, issued at Corsendonk in Febuary 1997, to apply the principle of mutual recognition to self-regulation, thus setting an example for other regulators of how a European regulatory framework for com-

mercial communications might operate.

Since Corsendonk, the industry and the Alliance have taken up the mutual recognition challenge. The Alliance has already produced a new edition of the *Blue Book, Advertising Self-Regulation in Europe: An analysis of advertising self-regulatory systems and their codes of practice in 20 European countries*, which is due to be published in September.

We are currently examining the results of a survey of advertising campaigns which appeared in several EU countries. Initial results suggest that there are strong cultural influences at work and that the activities of specific interest groups can produce a very different reaction to an advertising campaign than might be expected from consumers in a particular country. It is clear that the procedures and methods for applying the rules vary from country to country and may necessitate some convergence. Despite these differences, the outcome in terms of ensuring compliance is remarkably similar. The self- regulatory rules and principles in each Alliance member country are inspired by the same basic principles of the ICC code that advertising should be legal, decent, honest and truthful.

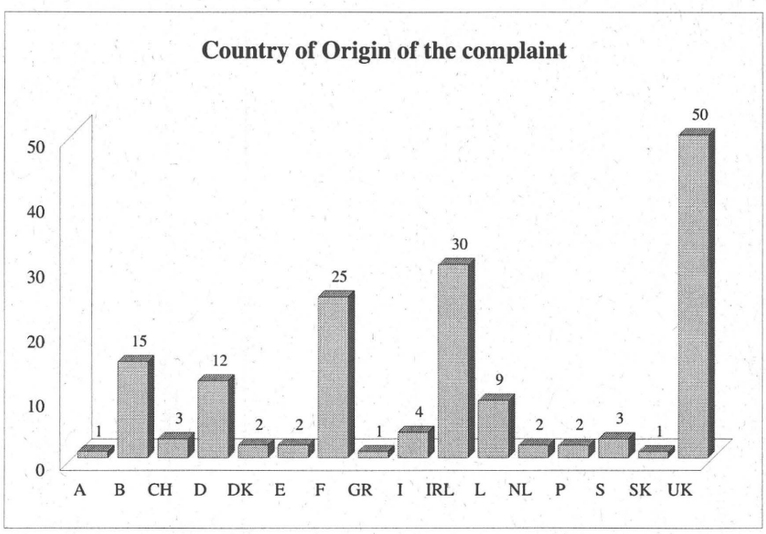
Differences in emphasis on particular issues, themes or activities reflect the special circumstances in each country. Specific rules on the portrayal of women, for example are found in Germany and Austria, where the percentage of complaints on this issue are the highest, whereas in other countries, this issue is covered by the general code of advertising practice.

The next phase of the industry's response will result from a comparative study of the differences and similarities between self-regulatory codes/principles and to what extent these constitute a barrier to trade in the Single Market.

The real barriers to the Single Market

We believe that the most important barriers to a Single Market are legal ones; in this spirit we support the principle of proportionality as regards existing and future legislation. National legislative bans cause barriers to the Single Market and, in our view, one of the Commission's priorities should be to identify legal barriers for national governments to address. Discussions on the need for their continued existence might take place in the proposed Committee, in which Alliance members hope to participate as regulators of advertising content and not, as some have wrongly assumed, as industry representatives.

Self-regulation does not exist in a vacuum, nor is its role to substitute for the law. Framework law and self-regulation complement each other, rather like the frame and the strings of a tennis racquet, to produce a result which neither could produce alone. It is however apparent, even at this early stage, that many of the differences between Member States which cause barriers to trade are legal rather than self-regulatory in origin.



While the Alliance and the advertising industry have responded to the Commission's challenge to examine the scope for mutual recognition with a view to removing self-regulatory barriers, it is clear that little can be achieved without a similar exercise on the part of the Commission itself, to tackle the existing legal obstacles. For this reason many of the European advertising associations and the Alliance recently pressed the Commission to take action against the Loi Evin. By taking strong positive action to remove this major legal barrier, the Commission would send a powerful signal to the whole advertising community. Conversely, any perceived reluctance on the Commission's part to tackle this highly visible barrier would inevitably cast doubt on its commitment to achieving the Single Market. This would make the task of persuading national self-regulatory systems of the need for harmonisation and mutual recognition much harder. To pursue the tennis racquet analogy, a distorted or broken frame makes it difficult, if not impossible, to attach effective strings.

It is essential that all concerned assume responsibility for best practice in commercial communications at all levels of the organisations we represent, to ensure that advertising really is responsible, i.e., legal, decent, honest and truthful.

A shared responsibility

It was generally agreed at Corsendonk this year that a firm commitment is needed by industry, in the light of this challenge, to promote self-regulation 'and not just pieces of paper' or lip service. Pledged as it is to promoting best practice in advertising across Europe. the Alliance is encouraged, by the Commission's and Parliament's interest in this area and welcomes the establishment of a single point of contact. It is essential that all concerned assume responsibility for best practice in commercial communications at all levels of the organisations we represent, to ensure that advertising really is responsible, i.e., legal, decent, honest and truthful, while at the same time respecting the culture of each country and the diversity so much cherished by consumers This will prevent opportunism by individuals from provoking detailed legislation whether at national or European level. In this way we can ensure the confidence of consumers and governments alike in responsible commercial communications.

We ignore this challenge or lack commitment to it at our peril. Only through the effective and responsible regulation of its own activities will advertising maintain its own freedom and the continuing trust and confidence of Europe's consumers.

This article is based on the Alliance's response to the Green Paper, which can be obtained, together with other publications referred to, from:

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Cross-border TV and film production in Europe

It goes without saying that programme sponsorship is the key to supporting a competitive film and television production business in Europe. At least, that is the long-held view of the Producers Alliance for Cinema & Television (PACT), the trade association representing British film and independent television production companies.

The decision by the European Commission to examine the role of programme sponsorship in its Green Paper on Commercial Communications is, therefore, only logical. But it should, nonetheless, be applauded.

In particular, we would support any means to stimulate cross-border film and TV production that can draw on sponsorship without falling foul of national regulations.

Stimulating EU-produced programmes with popular cross-border appeal is the obvious antidote to the Television without Frontiers directive's protectionist quota thresholds. But a buoyant European industry will remain a dream unless all viable sources of funding for the programme makers are actively leveraged.

It is a matter of fact that the majority of new TV broadcasts depend on production finance obtained directly or, more usually, indirectly from a vigorous advertising industry.

Sport, art and music are just three examples of programmes whose international currency is sound and images - rather than words - and as such are suited to attracting production finance from commercial sponsors. As long as the sponsor's objective remains perceptual, surely the exchange of cash for corporate exposure is in the public interest - especially if it adds to the wealth of programme choice.

The power of television to carry a sponsor's message across borders is undisputed. In particular, events that are guaranteed to reach a pan-European audience are so widely valued by sponsors that we have reached the point where advertisers are now asking for the chance to participate directly in the actual programme making process.

PACT protects its' members creative, artistic and journalistic integrity

Co-production with advertisers, however, is easier said than done. PACT's British independent producers are now incensed by the UK TV regulator's refusal to trust them to work directly with advertisers as sponsors and co-producers within the bounds of good taste and integrity. Indeed, protection of the creative, artistic and journalistic integrity of its membership is a fundamental purpose of PACT's existence.

The independent producers' track record is impressive in terms of the number of awards they win both at home and abroad. These independents are ideally placed to be the engine for cross-border communication of exactly the type envisaged by the European Commission's DGXV.

Unfortunately, the desire of advertisers to contribute to the production of television is severely hampered the UK's regulator - the ITC - which effectively gives broadcasters exclusive access to its regulatory advice. Yet without guidance, no programme can be guaranteed a safe passage through the regulatory minefield of sponsored programming. Indeed, independent producers frequently complain that the only advice available from the ITC is to seek guidance from the very broadcasters (who are also producers) with whom they are in competition to finance and supply programmes.

The result is a commercial gamble for independent producers, advertisers, sponsors and magazine publishers who are deprived of any firm assurance that the goal posts will not be moved before the programme is cleared for broadcast. Independent productions have been blocked at the last minute in the past and, unless the ITC extends its generosity to independent producers, this is likely to happen again.

Meanwhile, the safest route for independent producers is to accept production finance