

# COMMERCIAL COMMUNICATIONS

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## Communication: follow-up to the Green Paper on Commercial Communications

Mario Monti, European Commissioner

The Communication which is reprinted in this special edition of the newsletter puts into place a framework for the enforcement of Internal Market principles for this important sector which we proposed in May 1996 when we adopted the Green Paper on Commercial Communications. This has been strongly supported by the European Parliament and over four hundred interested parties. This framework of actions is in line with the commitment we made to improve the Internal Market in the Single Market Action Plan. The objective is to facilitate the cross-border provision of commercial communications services while ensuring appropriate protection of public interest objectives such as health and protection of consumers and the environment.

The Communication takes into account the economic importance of this sector. It plays a key role in the European Union employing hundreds of thousands of people and it is growing rapidly thanks to the development of new communications technologies and buoyant demand. For example, in the specialised area of telemarketing the current number of 193,500 employees in Europe is forecast to grow to 669,500 in the year 2001. Growth of Internet-related commercial communications is similarly expected to increase.

The sector also plays a key role in promoting the competitiveness of European business. Without cost-effective marketing campaigns, business cannot develop markets or indeed are unable to undertake viable investments in new products or services. Furthermore, commercial communication services are critically important for the realisation of the Single Market given that if businesses cannot communicate their presence, products and services across borders, they are less able to engage in cross-border trade. Finally, these services also help finance all media. It is recognised internationally that the development of information society services and electronic commerce are, and will continue to be, largely financed by revenues earned from carriage of these services.

The need for an appropriate EU framework in this field is not only because such services are increasingly offered across borders thanks to the development of new communications channels, but also because they are subject to highly divergent national regulations to protect a wide variety of public interest objectives. The Commission's approach has taken account of the importance and sensitivity of the various public interest objectives pursued by Member State measures giving rise to difficulties for cross-border commercial communications.

The new framework includes the application of a transparent method of helping in assessing whether restrictions on cross-border commercial communications are proportional to the public interest objective pursued and the creation of a group of Member States' experts which would, inter alia,

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Toby Syfret, *Research Consultant*

Published by **asi**,  
34 Borough Street  
Brighton BN1 3BG, UK  
Tel: +(44) 1273 772741  
Fax: +(44) 1273 772727  
e-mail: asi@dial.pipex.com

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seek solutions to restrictions via administrative co-operation.

The Commission will apply this approach in four key areas where commercial communication regulations at the national level diverge significantly and therefore potentially give rise to both Single Market barriers and to a lack of effective protection across borders within the Community. The four areas are:

- (i) the protection of minors
- (ii) unfair competition
- (iii) sponsorship and
- (iv) misleading claims.

I am confident that through this proposal we have taken account of the different social and cultural situations in the various Member States. At the same time, we have prepared the ground for a vibrant commercial communications sector in the EU, which is vitally important for creating sustainable jobs and ensuring the Union's competitiveness.

## The UK European Presidency welcomes the Communication

*Lord Simon, UK Minister for Trade and Competitiveness in Europe*

One of the Government's priorities for the UK Presidency of the European Union this half year is the improvement of the Single Market. A more effective Single Market is vital for all our citizens, for consumers and of course for the competitiveness of the UK and the EU. As Europe makes the final preparations for the Single Currency, effective communication and a more sophisticated and adaptable market place become increasingly important.

We are looking to improve the Single Market through:

- eliminating delays to transposition of Directives into national law;
- ensuring more even and effective enforcement of Single Market rules.

Some examples of how we wish to level the playing field are:

- (i) establishment of compliance units in each Member State on the model of Action Single Market in the DTI. This has been achieved, and we now need to ensure the units work efficiently;
  - (ii) improved Commission complaints procedures;
  - (iii) improvement of the operation of mutual recognition of standards, testing and certification arrangements - where there are no harmonising rules. We agreed Council conclusions on this at the 30 March Internal Market Council;
  - (iv) more efficient production of European standards;
- improving weaker parts of the Single Market such as public procurement;
  - ensuring proper enforcement of new legislation on telecommunications and electricity.

We want to modernise the Single Market by obtaining agreement to new legislation in the electronic commerce and biotechnology areas.

We want to simplify the Single Market by:

- giving impetus to the Commission's SLIM initiative (Simplification of Legislation in the Single Market), which involves project groups comprising business, Government and other representatives looking at particular Single Market Directives;
- through the experimental business test panels, launched at the Internal Market Council on 30 March, which will operate on a national basis and give business an opportunity to comment on draft Commission proposals. Nine Member States have volunteered for the experimental phase!
- through discussion of national simplification - after the informal meeting of Internal Market Ministers in February at Cambridge, the Manchester conference on better regulation, this is now firmly established on the Internal



Market Council's agenda.

For commercial communications the task is most definitely to improve the Single Market. Commercial Communications is an area which has not been given the attention it deserves in the Single Market. There is some legislation affecting the sector but it is largely designed to secure a Single Market in other areas such as pharmaceuticals and broadcasting. There are of course relevant Treaty articles, not least Article 59 on free movement of services. And there is a growing body of European Court of Justice case law, in the main of a liberalising nature. For example the recent *De Agostini* case confirmed that prohibitions on certain types of advertising are covered by Article 59, whereas the position on this was previously unclear.

But of course there are problems. There are varying and conflicting national laws, for example on special offers and sponsorship. One possibility would be for the Commission to propose Single Market legislation in order to achieve a level playing field in all aspects of commercial communications. But the Commission shows no signs of making such a proposal. We agree with the Commission. We suspect that whatever the content of the proposal, the negotiations would be interminable, given the number of variations in practices between Member States in different areas of commercial communication. It is surely better to have an approach whereby the Member States can discuss specific areas of commercial communications without an emphasis on a legislative solution.

We are pleased that this is what the Commission has been proposing. The Commission's Green Paper on Commercial Communications recommended a Commission chaired committee of Member State representatives to look at specific problems in the Commercial Communications area. In its response to the Green Paper, the UK Government welcomed this proposal. It is of course far from a miracle cure for the obstructions to the Single Market in this area. But it would be a basis for serious discussion and formulation of guidelines against which future developments could be seen.

We welcome the European Parliament's support for this proposal; and we understand that it received widespread support from other respondents to the Green Paper.

We are pleased that the Commission has now issued a Communication to follow up the Green Paper and the responses to it. Equally we are pleased that the Communication confirms the Commission's proposal for a committee.

Commissioner Monti introduced the Communication at the 30 March Internal Market Council. We are preparing for discussion by Ministers at the 18 May Internal Market Council. I very much want to preside over a debate on commercial communications then even though that Council will have a very full agenda. I want to ask my Ministerial colleagues to give a green light to the Commission to launch its committee.

We hope that the Committee will then be promptly set up, with an early meeting to establish working methods and launch a challenging programme of work. We hope that the officials of Member States will make enlightened and considered contributions to the work of the committee. I shall certainly call on those DTI officials concerned to do this - and to closely consult consumer and business interests. We are sure that other Member States' representatives will do likewise.

None of this will prevent the need to tackle immediate problems.

DTI is supporting several complaints by business in the Commercial Communications sector. These relate to television advertising to children in Sweden, television advertising of toys in Greece, the operation of air miles schemes in Belgium and Germany, and the broadcasting in France of sporting events in other countries at which alcohol advertising is on display. Several of these issues are all the subject of Commission infractions proceedings. These proceedings are not moving as quickly as business or we would like. No doubt there are reasons for this; but we hope that the processes can be speeded up. My Department's Action Single Market stands ready to help business and individuals in the UK take up what may be obstacles to Single Market rights; and for example is helping business with the problems I have just mentioned.

The Commercial Communications sector is vital. It has a major contribution to make to business competitiveness. It has a major contribution to make to consumer choice. In itself it is a substantial generator of employment.

For the good of the Single Market we must ensure that we maximise the extent to which the Commercial Communications sector can contribute to the achievements of the Single Market; and the extent to which we can achieve a Single Market in Commercial Communications.





# Communication from the Commission to the European Parliament and the Council

## Executive Summary

The May 1996 Green Paper on Commercial Communications in the Internal Market recognised the importance of the sector in terms of employment and growth potential and its key role in helping European businesses and non-profit-making associations to market their goods and services throughout the Union. These services affect a number of important public interest objectives such as the protection of consumers and public health and are therefore subject to a variety of different national regulations. The Green Paper noted that the divergence of these national regulations together with the development of cross-border commercial communications was leading to obstacles to the proper functioning of the Internal Market. At the same time, the increase in cross-border commercial communications, in particular in the area of new Information Society services and electronic commerce, could adversely affect the efficient protection of public interest objectives.

The very high level of response confirmed this sector's importance. In addition to the European Parliament, the Economic and Social Committee and ten Member States, 433 interested parties responded to the call for comment over the past 18 months. In general, there was strong support for the Commission's proposals. Indeed, suggestions were made both to strengthen and add to them.

The Commission has therefore decided to adopt a range of actions in this sector with the objective of facilitating the cross-border provision of commercial communications services through the establishment of an efficient and transparent framework which will also ensure an appropriate protection of public interest objectives concerned. These actions represent a tool to assist relevant authorities in their analysis of

problems in this field. This approach is fully consistent with, and complementary to, the Single Market Action Plan's Strategic target of making rules more effective.

More specifically, the Commission proposes:

### **The application of a transparent assessment methodology.**

In many cases, the examination of the compatibility of a restriction to cross-border commercial communications with Internal Market principles raises the issue of its proportionality with the public interest objective pursued. The Commission will apply, where appropriate, the proportionality assessment methodology described in the Green Paper. This will increase the speed and efficiency with which infringements are processed and also improve the quality of any harmonisation initiatives the Commission will propose in the field of commercial communications.

### **Setting up a Commercial Communications Expert Group.**

The Commission will set up a Commercial Communications Expert Group to establish transparent and efficient administrative cooperation between itself and the Member States and a dialogue with interested third parties. In response to the calls of the Parliament and the Member States, the Commission will ensure that any possible duplication with Commission committees' activities will be avoided. It will also ensure that the Expert Group acts rapidly in the relevant areas. The Expert Group will not cover issues that are already dealt with by Commission committees.

### **Making available a commercial communications' contact point and information network.**

The Commission will establish a central contact point in the Directorate General for the Internal Market and Financial Services

(DGXV) for interested third parties which will work closely with the other Directorates General involved with policy in this field. It will also establish a Web site to facilitate information flows and transparency.

**Establishing a commercial communications database.**

The Commission will establish an information database on national and Community regulations and self-regulatory codes.

**Accelerating complaint processing.**

The Commission will continue its general efforts to speed up the handling of complaints. In this field, it will make efforts to reduce delays by using, where appropriate, the proportionality assessment methodology.

**Setting up a network of academic experts.**

The Commission will establish a 'representative group of academic experts' interested in the various aspects of the commercial communications field in order to assist its work and that of the Expert Group of Member States' representatives. The network of academic experts will be invited by the Commission to provide opinions on specific issues.

**Promoting international co-operation.**

The Commission will promote the princi-

ples of this approach in international negotiations.

**Clarifying electronic commerce issues.**

The Commission will take account of restrictions concerning commercial communications services in its current examination of the specific legal issues relating to the development of cross-border services in the Information Society. In certain areas where there is legal insecurity it will propose clarification in the context of a proposal relating to electronic commerce and associated Information Society services.

**Keeping the European Parliament informed.**

The Commission will inform the European Parliament on the application of this approach including an evaluation of the work carried out and an update of the work programme.

The Commission will apply this approach to four key areas where commercial communications regulations at the national level diverge significantly and therefore potentially give rise to both Internal Market barriers and to a lack of effective protection across borders within the Community. The four areas are:

- (i) the *protection of minors*,
- (ii) *unfair competition*,
- (iii) *sponsorship* and
- (iv) *misleading claims*.

## Introduction

### Objective

The European Commercial Communications sector plays a key role in the European Community. It employs in excess of 1 million Europeans and it is growing thanks to the development of new communications technologies and demand. Examples of this growth are well reported. In the specialised area of telemarketing the current number of 193,500 employees in Europe is forecast

to grow to 669,500 in the year 2001. Growth of internet related commercial communications is similarly expected to increase. For France, Germany, the Netherlands and the United Kingdom alone it is forecast that these new commercial communications services could amount to 1.3 billion Ecus in 2002. This is reflected in the development of new specialised on-line agencies and internet audience



measurement specialists. Its importance for employment is further emphasised by the fact that many users of commercial communications have marketing and marketing research personnel that must be added to the total employed directly by the sector. It should be emphasised that the creative parts of this sector depend on new young talent and the sector is therefore important in terms of youth employment in Europe.

The sector also plays a key role in promoting the competitiveness of European business. Without cost-effective marketing campaigns, businesses cannot develop markets or indeed are unable to render viable investments in new products or services. Furthermore, commercial communications services are critically important for the realisation of the Internal Market given that, if businesses cannot communicate their presence, products and services across borders, they will not be able to engage in cross-border trade. Finally, these services also help finance all media. It is recognised internationally that the development of Information Society services and electronic commerce are, and will continue to be, largely financed by revenues earned from carriage of these services.

The Commission acknowledges that an Internal Market approach was required in this area given that there existed no co-ordinated framework for the sector even though it is: (i) regulated for a wide variety of public interest objectives and (ii) increasingly offering services across borders, thanks to the development of new communications channels.

The Commission's approach to the area of commercial communications has to take account of the importance and sensitivity of the various public interest objectives - such as health, safety, environmental and consumer protection - which may be pursued by Member State meas-

ures giving rise to difficulties for cross-border commercial communications. Article 100a of the Treaty makes it clear that Internal Market measures which affect such public interest objectives must take as a base a high level of protection. The importance accorded to these public interest objectives by Community law is reflected also in Articles 129, 129a and 130r of the Treaty.

It follows that a certain balance must be struck between Internal Market concerns and other objectives validly pursued by Member States. In determining what action the Commission should take in this area, a certain sensitivity must be shown towards the different social and cultural situations in the various Member States.

This Communication summarises the responses to the Green Paper on Commercial Communications in the Internal Market (COM(96) 192 final) and presents the Commission's approach aiming at establishing a European policy framework for commercial communications services. Commercial communications means:

*'All forms of communication seeking to promote either products, services or the image of a company or organisation to final consumers and/or distributors.'*

### **The Green Paper's proposals**

On 8 May 1996, the Commission adopted a Green Paper on Commercial Communications in the Internal Market. The Green Paper followed an extensive survey exercise to which over 1,000 interested parties responded.

The Green Paper stressed that the sector of commercial communications was of significant importance to the functioning of the European economy; cross-border commercial communications were a growing phenomenon in the Internal Market; differences in national regulations gave rise to regulatory problems for users, suppliers and carriers of such services as well as their recipients and these prob-

lems were likely to become more manifest as communications possibilities improved with the advent of the Information Society. These problems are witnessed by the increasing number of complaints in this field. The number of these complaints and the calls for European action from interested parties will multiply as a consequence of the technical ease with which commercial communications services can now cross borders thanks to the development of electronic commerce.

Given these concerns and since these services are used to promote cross-border trade of all goods and services circulating within the Internal Market, the Green Paper proposed (see Annex 1) a review of existing restrictions to ensure that there exists a qualitative Community framework allowing for cross-border provision of such services together with effective cross-border protection of public interest objectives and redress against abuses.

Two key proposals were made to ensure, in view of the expected growth in cross-border commercial communication services, that this review would lead to the establishment of a high quality, appropriate and coherent European framework:

1) the application by the Commission's services of an *assessment methodology* aiming to facilitate and render transparent the assessment of the compatibility with the Treaty of restrictions on cross-border commercial communications;

2) two inter-related *tools to improve co-ordination and information exchange between the Commission, the Member States and interested parties*:

i) An Expert Group of Member States representatives whose aim would be, on the basis of the proposed assessment methodology, to help find constructive solutions to problems for cross-border commercial communications, to safeguard the coherence of national initiatives and to improve the cross-border protection of pub-

lic interest objectives in this field.

2) In response to both the call for improved information flow and the need to provide the data required for the application of the assessment methodology, the Commission will establish a *central information contact point* which would co-ordinate an *information and communications network* between itself, the Member States and all interested parties.

These proposals meet the objective of ensuring effective regulation as set out in the Commission's Single Market Action Plan which was adopted in June 1997 (CSE(97)1 final). More specifically, they represent a framework for enforcement and problem solving in order to improve the Community legal framework for commercial communications.

## Response to consultation

### European Parliament

The European Parliament adopted its resolution on the Commission Green Paper on Commercial Communications in the Internal Market ((COM(96)0192 - C4-0365/96). PE 260.946) at its Plenary meeting on 15.7.97.

### Economic and Social Committee

On the 27 November 1996 the Economic and Social Committee adopted its opinion on the Green paper from the Commission on Commercial Communications in the Internal Market. (O.J. No C 66/11 of 3.3.97).

### Member States

To date, the Commission has received responses from ten Member States. These are Austria, Belgium, Denmark, Finland, France, Germany, the Netherlands, Portugal, Sweden and the United Kingdom.

### Interested parties

The Commission received 433 replies from the five groups of interested parties, demonstrating the wide interest in this field of Community policy. These can be broken down as follows: 127 suppliers of commercial communications services



(e.g. advertising agencies and of which 30 were European or national trade associations); 44 receiver associations (e.g. consumer associations or public health

bodies); 197 users (e.g. advertisers, of which 70 associations) 52 carriers (e.g. media, of which 18 associations) and 13 self-regulatory bodies.

## Section 1: Summary of reactions to the Green Paper on Commercial Communications

Given the purposefully broad questions that were set at the end of each section of the Green Paper, responses have tended to comment on the entire text and all its proposals. The detailed summary in Annex 2 of this Communication covers those points that received the most comments. The key positions of the Institutions and interested parties were as follows.

### **The European Parliament.**

The European Parliament in its resolution dated 15 July 1997 gave strong support to the proposals made in the Green paper. The Parliament wished for the scope of the definition of commercial communications to be extended to include on-pack commercial communications such as on-pack price promotions, coupons, free-gifts, etc.

Regarding the two key proposals the Parliament's position was as follows:

On the proposed assessment methodology, the Parliament gave its full support and, indeed, demanded for it to be strengthened by making it mandatory for the Commission's work, adding strict time limits for Commission decisions and requiring that it be applied to all national restrictions whether they be in law or self-regulatory codes.

As regards the Expert Group, contact point and the information network, again the Parliament voted with a strong majority in favour of these proposals.

Regarding the Expert Group, the Parliament called for it to be as open and

transparent as possible. In order to ensure transparency and efficiency it also called for the Expert Group to meet regularly and reach opinions on specific issues raised to it within short and strict time limits. It requested that the Expert Group should prepare a regular report for the Parliament to allow the latter to monitor its progress. Finally, it felt that the contact point should also provide a central data bank on regulations and self-regulatory codes in the European Community.

The Parliament also identified the areas of regulations that it felt should be the first to be examined under the new approach. These were regulations on commercial communications to children, the regulatory framework for unfair marketing methods and differing national restrictions on brand diversification, on-pack commercial communications, event and television sponsorship.

Finally, it added to the proposals. It called for a system of appeal against the Commission's decision to proceed with or close infringement cases and added that all efforts should be made to ensure that self-regulatory systems be strengthened as well as operated according to the principle of country of origin control.

### **The Economic and Social Committee**

In its opinion, the Economic and Social Committee strongly supported all of the proposals made in the Green Paper. Unlike the Parliament, it did not indicate a priority on which areas of regulations should

first be subject to the proposed approach.

The Economic and Social Committee was particularly supportive of the proposed assessment methodology and especially the economic chain reactions which it felt accurately mirrored how the market for commercial communications operated in the real world. It applauded the establishment of the Expert Group and suggested that Member States should copy the Commission's lead by establishing national central contact points for policy in the field of commercial communications.

#### **Member States**

A large majority of the ten Member States who responded was supportive of the proposals. Only one of the ten felt that the assessment methodology was not acceptable in principle. The others were supportive with a few suggesting that the consumer impacts should be more fully integrated in the economic chain reaction.

Likewise, all the Member States who responded on the proposal to establish an Expert Group were favourable. Two stated that consumer associations should be involved as well as self-regulatory bodies and another two insisted that it should not duplicate the work of other committees or in any way add further delay to the Commission's already long infringements procedure.

Seven of the ten Member States commented on the contact point and information network. They all agreed to these but two made the point that consumer associations should be able to have full access to these and should be given sufficient resources to be effective.

Finally, the Member States went through the priority areas listed in the Green Paper in detail (see Annex 2) pointing out where they thought the new approach should first be applied. They also made a number of further proposals including the need for further work on cross-border dispute settlement systems

and the need to accelerate the existing infringement procedure which was considered to be too slow.

#### **Interested parties**

A large number of interested parties (both from consumer associations and industry) agreed with the Parliament that the definition of commercial communications should include on-pack forms of such services. A large majority of interested parties favoured the assessment methodology and a number of differing suggestions were made to strengthen this. This majority called for mandatory application of the methodology. A number also felt that new legislative proposals should be assessed with the proposed methodology to ensure that they would not create new barriers in the Internal Market. Self-regulatory codes should also be subject to it. Finally, the majority believed that the Commission should make a commitment to process infringement cases in this field more rapidly given that the assessment methodology should allow the Commission to be more efficient in its future work. Certain consumer associations had doubts that the methodology would work without improvement. In particular, they felt that the economic chain reaction should give more emphasis to impacts on consumers. A few respondents from all groups stated that subsidiarity was more important than proportionality and finally a few respondents suggested that the economic chain reaction was far too complex to evaluate and should therefore be dropped.

On the Expert Group the vast majority of respondents from all five interest groups welcomed this proposal. However, most called for the Expert Group not to add further delays either to the processing of infringement cases or to the launching of required harmonisation initiatives. Various suggestions were made as to how the Expert Group should be composed and operate ranging from the use of opinions from accompanying industry or consumer



groups which would bring together national associations representing interested parties to its dependence on public hearings. Consumer associations opposed the continual presence of self-regulatory bodies and felt that this should be balanced with a representation of themselves. Many respondents from the five consulted groups called for the Expert Group to draw conclusions on a specific point within a fixed time frame and requested that these conclusions be made public. There was broad support for the contact point and information network.

Given the very large number of respondents and their different concerns it is not possible to summarise the priority areas that were mentioned by them all. However, it is important to note that all the problems raised in the Green Paper were referred to across the responses that

were received.

Finally, a number of consumer associations and public health bodies called for easier access to national and Community regulations in this field for their members. They also called on the Commission to impose its efforts on effective enforcement, particularly in cross-border cases. They felt that the Commission should examine and develop new systems for cross-border dispute settlements, given the increase in cross-border commercial communications that was expected. Industry was critical of the existing infringements' procedure and called for improvements. In particular, it was felt that this should be made more transparent and timely. Some respondents called for the Commission to commit itself to strict processing time limits and to decisions that should be subject to appeal by all interested parties concerned.

## **Section II: The Commission's response**

### **Objective**

The approach seeks to facilitate the cross-border provision of commercial communications services within the Internal Market through the establishment of an efficient and transparent framework. This will promote the growth of the European commercial communications sector and allow for the development of efficient cross-border marketing strategies by European industry.

This approach will at the same time ensure the efficient protection of public interest objectives. The Commission considers consumer protection and the protection of other public interest objectives as being essential for the development of the European Community and the proposed approach in the field of commercial communications intends to meet these objectives. The Commission considers that an

efficient protection of such public interest objectives across the entire Community also ensures the efficient functioning of the Internal Market. There is therefore a balance to be found between the objective of promoting the growth of cross-border commercial communications services and that of ensuring consumer protection.

### **Scope**

The Commission's approach will be applicable to all forms of communication seeking to promote either products, services or the image of a company or organisation to final consumers and/or distributors. This includes all forms of advertising, direct marketing, sponsorship, sales promotions, public relations and those services used in the design of packaging excluding labelling.

The Commission has extended the scope of the definition proposed in the Green Paper to include *on-pack communications* which are not covered by labelling regulations following, in particular, comments from consumer bodies and advertisers.

These services fall within the scope of Articles 59 and 60 such as interpreted by the jurisprudence of the Court. Indeed, such services are remunerated and can be, or are, provided on a cross-border basis. The fact that these services (be they to an individual or other business) are not paid for by the final consumer cannot be invoked to contest the service nature of these activities.

In certain circumstances, commercial communications activities could, according to the case law of the European Court of Justice, benefit from the application of Article 30 of the EC Treaty relating to the free movement of goods. The Court's recognition of the indirect economic link between commercial communications services and the sale of goods is clearly explained in a number of cases that were referred to in the Green Paper.

## Actions

### 1) Applying a transparent assessment methodology.

The Commission's services will, in future decisions taken in this field, apply, where appropriate, the following assessment methodology which builds on that described in the Green Paper (see Annex 1) but adds two further criteria in recognition of cultural and social differences in the Member States and the need to ensure coherence across public interest objectives. The methodology consists of two steps.

#### **First step: (Analytical overview).**

The objective of the first step is not to undertake the proportionality test as such but to set out a complete 'picture' of the impacts of the measure. The aim is not to identify restrictions but to provide a fac-

tual overview of all possible effects of a measure in particular on activities that the measure is meant to regulate and also on the public interest objectives such as consumer protection and public health. The first step characterises either (i) the relevant national measure restricting the free movement of commercial communications services or (ii) the harmonisation measure proposed by the Commission.

Seven criteria are proposed for this characterisation: (i) what is the potential economic chain reaction and the resulting impact on consumers caused by the measure; (ii) what are the public interest objectives motivating the measure; (iii) is the measure linked to the invoked public interest objective; (iv) does the measure affect other public interest objectives; (v) how efficient is the measure in achieving the invoked public interest objective; (vi) does the measure reflect cultural or social specificity and (vii) is the measure coherent across all relevant public interest objectives and notably those of consumer protection and public health?

#### **Second step: (Legal assessment).**

On the basis of this overview and the factual information that it provides, the second step consists of an overall legal assessment of whether, for a national measure, it could be considered to be proportional or, in the case of a Community measure, it would be proportional and also coherent with other Community measures. By knowing the key characteristics of the measure, the above mentioned seven criteria will help the relevant authority to be in a better position to assess its proportionality and coherence.

The methodology will thus take particular account of the impact of commercial communications on the public interest objectives of the protection of consumers and public health. This methodology is not an automatic test for assessing proportionality, which is left to the decision of the relevant authority. Nor is it a cost-ben-



enefit or a mathematical analysis seeking to quantify the value of public interest objectives. It is only a means of ensuring that such evaluations are based on a complete overview of the effects of the measure concerned. In this respect this methodology does not substitute the criteria developed by the Court but rather assists in their application. Even if the application of this methodology is not rendered mandatory, as was explicitly requested by the Parliament, the Commission's services will, where appropriate, apply it when:

- (i) considering infringement cases in the field of commercial communication services raising the issue of proportionality.
- (ii) providing analysis and discussing issues within the Commercial Communications Expert Group (see below). The Commission plans that discussions on the regulatory problems for cross-border commercial communications brought to the attention of the Expert Group will be oriented on the basis of this methodology.

The Commission's services will, where appropriate, apply the assessment methodology when designing the Commission's own initiatives which are directly linked to the provision of commercial communications services. This will further help to ensure the transparency and coherence of such proposals across the Community's policy competencies.

The assessment methodology will provide the following benefits;

- (i) Facilitate the required application of the Treaty.*

As the guardian of the Treaty, the Commission, taking account of all the objectives of the Treaty, should assess the compatibility with the principle of free movement of services of restrictions arising from the application of differing national regulations to cross-border commercial communication services. As demonstrated in the Green Paper, many of these cases give rise to problems of proportionality of the relevant

measures and, in any case, the Commission has to assess proportionality in conformity with the jurisprudence of the Court. The Commission is obliged to undertake this task to ensure that it is not possible to remove barriers that have been identified by application of the Treaty. This has to be assessed before proceeding with Internal Market harmonisation. It is worth noting that in the opposite case where measures are considered as being disproportionate this does not mean that Member States cannot take measures to protect the public interest objectives concerned. They would rather be required to adopt other measures which meet these objectives in a more proportionate way.

- (ii) Achieve greater transparency and legal security.*

Some legal uncertainty in the field of commercial communications could follow from the lack of transparency and differing interpretations of the principle of proportionality in Article 3B of the Treaty and in the jurisprudence of the Court on the principles of free movement. In presenting how it intends to proceed when assessing the proportionality of national restrictions or Community initiatives in the field of commercial communications, the Commission seeks to achieve greater transparency and legal security *vis à vis* the European Institutions, Member States and interested parties. This legal security is crucial for entrepreneurs considering investing in Europe in electronic commerce.

- (iii) Improve the protection of public interest objectives.*

It is important that in line with existing Community directives or proposals for such directives, the Community and Member States should efficiently protect public interest objectives such as the protection of consumers and public health. However, it is also important to avoid these objectives being unjustifiably invoked so as to protect their own national market and thus frag-

ment the Internal Market. The only way to achieve these requirements within the area without frontiers is to promote an approach which focuses on the quality and the substance of the protection aimed for by the measure. The recognised intention to protect should be apparent from an assessment of the concrete content of the measure. Furthermore, a more systematic analysis of the effects of measures would help detect where existing measures are not sufficient for protecting the public interest objectives and, therefore, where supplementary measures are necessary. In this respect it is worth noting that through assessing the reactions in the market, the methodology identifies the overall impact on consumer protection or other public interest objectives such as public health.

In this context the application of a transparent assessment methodology would have positive impacts on consumer protection and the protection of public health since:

- It would, in particular, help identify national legislation in terms of consumer protection or other public interest objectives which offers best practice in the Community. Given that any citizen could expect to benefit from a high level of protection, such a common methodology will facilitate the assessment of the differing levels of consumer protection.
- It will contribute to the design of efficient initiatives in this field. For example, through the economic chain reaction assessment one can evaluate how market players react to the specific regulation in order to see whether the final outcome is positive or, indeed, counterproductive for the consumer.
- It will facilitate the explanation to interested parties of Community initiatives seeking to promote public interest objectives which affect commercial communications.
- It will incite an improvement in information gathering relating to, for example,

research and factual evidence on the risks to and the behaviour of consumers.

*(iv) Facilitate assessment*

The assessment methodology is not difficult to apply since it relies on the analysis of concrete and real situations. In particular, the economic chain reaction analysis of the market that drives these services is based on factual information which can easily be made available.

*(v) Allow the use of a tool that is both efficient and flexible.*

The Commission will apply the transparent proportionality assessment methodology where appropriate. It recommends that national authorities should also apply such a methodology. However, the Commission considers, at this stage, that it is not necessary to propose a binding instrument. The Commission will monitor the efficiency of this approach and according to its result could make additional proposals in the future.

This tool can also be applied by and to self-regulatory bodies which are present in certain Member States in this field. The Commission recognises the efforts that the national self-regulatory bodies have made in establishing a cross-border complaint system that works on the basis of the country of origin control principle in the European Advertising Standards Alliance (EASA). The Commission believes that self-regulation is only effective when its codes are adhered to in a comprehensive fashion by all parties, its sanctions are effective and, at the European level, it works on the basis of mutual recognition. The Commission identifies the lack of mutual recognition in certain self-regulatory regimes as a clear indicator that the proportionality assessment methodology should be applied to codes and that certain national systems are still requiring development. In any event, the codes should be compatible with the Treaty in order to avoid the introduction of Internal Market barriers through self-regulation.



## 2) Setting up a Commercial Communication Expert Group

The Commission will establish a Commercial Communications Expert Group. It will have four functions:

- Facilitate the exchange of views between the Commission and the Member States.
- Help the Commission to identify solutions to problems in the field of cross-border commercial communications services which will either: (i) allow for the application of mutual recognition or (ii) identify precise harmonisation needs.
- Provide data and facilitate information exchange on national measures in the field of cross-border commercial communications services in order to assist the Commission to: (i) establish and run a database; (ii) collect information on its specific request; (iii) collect information on the Member States' regulatory problems with services emanating from third countries.
- Provide information for the work of committees established by secondary Community law in the field of cross-border commercial communications services. The Expert Group will be chaired by an official of the Commission. Its members will consist of two representatives appointed by each Member State. The Commission will invite groups, where they exist, made up of national representatives of interested parties (from all areas including consumer associations) to present their positions on the issues being considered. The Expert Group will meet on a regular basis. The Commission will decide on its agenda in view of the information it receives from the information network (see below) and the problems raised by the Member States themselves.

Furthermore:

- The agenda of Expert Group meetings will be made public via the information network where appropriate.
- The Expert Group should seek to reach an opinion on a specific point

within six months.

- Its opinion, where appropriate, will be made public by the Commission's central contact point (see below) to interested parties.
- The work of the Expert Group will be without prejudice to the Commission's power of initiative and its discretion to propose legislation or to begin infringement proceedings accorded by Article 169 of the Treaty. Furthermore, complaints made to the Commission under Article 169 will not be forwarded to the Expert Group.
- The work of the Expert Group will obviously not cover national measures which transpose existing directives nor will it overlap with work of committees established under such directives (e.g. the contact committee of the TVWF directive (Directive 89/552 EEC as amended by Directive 97/36 EC)).
- The Commission will keep the Parliament informed of the work and conclusions of the Expert Group.

The Expert Group represents a new tool for implementing Commission policy in this field and will offer the following advantages:

### (i) Increased problem resolution efficiency.

The Expert Group would improve the possibility of solving problems concerning cross-border commercial communication services by:

- Providing an easily accessible forum for the Commission and Member States to hold constructive discussions.
- Facilitating the awareness of national authorities to potential problems of a Community dimension.
- Facilitating informal information flows between national authorities and the Commission.
- Allowing the Commission's services to have greater information for assessing the possibilities for applying mutual recognition or, where this proves not to be possible, for

preparing targeted harmonisation initiatives.

The work of the Expert Group will not overlap with the Commission's power in the field of Article 169 infringements. The Commission's powers will be fully maintained to initiate an infringement procedure or to decide whether or not to proceed with a complaint.

*(ii) Increased transparency of the policy-making process.*

The Expert Group will clearly reinforce transparency through:

- The publication of its agendas and opinions.
- Allowing interested parties to participate in the policy process.
- Ensuring that the Parliament is kept fully informed and aware of policy developments.

In conformity with the Parliament's resolution it will be kept closely informed of the work of the Expert Group. By keeping the Parliament informed directly it will be possible to involve the Parliament in this approach. The latter will therefore be able to plan and inform its debates on future proposals in a more efficient manner.

*(iii) Keeping interested parties involved in the policy debate.*

Interested parties, in particular consumer associations, will benefit from the Expert Group because:

- They will have far easier access to information in this field.
- They can submit written representations.
- They will be incited to co-ordinate, where possible, their opinions at Community level.
- Avoiding polarisation of the policy debate.

Polarisation of policy debates will be avoided by allowing a wide variety of interested parties to have access to the Expert Group's findings.

### **3) Making available a Commercial Communications' contact point and information network**

The Commission will establish a central contact point in the Directorate General for the Internal Market and Financial services which will work closely with the other relevant Directorates General. Its role will be:

- To respond to request for information regarding the Commission's policy in this field.
- To collect information especially about problems regarding the efficient operation of the Internal Market in this domain. Obviously, formal complaints (Article 169 proceedings) will be sent to the Secretariat General of the Commission for registration. Complaints with respect to existing directives will be passed to those services of the Commission responsible for their transposition and management.
- To maintain communications between the Commission, the Parliament and the Member States. Other Commission services will be closely associated with and be kept fully involved by the central contact point to ensure a better flow of information.

As a complement to the existing *Commercial Communications* newsletter, the Commission will establish a Web site. It will:

- Make available information on the Expert Group's work (work programme, opinions, follow-up etc.).
- Give access to the database on European commercial communication regulations (see below).

These actions will bring a number of advantages:

- Interested parties will benefit from the Web site since they will have the possibility of letting their views be known directly to the Commission and the Member States.
- Unlike the organisation of formal public hearings which restrict participation in debates to a select number of participants, the network will allow for a far larger number of interested parties to be reached



and likewise allow them to provide comprehensive information to the policy process.

- The Web site and network will allow the Commission to disseminate policy information to a very large number of interested parties;
- The contact point will facilitate information collection as well as assist co-ordination of policy in this field.

#### **4) Establishing a Commercial Communications Database**

The Commission will establish a database on national and Community regulations and self-regulatory codes in this field.

This initiative responds to the call for easier access to national and European regulations. The Commission believes that this database should be constructed on the basis of information exchanged between the Commission, national authorities and self-regulatory bodies. The database will be accessible via the Commercial Communications Web site. This would ensure that interested parties receive the most up to date regulatory information available from those competent for applying the relevant rules.

#### **5) Accelerating complaint resolution**

In line with its general policy, which seeks to improve its handling of infringements, the Commission will also seek to accelerate complaint resolution in this field.

The Commission considers that the contact point, the information network and the proportionality assessment methodology should result in faster processing of complaints and thus greatly help the sector and its users as well as the consumers who are the receivers of such services. Indeed, all these measures will increase the transparency of the proceedings and therefore the plaintiffs, the responding national regulatory authorities and the Commission services involved will all be able to work in a more efficient and rapid manner. This is, of course, without prejudice to the confidentiality of procedures

between the Commission and the relevant Member State concerning possible solutions to an infringement proceeding. The analysis of measures requires as much precise and factual information as possible and this should be more forthcoming under this approach.

#### **6) Setting up an Expert network**

The Commission will encourage the establishment of a network of independent experts interested in the various aspects of the commercial communications field in order to assist its work and that of the Expert Group. The network of academic experts will give views at the Commission services' request.

In view of the need to assess proportionality *vis à vis* the relevant public interest objectives, it could be necessary on a case by case basis to benefit from the assistance of recognised experts which represent all the differing interests concerned. In order not to limit the number of experts, the Commission will use the new possibilities offered by the internet as a basis for organising the work and communication within this network.

#### **7) Promoting international co-operation**

The Commission will ensure that EU policy in this field will be promoted in international fora and, in order to facilitate cross-border commercial communications services at the global level, will promote the principles of this approach in international discussions.

The principles of this approach, in particular the objective of further improving the analysis of proportionality and coherence of regulation in this field, have already been welcomed by our major trading partners as well as many operators. Given that the advent of the Information Society leads to the globalisation of commercial communications services, cross-border problems with such services from third countries are likely to increase. Therefore,

there is a need to find international solutions to achieve more efficient protection of public interest objectives in an increasingly cross-border trading environment. The Internal Market regulatory framework represents a good starting point for reaching such solutions and therefore the Community should be involved in international discussions on these issues.

#### **8) Clarifying electronic commerce issues**

The Commission is examining the specific legal issues relating to the use of cross-border commercial communications services in the Information Society and will propose possible clarification in the context of a proposal relating to electronic commerce and associated Information Society services.

Revenues generated from commercial communication services represent one of the major sources of funding for Information Society services. This form of funding needs to be promoted in order to ensure that the distribution of high quality information will increase and remain accessible free of charge. There are already indications that cross-border commercial communication services on the internet are subject to legal insecurity and barriers. Examples include whether or not Web sites are to be considered as advertising or points of sale, transparency provisions for sponsorship which vary between Member States and differing national restrictions on advertising for the liberal professions that could undermine the development of their on-line information services. Other complex issues such as those relating to intellectual property rights and branded domain names also need to be addressed. Moreover, as regards new national proposals for regulations pertaining to on-line commercial communication services, the compatibility of these with the Treaty will be evaluated via the application of the currently proposed third amendment of

Directive 83/189/EEC concerning regulatory transparency in the Internal Market for Information Society services. A common position was reached on this proposal in the Council on 26 January 1998.

#### **9) Keeping the Parliament informed**

The Commission will inform the Parliament on the application of this approach including an evaluation of the work carried out and update the work programme.

In its resolution, the Parliament explicitly asked to be kept informed by calling on the Commission to ensure that the Expert Group would work in a transparent manner and would have its results reported to the European Parliament. The Parliament sought, through this proposal, to express its willingness for this approach to lead to rapid results and, where necessary, to propose to adapt the approach in the light of this monitoring. Given the significant number of important public interest objectives (e.g. consumer protection and the protection of public health) pursued in this field, it is crucial to keep the Parliament actively involved in the development of this approach.

#### **Priority areas for the Expert Group's consideration**

According to information and responses received during the consultation on the Green Paper, and, in order to ensure rapid and efficient results of its policy, the Commission will prioritise its work. During the two years following the adoption of this Communication, the Commission will call on the Expert Group to examine problems arising from cross-border commercial communications and the objectives, levels and means of protection of public interest objectives of differing national regulations pertaining to them in the following areas:

##### **1) The protection of minors.**

In the field of television advertising the Commission has already undertaken minimal harmonisation regarding advertising to



minors (Directive 89/552 EEC as amended by Directive 97/36/EC). However, further problems have been raised in the context of minors' advertising. The *European Parliament* in its resolution has requested for a more detailed assessment of the effects of commercial communications on children. This issue has also been raised in a number of positions on the Green Paper.

*Consumer associations* and public health bodies have called for harmonisation of regulations and, in some areas, for strengthening of protection concerning commercial communications aimed at minors.

*Operators* complained about certain national restrictions causing barriers to cross-border services that were invoking the protection of minors.

The key problem areas that were highlighted and that will need to be addressed are:

- Differing national regulations on sponsorship for educational programmes;
- Differing national regulations on direct marketing targeted at minors;
- Differing national regulations on television advertising aimed at minors (toys, snack foods, confectionery) in so far as these are not already covered by Directive 89/552 EEC as amended by Directive 97/36/EC or by work of its contact committee;
- Differing national regulations on the sponsorship of sports events by brands that are associated with products aimed at children or that can have harmful effects on public health.

## **2) Unfair competition laws and associated matters.**

This issue was raised by the *European Parliament* who called for a framework of rules on dishonest marketing methods.

Certain *consumer associations* also felt that harmonisation of laws preventing unfair marketing practices was necessary. This is a particularly important point in view of the development of electronic

commerce. Consumer associations also wished to ensure that fraudulent schemes and pyramid selling techniques are outlawed across the Community.

*Operators* pointed to the significant variations in national regulations concerning discounts, gifts and competitions, which effectively impeded the development of cross-border promotional campaigns. They also noted that multi-level marketing techniques (i.e. promotion and selling of products through networks of independent (non-salaried) distributors) could develop as a consequence of the possibility of networking independent agents globally.

More specifically, the following problem areas will be addressed:

- Differing national regulations on discounts;
- Differing national regulations on couponing;
- Differing national regulations on free offers and gifts;
- Differing national regulations on prize competitions, commercial lotteries and sweepstakes;
- Differing national regulations on multi-level marketing and pyramid selling.

## **3) Sponsorship.**

Whilst recognising that certain aspects of TV sponsorship had already been subject to harmonisation by Directive 89/552 EEC as amended by Directive 97/36/EC the *European Parliament* called for the different national regulations relating to sponsorship which are not harmonised by this directive and patronage to be examined.

A *number of interested parties* noted the differences in definitions of sponsorship or even their absence (whereby sponsorship is treated as identical to advertising) for regulatory purposes across the Member States. They complained of the legal uncertainty that arose as a consequence. Likewise, certain parties also noted that TV sponsorship regulations

vary significantly between countries.

The following problems will be addressed:

- Differing national regulations on sponsorship services related to particular products.
- Differing definitions in national regulations of sponsorship and patronage which restrict the development of cross-border services in this area.
- Differing national regulations on TV sponsorship insofar as they concern aspects which are not covered by Directive 89/552 EEC as amended by Directive 97/36/EC or the work of its contact committee.

#### 4) Claims and misleading advertising

The Green Paper noted that Directive 84/450 EEC has already harmonised misleading advertising and more recently comparative advertising. However, additional calls for action were made in this field as regarded claims.

*Consumer associations and public health bodies* wished to see stricter harmonised rules at the European level controlling the use of certain health and nutritional claims. Consumer organisations noted that differences remain in the interpretation of what is misleading advertising between the Member States. They pointed out that this leads to great difficulties in the processing of cross-border complaints.

*Operators* criticised differing national restrictions on requirements of packaging which went beyond the prescribed requirements of labelling legislation. These not only covered 'product information' (i.e. claims) but also use of brand names (certain Member States have restrictions on brand diversification for brands associated with particular product categories) and the use of licensed graphics.

The following problems will be addressed:

- Specific areas where differing national regulations are giving rise to divergent interpretations of 'misleading'. This is giv-

ing rise to evident legal uncertainty for cross-border commercial communication services and their recipients;

- Differing national regulations on product or service 'claims' that have not been covered by legislation on labelling requirements;
- Differing national regulations on brand diversification relating to particular products or services.

#### 5) Redress systems

The Commission has already proposed to improve access to justice with its modified proposal for a directive on injunctions for consumers interests (Council Common position CE n° 48/97).

Whilst welcoming this action, *consumer associations* called for improvements in both judicial and extra-judicial cross-border redress systems against misleading and fraudulent commercial communication services.

The following issue will be addressed:

- The Expert Group will examine how existing redress and dispute settlement systems (including those operated by self-regulatory bodies) can be improved in a cross-border environment.

#### 6) Application of the proportionality assessment methodology at national level

Some *national authorities* have indicated to the Commission their support for the application of the assessment methodology. The Commission would recommend its assessment methodology to be applied at national level by relevant national authorities.

In this context the members of the Expert Group will be invited to indicate:

- how they apply the principle of proportionality (organisational aspects),
- to what extent they are applying the Commission's methodology and, if not,
- whether they would be prepared to adopt this methodology.



## Annex 1

# A summary of the proposals made in the Green Paper on Commercial Communications in the Internal Market.

### Definitions and scope

The Green Paper defined commercial communications as: 'All forms of communication seeking to promote either products, services or the image of a company or organisation to final consumers and/or distributors.' This covers all forms of advertising, direct marketing, sponsorship, sales promotions and public relations. It encompasses the use of such services by all goods and service industries as well as public and semi-public bodies.

### The proposed assessment methodology

The Green Paper explained the implications, in terms of Community action, that could follow the expected increase in cross-border commercial communications services. It was likely that restrictions to cross-border services would appear as well as problems for the efficient protection of public interest objectives as a consequence of Member States applying their differing laws' provisions to incoming services. This problem is particularly relevant to commercial communications given the disparity of public interest objectives pursued by Member States' regulations.

This view resulted from the analysis of existing laws in the Green Paper. This not only highlighted that national rules differed significantly across Community borders but also that the compatibility of any resulting cross-border restrictions with EC law would depend, for the most part, on whether or not they met the principle of proportionality, i.e. if the measure is proportional to the

pursued public interest objective. Applicable national legislation on commercial communications pursues important public interest objectives such as the protection of consumers, the protection of minors, the protection of public health, the protection of pluralism, etc. For Community measures in this field, the Green Paper examined how a measure pursuing one public interest objective might impact on a number of other public interest objectives and therefore how there was a need to ensure coherence of the Community framework. A careful assessment of proportionality was therefore considered to be essential in this field.

The methodology is not an automatic test for assessing proportionality, which is left to the decision of the relevant authority. Nor is it a cost-benefit or a mathematical analysis seeking to quantify the value of public interest objectives. It is only a means of ensuring that such evaluations are based on a complete overview of the effects of the measure concerned. In this respect this methodology does not substitute the criteria developed by the Court but rather assists in their application.

As specified in the Green Paper, according to the case law of the Court, the assessment of proportionality requires: first the verification of the appropriateness of the national restrictive measure *vis à vis* the pursued objective, i.e. *it must be such as to guarantee the achievement of the intended aim*; and, secondly, testing that the national restrictive measure *does not go beyond that which is necessary in order to*

achieve that objective or in other words that *the same result cannot be obtained by less restrictive rules.*

Since the jurisprudence of the Court has not, as yet, provided precisely defined elements that would allow for the assessment of the proportionality of national or Community measures, the Commission proposed a methodology in the Green Paper which would help, where necessary, to further improve a systematic and well informed analysis. The Commission suggested that this methodology would help appreciate the proportionality and coherence of national or Community measures in this field.

The methodology drew on the jurisprudence of the Court and an analysis of the Community market for commercial communications services in particular, in terms of how these services impact on public interest objectives, such as the protection of consumers and public health.

It consisted of a two step procedure:

**First step: (Analytical overview).**

The objective of the first step was not to undertake the proportionality test as such but to set out a complete 'picture' of the impacts of the measure. The aim was not to identify restrictions but to provide a factual overview of all possible effects of a measure in particular on activities that the measure is meant to regulate and on the public interest objectives also. The first step was to characterise either (i) the relevant national measure restricting the free movement of services or (ii) the harmonisation measure proposed by the Commission. Five criteria were proposed for this characterisation: *Assessment criterion A.* What is the potential economic chain reaction caused by the measure? This consisted of assessing how the business strategies of the economic players involved would alter in response to the measure being examined or proposed in order to assess the overall impact of that measure or proposal on the consumers that

it seeks to protect; *Assessment criterion B.* What are the public interest objectives motivating the measure?; *Assessment criterion C.* Is the measure linked to the invoked public interest objective?; *Assessment criterion D.* Does the measure affect other public interest objectives?; *Assessment criterion E.* How efficient is the measure in achieving the invoked public interest objective?

**Second step: (Legal assessment).**

On the basis of this overview and the factual information that it provides, the second step would consist of an overall legal assessment of whether, for a national measure, it could be considered to be proportional or, in the case of a Community measure, it would be as proportional as possible taking into account the overall objectives of the Treaty and also coherent with other Community measures. By knowing the key characteristics of the measure, the above mentioned five criteria will help the relevant authority to be in a better position to assess its proportionality and coherence.

**Improved co-ordination and information at the European level**

The Commission proposed in the Green Paper to establish an *Expert Group* to consider commercial communications issues. This Expert Group's discussions would be based on the assessment methodology. It would seek to establish a constructive dialogue between the Commission, Member States and interested parties. It would allow for agreement on application of mutual recognition by permitting the Commission and Member States to reach consensual solutions and thus avoid excessive reliance on the conflictive 'infringements' procedure. Where mutual recognition would prove not to be possible, it would represent a new, rapid and precise manner to detect specific problems requiring harmonisation. It would therefore avoid broad, all-embracing harmonisation initiatives.

The Expert Group was also to act as a



forum for administrative co-operation, in particular, to allow for an exchange of information on new Information Society developments in this field. It was proposed that it would therefore consider how the Community approach to commercial communications could be promoted at the international level which is essential given the global nature of the Information Society.

As regards the format of the Expert Group, the Commission proposed that it should be an Expert Group which would be called when problems arose. The problems to be discussed would be tabled by the Commission. The Expert Group would be composed of representatives of the Member States. These could be accompanied by national self-regulators when the issue discussed entered their fields of competence.

For the Commission's work to be well targeted and informed, and in order to ensure that the Expert Group focussed its attention on key issues affecting 'receivers', 'suppliers', 'users' and 'carriers' of com-

mmercial communications, the Commission made two proposals to improve information provision and communication with interested parties. The first was a central information *contact point* which could both give and collate information on regulatory issues affecting these services. The second was an on-line *information network* that would enable interested parties to have direct access to the Commission's and Expert Group's work and would complement the existing *Commercial Communications* newsletter.

### **Areas of commercial communications regulations requiring priority attention**

Parts I, II and III of the Green paper called on respondents to comment on the Community's objectives in this field and also to comment on the problem areas that the Commission had identified thanks to the survey exercise that it had conducted prior to the drafting of the text.

## **Annex 2**

### **Summary of responses to the Green Paper on Commercial Communications in the Internal Market**

#### **Definitions and scope**

##### **European Parliament**

In its resolution the Parliament called for the scope of commercial communications to be delimited in terms of the service providers covered. It also suggests that this scope should be extended to cover packaging by calling on the Commission to study the obstacles of using commercial communications on packaging<sup>1</sup>.

##### **Economic and Social Committee**

The Committee did not contest the scope of the Green Paper but insisted that com-

mmercial communications services used or supplied by charities and non-profit organisations should be included in the scope of the definition given the important role that these services have for the operations of these organisations.

##### **Member States**

No Member State contested the definition of commercial communications set out in the Green Paper.

<sup>1</sup> For example, promotions such as vouchers or competitions placed on the packaging of the product.

### Interested parties<sup>2</sup>

Certain users of commercial communications (e.g. advertisers) and consumer associations criticised the definition for not including on-pack commercial communications which were closely associated with the other communication services listed in the definition. It was noted that on-pack commercial communications were directly associated to branding strategies. Consumer associations pointed out that claims and promotions made on pack attract consumers' awareness and therefore should be regulated accordingly.

In addition a few consumer associations contested the entire policy by constructing two lines of reasoning. First, they claimed that since consumers did not demand commercial communications services they could not be considered as services under the provisions of the Treaty. Secondly, they claimed that the recent jurisprudence of the Court suggested that restrictions on 'sales methods' could not be analysed under the EC Treaty's provisions on free movement unless their application was discriminatory.

### The assessment methodology

#### European Parliament

The Parliament's resolution was clearly supportive of the proposed methodology. To quote the resolution, the Parliament:

*'Supports the approach proposed in the Green Paper of assessing whether restrictive measures are proportionate to their intended purpose, as this will make it possible to ensure that the area without frontiers operates effectively and provides 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.'*

The Parliament made a number of suggestions as to its implementation. More specifically, it:

- *'Asks the Commission to publish [in this Communication] the definition of the 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'*
- *calls for the approach 'to be 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 in the Member States.'*

#### Economic and Social Committee

The Committee commended the examination of potential economic chain reactions (Criterion A) as an important part of the overview process proposed. It gave a favourable opinion on the usefulness of the proposed methodology and the analysis on which it was based, as provided in the Working Document that was distributed with the Green Paper.<sup>3</sup>

More generally in its conclusions the Committee noted that:

*'...the introduction of this type of methodology would offer the prospect of a comprehensible and agreed assessment procedure which would reduce the ambiguity and/or uncertainty which prevails in its absence.'*

Whilst noting that any reduction in consumer protection must be avoided as should the provision of an unfair advantage to multi-national enterprises, the Committee considered that:

*'...the methodology may offer the prospect of combining enhanced consumer protection with the opportunity for harmonisation of the practices used in commercial communications. As a result, this should also help to create more open competition between enterprises creating and supplying commercial communications.'*

<sup>2</sup> The five interest groups are 'receivers' (i.e. all forms of consumer and public health associations), 'users' (e.g. advertisers), 'suppliers' (e.g. advertising or direct marketing agencies), 'carriers' (e.g. media or sports events organisers) and 'self-regulators' who were the five target groups of the initial surveys run by the Commission prior to the preparation of the Green Paper.

<sup>3</sup> *'...confirms, in analytical form, the experience of members of the Committee who have experience of the production and marketing of goods and services and also those who have examined the prospects from a consumer viewpoint.'*



**Member States**

Nine Member States made comments on this proposal. They can be broadly divided into two camps. Those who supported it and one that was completely against the methodology in substance.

Of the eight in support two gave their full backing to the methodology. To quote one:

*'The... Government has no objections to the methodology proposed by the Commission for a uniform assessment of measures, including Community measures. The methodology gives tangible expression, in the area of commercial communications, to the principles that also underlie [its] legislation.'*

The third was supportive but felt that more consultation would be required to make it as transparent and efficient as possible. The fourth suggested that it should be less focussed on the Internal Market policy objective. The fifth and sixth thought that the methodology would be useful but suggested that the economic chain reaction should include more detail on the impact on consumers. The next felt that the methodology could not be legally binding since only the Court's jurisprudence could be referred to, whereas the eighth believed that, although it did not object in principle, the infringements system was sufficiently effective and the Court's jurisprudence could be relied upon to deal with the highlighted problems.

Only one Member State was opposed to the proportionality assessment methodology in principle. It believed the proposed methodology to be vague and unpractical to apply<sup>4</sup>. Furthermore, it did not agree that country of origin control is required in this area.

**Interested parties**

Four types of views were received regarding the proposed proportionality assessment methodology. These can be summarised as follows:

(i) *The proportionality assessment meth-*

*odology needs to be strengthened and rendered mandatory since in its application its results are neither politically nor legally binding.*

Respondents across the spectrum of interested parties who were generally positive about the methodology wished to strengthen its application and legal standing. In particular, four suggestions were made:

- *The proportionality assessment methodology should be applied in a mandatory fashion to all decisions made by the Commission in this field (i.e. when examining national restrictions and when preparing harmonisation initiatives).*

- *Member States should be obliged to notify any new measures affecting these services and these should be subjected to the proportionality assessment methodology prior to being adopted.*

- *Self-regulatory codes should be promoted by the Commission and also be subjected to the proportionality assessment methodology.*

- *The proportionality assessment methodology should be applied efficiently so as not to add further delays to the existing lengthy infringements procedure. In particular, it was suggested that the Commission should, in view of the adoption of this agreed methodology, make a commitment to process 169 infringement complaints (under Article 169 of the Treaty) in a more timely fashion.*

*(ii) The assessment methodology is market driven and fails to account for the interests of the receivers of commercial communication services.*

This criticism was made by the vast majority of the responding consumer associations and public health lobbies. In essence, these suggested that Criterion A on economic chain reactions is supply-led and therefore fails to account for the needs of receivers of commercial communications in their various forms. It was further sug-

<sup>4</sup> It stated that:

*'It will not be possible to produce a summary of all the possible effects of a measure on the market. It is doubtful whether the chain reaction analysis will be realistic, capable of being implemented, or of any help. It will be very difficult to identify and define the specific objective of the measure. It will also be difficult to identify and evaluate the negative side-effects of the measure.'*

gested that in proposing this assessment the Commission intended to ignore the evidence showing how recipients can suffer from certain forms or types of commercial communication services.

*(iii) The assessment methodology is not relevant since the emphasis should be on subsidiarity rather than proportionality.*

Proportionality of a restriction was not considered to be important by certain interested parties. These suggested that, because commercial communications were culturally sensitive, they could not be treated the same as other services but rather had to account for national sensitivities as reflected in existing national rules. This view was received from certain consumer interest groups, certain advertisers (largely nationally based ones) and self-regulatory bodies. The suggestion made was that before considering proportionality, the principle of subsidiarity should be used to, in a sense, 'cut out' commercial communications from the remit of the Commission's existing and future action. Depending on replies, the scope of this exclusion varied. The most extreme being the total exclusion suggested by a few consumer organisations. Areas such as the portrayal of women, the use of nudity in advertising, etc. were often cited.

*(iv) The proportionality assessment methodology is impossible to apply and it would therefore be far wiser for the Commission to propose general guidelines and harmonise on this basis.*

A minority of respondents across all the interest groups suggested that the chain reaction was far too complex to evaluate and apply and that it would be far simpler to lay down some common guidelines<sup>5</sup>.

### Improved co-ordination and information at the European level

#### European Parliament

The Parliament voted to support the Expert Group with a large majority and insisted that it should be strengthened. It called for

the establishment of a tripartite Committee made up of equal numbers of representatives of the Member States, industry and consumer organisations, and asked to be consulted on its rules of procedure.

The Parliament also called on the Commission to make its procedures fully transparent and insisted that the Commission 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.'*

As regards the *contact point* and *information network*, the Parliament requested that the contact point should, as a priority, establish a central databank on regulations and self-regulatory codes in this area and report back to the Parliament on the latter.

#### Economic and Social Committee

The Economic and Social Committee welcomed the Expert Group proposal. It also welcomed the notion of bringing together, within a designated Directorate General, responsibility for giving an overall lead for the Commission on commercial communications. It felt that such a *central contact point* should ensure: *'a common and consistent approach to this complex topic.'*

It finally added that:

*'The Governments of the Member States might also consider parallel arrangements for subjects falling within national regulatory authorities.'*

#### Member States

Nine Member States commented on the proposal to set up an *Expert Group*. A majority of Member States supported the idea of an Expert Group. Two agreed that it would be useful and noted that it should not undermine the Commission's power of initiative nor prolong the time taken by the Commission to deal with cases. One questioned whether the self-regulatory bodies should be admitted to the Expert Group. A

<sup>5</sup> Typically, 'users', 'suppliers' and 'carriers' who called for such an alternative wished to see non-binding European guidelines whereas consumer groups in particular felt that these guidelines should be the basis of European harmonisation.



further two insisted that consumer associations be more involved. Another noted its support and suggested that the Expert Group should maintain a core membership at successive meetings to ensure consistency. Two Member States did not object in principle to the proposal but felt that care should be taken such that it would not duplicate certain other committees' work and that further evaluation of how it would work would be useful.

One Member State was opposed on the grounds that the on-line information network and contact point would be sufficient to exchange information between Member States.

As regards the central *contact point* and *information network*, seven Member States commented on this proposal and agreed with it in principle. Five gave their support. Two other Member States agreed with this proposal but insisted that particular attention should be given to ensure that consumer associations had adequate resources to play their part in such a network.

**Interested parties**

(i) *Expert Group must meet strict deadlines and not serve as a manner to add further administrative delay in processing complaints.*

Although the vast majority of parties from all five interest groups<sup>6</sup> welcomed the establishment of the Expert Group and its role, there were concerns expressed that it should not lead to a further administrative burden for the Commission when dealing with complaints or calls for harmonisation. Interested parties wished to see the Expert Group working in parallel to either the infringement procedure or the Commission's existing initiatives to harmonise certain regulations regarding commercial communications.

(ii) *Expert Group must be far more open and transparent in its operation.*

'Users', 'suppliers' and 'carriers' were

generally open towards the composition of the Expert Group although a number of their trade associations called for the right to be present on the Expert Group or at least to make representations to it. Suggestions varied between full participation, in which case the Expert Group would work in the open and would hold public hearings, or the composition of shadow committees for each of the five interested parties that would select representatives who would present at selected Expert Group meetings the written representation of their respective 'constituencies'.

Consumer associations did not agree that self-regulatory bodies should be the only group other than the Member States who could attend such meetings.

(iii) *Expert Group's agenda must be known and its results must be published.*

Those in favour of the Expert Group, but concerned that it should operate in as transparent a manner as possible, called for its agenda to be made public prior to its beginning discussions on a specific issue. Furthermore, many respondents from the five consulted groups called for the Expert Group to draw conclusions on a specific point within a fixed time frame and requested that these conclusions be published and made available to all interested parties.

**Areas of commercial communications regulations requiring priority attention**

**European Parliament**

The Parliament asked the Commission to list in this Communication a full inventory of existing barriers to the free circulation of commercial communications services but then went on to note that it believed the following areas were particularly in need of attention:

- multi-level marketing restrictions,<sup>7</sup>
- restrictions on brand diversification,
- restrictions on commercial communi-

<sup>6</sup> See footnote 2.

<sup>7</sup> Multi-level marketing refers to door-step and in the home marketing systems whereby agents working as freelance salespersons for a particular company market that company's products or services by advertising their presence at local level and seeking to arrange meetings with particular clients in their homes or other pre-arranged locations.

cations on packaging, and

- restrictions on both events and television sponsorship.

The Parliament called on the Commission to come forward with a more detailed assessment of the effects of commercial communications on children as well as their impact on privacy and the mechanisms through which consumer cross-border complaints should be addressed.

It also called on the Commission to propose a framework of rules on dishonest marketing methods.

Finally, without making reference to which legislative texts should be reviewed, the Parliament believed that the Commission should consider a SLIM<sup>8</sup> analysis of the sector.

#### **Economic and Social Committee**

The Committee did not comment on this point.

#### **Member States**

Seven of the Member States who responded to the consultation commented on this point. One felt that differing national misleading advertising restrictions on *the regulated professions* should not be reviewed. Whilst noting that it has repealed its ban on price advertising and discounts, it felt that harmonisation of *'bait'*<sup>9</sup> and *unfair price undercutting* is required. It further called for a harmonised ban on *cold-calling* without prior consent and similar *restrictions for e-mail and internet communications*. On *children*, it stressed that any future action must distinguish between information and commercial communications. As for *financial services* the lack of advertising harmonisation in this area was considered to undermine consumer confidence in non-domestic firms.

The second Member State pointed out that its laws on *sales periods* could require modification and that its regulations on *free gifts, promotional offers* and competitions are some of the most restrictive in

Europe and are being reviewed.

The third suggested that the Green Paper should have given more emphasis to protecting and developing consumer-related regulations. At the European level, in the area of *unfair marketing practices*, it suggested that the International Chamber of Commerce codes in the field would serve as a good basis for harmonisation.

The fourth noted that its regulations on pharmaceuticals advertising are compatible with EC law. It felt that problems remained in the field of *Internet-related commercial communications, environmental advertising* and, more generally, *commercial communications and public health*.

The fifth went through the list of areas highlighted in the Green Paper and suggested that it does not apply any incompatible restrictions to cross-border commercial communications. It believed that no further harmonisation is required in any of these areas and that any restrictions elsewhere should be remedied by the Member States themselves and not the Community.

The sixth believed that there may be further grounds for harmonisation of consumer protection laws through the application of Article 129a (3) and contested the need for any lowering of national restrictions whatsoever on the grounds of Internal Market principles.

The seventh Member State stressed that in the area of pharmaceuticals' advertising Directive 92/28/EEC should be transposed by all the Member States. It also raised the issue of *alcohol sponsorship* arguing for self-regulatory codes. In the field of public relations services it questioned restrictions caused by *insistence on detailed requirements for public relations companies* tendering for public procurement contracts.

#### **Interested parties**

Given the very diverse range of interested parties that responded to the Green Paper

<sup>8</sup> SLIM stands for Simpler Legislation for the Internal Market

<sup>9</sup> 'Lockvogelwerbung'.



and the fact that some were individuals and others representative bodies, it is not feasible for the Commission to list priorities simply according to the quantity of references made to one or other specific problem<sup>10</sup>. However, it should be noted that all the areas identified in the Green Paper as requiring analysis were confirmed by a number or many respondents.

**Other actions called for during the consultation: Summary of responses received**

**European Parliament**

The Parliament criticised the long delays that the Commission takes in processing infringement complaints and believed that Commission decisions on whether or not to proceed with such complaints should be open to appeal, in order to render the Commission more accountable. It therefore:

*'Asks for the introduction of a Council decision to enable possible infringement proceedings in the Court of First Instance.'*<sup>11</sup>

It believed that the Commission should, when restrictions are proportional and harmonisation is required, study International Chamber of Commerce codes as a model for such harmonisation particularly in the field of on-line commercial communications.

Finally, the Parliament called on national regulatory bodies to apply the country of origin control principle and believed that the Commission, consumer organisations and industry should consider strengthening self-regulatory cross-border systems such as that operated by the EASA<sup>12</sup>.

**Economic and Social Committee**

The Committee did not add to the proposals made in the Green Paper.

**Member States**

One Member State believed that there should be a more detailed investigation of the need for EU regulations for the pur-

poses of consumer protection or for the general good.

Another insisted that the removal of trade barriers should be accompanied by the establishment of a Community network for dispute settlement both through the courts and out of court, combined with a coherent system for providing legal assistance to Community citizens not resident in the Member State where the dispute arises.

A third criticised the existing infringement mechanism as being slow and ineffective and called for improvements to the complaints procedure. It felt that the experience of self-regulators should be drawn on in this field particularly in view of the Information Society.

**Interested parties**

Consumer organisations and public health bodies representing 'receivers' felt that the Commission should give far more emphasis to the problems caused by cross-border commercial communications for consumers. In addition to the Commission making publicly available easy access to all national laws and self-regulatory codes in this domain, they made two other proposals. On the one hand they called for harmonisation to ensure that national standards were not undermined and, on the other, they felt the Commission should focus its efforts on effective enforcement, particularly in cross-border cases. They stressed that it should be encouraged to establish systems for resolving cross-border disputes and exchange of information about national regulations and their enforcement.

'Users', 'suppliers' and 'carriers' argued that the existing infringements procedure should be improved so that they could become more transparent, timely (some calling for the application of strict time limits for the processing of cases) and be altered such that Commission positions to proceed or not with a complaint could be subject to appeal by all interested parties concerned.

<sup>10</sup> This would lead to a bias against consumer and public health bodies, who, de facto, are less numerous than the various industry representations.

<sup>11</sup> This is in line with Parliament's Resolution of 16/9/93 on the role of the Court of Justice in the development of the European Community's constitutional system (OJ C 268, 4.10.93, p156)

<sup>12</sup> European Advertising Standards Alliance.