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Challenge facing the Expert Group on discounts

Rachel Clare Evans, DG XV

On 18th December, the Expert Group on Commercial Communications will meet in Brussels to try and agree an Opinion on discount sales promotions in the European Union. The first two meetings on discounts provided the Member States with the opportunity to debate the substance of this issue and to acquire vital information from the other delegations concerning the different national regulatory positions. Now is the time for the Member States to use that information to create an internal market for discount sales promotions for the benefit of industry and consumers alike.

Armed with a wealth of information on how discounts are regulated in each of the Member States, the challenge facing the Expert Group is to identify as broad a scope as possible for mutual recognition. Mutual recognition, otherwise known as the 'one stop shop' principle, means that businesses need comply only with the regulatory controls in their country of origin to be able to export their services throughout the European Union.

The application of this principle to the regulation of discounts would have a dramatic impact upon all European companies using such sales promotions. They would be able to use discount promotions to penetrate new markets in other Member States, without the vast expense of employing teams of lawyers to avoid the risk of legal action. The use of the mutual recognition principle to achieve an Internal Market, in preference to the blunt tool of harmonisation, has again recently received the endorsement of the Internal Market Council.

Of course, it may not be possible for the Expert Group to apply mutual recognition to all aspects of the regulation of discounts. A variety of different types of regulation concerning discounts has been identified during the earlier meetings, embracing such areas as the information that must be provided to the consumer during a discount promotion and the way in which a discount must be calculated and expressed. If Member States are unable to agree to mutual recognition for certain clearly-defined types of rules concerning discounts, then such areas will need to be harmonised to ensure that the Internal Market is not jeopardised. The advantage of this approach is that any resulting harmonisation will be targeted and will be based upon the

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wealth of factual information that has been gathered over recent months.

The outcome of the Expert Group's deliberations is eagerly awaited by the European Parliament, the Council of Ministers and a number of other interested parties. For example, The Austrian Presidency insisted that the Internal Market Commissioner, Mr. Mario Monti, presented an update on the progress achieved at the Expert Group to the Internal Market Council on 11th November. The results of the December meeting will be presented to a future Internal Market Council.

The European Parliament is also keeping a watchful eye. The Commission made a specific commitment in its Communication dated 4th March to keep the Parliament informed of the progress of the Expert Group, but MEP's are at present seeking to obtain a tighter commitment. In this context, Jessica Larive MEP has presented a draft resolution to the Parliament requesting six-monthly updates.

In order to improve the chances of agreement at the December meeting, Commission representatives will shortly embark on a tour of the capitals to discuss discounts on a one-to-one basis with the members of the Expert Group. Interested parties are urged to ensure that their national contact points are made fully aware of their views both on the importance of discount promotions and the best means of achieving a solution. Details of the national contact points were published in the September 1998 edition of the newsletter (some modifications are detailed on the back page of this issue) and can be obtained from the Commission contact point by sending an e-mail to comcom@dg15.cec.be or by telephoning (+322) 296 2143.

Editorial

The third meeting of the Expert Group takes place on the 18th of December and readers are urged to keep the national representatives advised of issues of concern to them. There have been a number of additions to the Group and the details are published on the back page of this issue.

As many will be aware, in recent weeks there has also been a significant proposal for a Directive on electronic commerce put forward by the Commission. We shall be publishing this draft proposal in full in a special edition later this month. In the meantime, this issue contains a number of articles commenting on the approach taken in the proposed Directive, in particular the application of the country of origin principle to the regulatory framework for the sector.

It may well be that this proposal will quickly be seen as a benchmark which will influence the future action of the Expert Group in the commercial communications sector. Re-affirming as it does the primacy of the Internal Market principles of country of origin and mutual recognition, the importance of this initiative can not be overstated. We shall keep readers informed of the progress of the Parliamentary debate, which is scheduled for the early part of next year.

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Record clubs sing the Internal Market blues

Philippe Kern
Director of Public and Legal Affairs
PolyGram

PolyGram is an entertainment company which produces and distributes sound recordings, films, TV programmes and videos. Its most famous record labels include *Deutsche Grammophon*, *Decca*, *Mercury*, *Polydor*, *A&M*, *Motown*. It employs 12,000 people.

One of PolyGram's ambitions is to develop its direct marketing operation on a pan-European scale. The company already operates in the record club businesses in the UK market (Britannia: 2 million members) and in France (DIAL: 1.5 million members).

The music club concept is based on encouraging the generally non-active music consumer and those who do not have convenient access to retailers to purchase music. A majority of club members live in smaller towns and rural areas where music is not readily available. Clubs also cater to people who are more comfortable shopping from home rather than from record stores. On average, the clubs' share of Europe's local music markets is around 12 % of total sales.

However, the most serious hindrance to a pan-European expansion remains the difference in regulations between Member States. PolyGram's problem in the German market is a very good example of the regulatory maze in the direct marketing business.

Catalogues distributed to members are central to the process of selling pre-recorded music and videos from a large number of entertainment companies. The success of the club concept is dependent on the quality of the repertoire listed in the catalogue, the prices of the products on offer and the related services which are supported by dedicated teams and considerable investments to recruit members.

PolyGram's music clubs are direct marketing companies whose communication medium with their customers is predominantly mail. They offer the following services:

- Providing information on CDs and artists' concerts (once a month, customers receive a brochure giving details of artists featured in the catalogue);
- A mail ordering service to purchase goods (CDs and videos);
- A mail delivery service to the customer's home.

The marketing proposition to club members is:

- To offer an immediate benefit via the introductory offer to club membership (for instance, 3 CDs for the price of 1);
- To encourage the consumer to buy, because of the choice of repertoire available, the price and consumer services offered;
- To remain members of the club by rewarding loyalty (i.e. gifts or price reduction for loyal and long-term members).

In normal circumstances, entry in the record club market in each individual Member State by individual companies is risky. Difficulties stem from a variety of factors including the need for massive advertising at key dates in specialised publications; the requirement to build up special mailing lists and to process great volumes of mail which generate a relatively small sales volume; the need to invest in complex computerised mail order fulfilment and credit screening facilities.

However, the most serious hindrance to a pan-European expansion remains the difference in regulations between Member States. PolyGram's problem in the German market is a very good example of the regulatory maze in the direct marketing business.

Since the launch of its commercial operations in Germany, the record club ("Sounds Plus") has had injunctions served several times on the grounds that its activi-

ties infringe some aspects of the German unfair competition law (the regulation on discount, 'Rabattegesetz', and the regulation on free gifts, 'Zugabeverordnung'). Indeed, the German unfair competition law potentially prohibits businesses making attractive introductory offers and from proposing discounts and free gifts, the essence of clubs' activities.

Under German rules, a record club is able to establish its market position on the basis of the quality of the service alone. It is not allowed to compete on price as this could influence and 'mislead' the emotive German consumer.

The characteristic of a club is to use the most effective direct marketing techniques and advertising tools to recruit club members. The granting of free gifts and special offers on membership application is one form of advertising whereby the consumer's attention is attracted. Without the possibility of making attractive price offers to potential customers, the business becomes unrealistic. This is even more so for a new entrant into the market which wants to differentiate itself from competitors. Price competition is one of the most important factors determining success. It is the only way to distinguish oneself from competition offering similar types of services and products at an equivalent quality level.

As a result of these injunctions, Sounds Plus has been prevented from introducing elements of price competition to establish a foothold on the German market.

All this has the effect of obliging a new market entrant to match its direct marketing policy to the local dominant player, ironically creating something that can lead to abusive restrictive practices. Whilst the German legislation applies to all record clubs operating in Germany, in practice, it gives unfair advantage to a company which is already established for many years and whose market share is reaching 90%. The underlying protectionist rationale is hidden behind the argument that 'the customer must not be misled'. Furthermore, the enforcement of such policy is left to 'Verein' (an association) where a competitor can conveniently hide.

The German legislation does not pursue any public interest objective that would justify such a measure. Neither consumer protection nor fair trading may justify the prohibition of special loyalty bonuses or attractive introductory offers to consumers. On the contrary, consumers' interest is enhanced if price competition is introduced on the German club market.

Needless to say, these injunctions have an enormously damaging impact on a newly created company. The company was forced to change repeatedly current and future marketing materials. Its mailing of a million addresses was constantly under threat as well as its advertising in magazines and the printing of its membership handbooks. It was unable to properly start its commercial activities.

The German legislation does not pursue any public interest objective that would justify such a measure. Neither consumer protection nor fair trading may justify the prohibition of special loyalty bonuses or attractive introductory offers to consumers. On the contrary, consumers' interest is enhanced if price competition is introduced on the German club market.

The legislation in question is also disproportionate given that such sales promotions are normal marketing tools in other Member States and that consumers benefit from price competition. Similar marketing techniques on introductory offers and loyalty bonuses have been used without any problems in the other European countries where PolyGram has established music club operations. German legislation is clearly out of step and this

prevents a company from developing a pan-European direct marketing strategy.

Furthermore, the law is preventing the record club market from growing in Germany. The club share of the total German music sales is half of the average European club market share. The abolition of the German law could mean the doubling in size of the record club business. This would be in the interests of both competition and employment.

So far, the direct marketing business does not seem to have attracted the attention it deserves from policy-makers.

The German law is contrary to EC law as it hinders:

- Free circulation of goods: the CDs are imported from other Member States;
- Freedom to provide services : Sounds Plus relies on services provided from Holland (postage, delivery, packing) and the UK (data processing, invoicing, printing of magazines);
- Freedom of establishment as the business is rendered unviable.

Acknowledging that price competition was restricted, the German Federal Government introduced a draft legislation in February 1994 seeking to abolish the 'Rabattegesetz' of 25th November 1933 and the 'Zugabeverordnung' of 9th March 1932. The Bundesrat opposed the adoption of the law. Following Austria's abolition of its own 'Rabattegesetz', Germany seems now to be the only country in Europe to approve such restrictions on this form of price competition.

So far, the direct marketing business does not seem to have attracted the attention it deserves from policy-makers. The perfect example is the Distance Selling Directive which envisages the proper functioning of the Single Market for cross-border distance selling only in relation to consumer protection policy. As a result, it fails to grant legal certainty for business decisions and does little to create a sufficient level of harmonisation for pan-European direct marketing activities.

Legal certainty in this business sector is further undermined by the European Court of Justice's decision of 24 November 1993 because of Cases *Keck and Mithouard* (C 267/91 and C 268/91) which provides Member States with the justification to enforce national provisions that run contrary to the fundamental principles of the Internal Market as laid down, in particular, in Article 30 of the EC Treaty. Direct marketing activities are badly affected by the 'selling arrangement' ('Verkaufsmodalitäten') test which tends to consider regulations - as found in Germany - compatible with Articles 30 and 36.

The record club business in Germany has been shielded from the forces of competition for too long. This is bad for prices, quality of services and employment. In its present state, the German rules on unfair competition restrict competition and consumer choice. It should have no place in an Internal Market as it prevents the free circulation of goods, services and hinders the freedom of establishment.

In July 1998, the European Commission decided to send Germany a reasoned opinion pointing out that the German legislation which prohibits promotional selling (discounts and gifts) impedes the supply of services from other Member States. This decision followed a complaint lodged by PolyGram in 1994. The Commission concludes that German legislation imposes a disproportional restriction on the supply of such services and sale of CDs to club members by a new entrant on the German market. The reasoned opinion represents the second stage of the infringement procedure provided for in Article 169 of the EC Treaty. If Germany does not provide a satisfactory reply within two months after receiving the reasoned opinion - sent in October 1998 - the Commission may decide to bring the matter before the European Court of Justice.

Web advertising in the EU

Margaretha Mazura
Deputy Secretary General
European Multimedia Forum

This is a summary of the New Technology Forum on 'Web advertising', organised by the European Multimedia Forum on 1st July 1998 in Brussels. It is based on the contributions of *Michel Bauwens, Kyberco, Belgium; Alexander Felsenberg, Deutscher Multimedia Verband (DMMV), Germany; Federico Rampolla, Internet Advertising Bureau, Italian Chapter; Gerardo Pavone, Interacta, Italy.*

Introduction

To evaluate the potential for web advertising, it is essential to have a look at the overall Internet situation in Europe. This, though, differs from country to country. Whilst 10% of German households are online (*DMMV*), 23% of Europe's families own a PC (compared to 45% in the USA – *Interacta*). Apart from the attitude towards this medium – most Europeans still consider the PC a 'working tool' as opposed to a TV set which stands for leisure – there are economic reasons which count for the low penetration. Computing material costs on average 25% more in Europe than in the USA (*Interacta*), VAT is up to three times as high and telephone charges for Internet use are substantially higher than in the USA (where local calls sometimes are even free of charge). The critical mass for Europe is estimated to be 10% of market penetration. This is achieved in Europe only in the UK (10.25%), Germany (12.1%) and Sweden (21.3%) [*NUA survey 97*], whereas the US market penetration is on average 30%.

Thus, the overall playing field for European Internet activities is not favourable to investors: from a marketing point of view it is not (yet) interesting.

Web site marketing

Web advertising depends wholly on how efficiently a web site is positioned. The old advertiser's rule of 'to see and be seen' also governs the new medium: the more visibility, the more impact of a web ad. Analyses and benchmarking are indicators but, still, the technological factor plays the main role: if a website takes 8 seconds to download, 20% of visitors drop out; if it takes 20 seconds, 40% drop out, if it takes 40 seconds, 75% drop out (*Kyberco*).

Therefore, to create a marketable website, one has to take into account 'leading-edge' technology. The high costs of hardware in Europe do not allow for a quick adaptation of users' equipment to technological developments. Most users are still using versions 3 of MS Internet explorer or Netscape. Any website requiring more sophisticated (or simply more recent) technology is bound to be limited to a few users on the European market, especially amongst SMEs and private persons.

Notwithstanding these technical limitations, active promotion of a website still allows for a high visibility and thus an interesting opportunity for web advertisers. The means on the European market place mainly consist in:

- Promotion in the traditional media;
- Placing the site in the major search engines and local indices;
- Placing the site under the top 20 of search engines;
- Buying of keywords.

How to measure effectiveness?

It has been emphasised that 'the introduction and diffusion of criteria for homogeneous measuring of interactive means is a priority for the development of electronic commerce and web advertising. Especially when referring to the development of web advertising, the existence of a third party who certifies access to sites carrying advertising on-line is something that all concerned consider essential'(*Interacta*). To guarantee a uniform evaluation, it will be necessary to agree – globally – on a system of measurements and standards.

To guarantee a uniform evaluation, it will be necessary to agree – globally – on a system of measurements and standards.

The traditional hit-count has been su-

perseded. 'Hits are like fingerprints on a newspaper, they give no more indication'(*DMMV*).

Traditional advertising or PR agencies are of little help as they are not prepared for the 'Internet revolution'. They usually subcontract a company specialising in on-line multimedia to handle web advertising on their behalf. However, it is clear that advertising agencies should and will have a role in this field.

To increase the market for web advertising it is essential a) to bring together companies who advertise, ad agencies and content publishers and b) to create market transparency.

In order to create market transparency, an on-line media database would be useful, offering information on:

- Ad-space availability
- Price pattern
- Booking
- Categories (measurement by rating)
- Usage

The European challenge lies in a cross-cultural approach, specialising in 'niche' marketing techniques.

Multinational ads vs. Local ads

Yahoo! generated in 1997 approx. 68 million $ in advertising sales – more than the total the European advertising market is expected to sell in 1998 (*Internet Advertising Bureau*). In Europe, only Swedish companies can somehow compete with such figures due to Sweden hosting the mirror site of Alta Vista, the biggest site in Europe for web advertising (*Telia*).

This example shows that the main market in the USA is for worldwide brands. This basis is lacking in Europe.

Therefore, the keywords are: look out for partnerships! Co-branded actions appear to be the best way to enter the market, as is shown, for example, in Italy where Lycus Italy owns the database of Virgilio. It is apparent that search engines as well as news sites attract most Internet users.

The European challenge lies in a cross-cultural approach, specialising in 'niche' marketing techniques. 'The capacity for customising communication media for even smaller groups of consumers is the essence of "niche" marketing.' (*Interacta*), taking into consideration not only potential customers but also cultural differences between countries or regions and using the panoply of new technologies to hand-tailor services and offers (Keyword: WYAWYG – what you ask is what you get).

However, the more the Internet becomes a consumer medium, the more local content will become increasingly important without being cannibalised by the USA. The first on-line supermarkets started their business in 1996 (Tesco, UK). Their strategy is geared towards expansion to other sectors like on-line banking, at the same time making the on-line medium attractive in selling Internet access at low rates at their physical supermarkets (Tesco). The acceptance of on-line grocery depends on the local penetration of the Internet, but studies have demonstrated, contrary to anticipations, that not only business men and women would take advantage of this service but to a surprising extent mothers who prefer virtual shopping to bothering with crying children and prams.

Conclusion

Without taking into consideration the economic, technical and attitudinal issues mentioned in the introduction, the European web ad market, far from being satisfactorily established or exploited, needs (without any priority ranking):

Capital – to push the market
Alliances – to gain visibility and importance
Statistics and standards – to convince future investors and to compare figures
Connectivity – to reach potential customers
Training – for professionals and users

The proposed E-commerce Directive and the consumer

Jim Murray
Secretary-General
BEUC

BEUC is absolutely opposed to the proposal in its present form, and ask that consumer transactions be removed from the scope of the proposed Directive - in favour of a more broad-based and collaborative approach towards building up a wider framework within which consumers can enjoy the many potential benefits of electronic commerce, together with a high level of protection in practical terms.

The proposal would provide as a universal principle that country of origin law would apply to electronic commerce transactions within the EU. According to the text, this principle would certainly apply to the marketing and disclosure laws (what information must be provided about what products and services) and, while the meaning and effect of the text is not clear, we understand it is also intended that the same principle would apply to questions of applicable civil law (such as contract law, and non-contractual liability) and even to choice of competent court - the consumer would have to pursue his/her remedies in the courts of the supplier's country and under the law of that country.

Even if the effect of the proposal were confined to marketing and disclosure laws only, we believe it is entirely inappropriate and against the consumers' interest to seek in this simplistic way to impose a universal country of origin principle to all consumer transactions in electronic commerce.

1. It would mean that consumers would have to have a knowledge and understanding of the relevant laws of 15 Member States (plus that of future EU members). It is difficult enough for consumers to have a good understanding of their own domestic law.

2. In practice, it is not realistic to propose, as a general proposition, that consumers must pursue their legal rights through the courts and under the law of another Member State, (irrespective of the fact that that Member State may have achieved a relatively high level of protection in its own domestic market).

3. The proposal is utterly unrealistic in its understanding of the nature of present and future transactions over the Internet. It implies that a consumer who logs on to the Internet, and subsequently buys a product or service, should be treated like a consumer who takes the initiative to go to the supplier's country to buy the product or service. As a basis for policy this is nonsense in most cases. Increasingly, marketing on the Internet will be targeted to those who log on to specific sites (for entertainment or information about sports for example) without any prior knowledge or expectation of what advertising or commercial communications from third parties they may find there. Internet content providers will sell advertising space on the basis of the profiles of those who log on to that site - they may market their sites to advertisers on the basis that they are reaching a specific client group in a particular Member State, for example. Commercial communications will be automatically customised on the basis of the consumer's previous surfing behaviour. Faced with this reality, it is utterly wrong to impose a simplistic and universal country of origin rule.

It would mean that consumers would have to have a knowledge and understanding of the relevant laws of 15 Member States (plus that of future EU members). It is difficult enough for consumers to have a good understanding of their own domestic law.

4. In our opinion, the current proposal would not meet the Commission's obligation to take as a base in regulating the Single Market a high level of consumer protection. On the contrary, the current proposal would jeopardise established consumer rights under international conventions, ECJ rulings and even perhaps under certain existing Directives.

There are genuine complexities to be resolved in this area but they cannot be resolved by the 'sledgehammer' approach of the proposal.

We urge therefore that consumer transactions be excluded from the scope of the current proposal, for the time being at least, in favour of setting in motion a consultative and collaborative process to try to reach a wide measure of agreement on the type of overall framework needed to maximise the benefits and minimise the problems for consumers in electronic commerce.

The present situation, with all its uncertainties and difficulties, is better for consumers than the solution currently proposed within the Commission.

The Commission earlier confronted similar difficulties and questions in relation to commercial communications. Eventually, the Commission opted for a collaborative approach to resolving these problems and wisely decided not to try to impose a universal country of origin principle. There is no sign of that wisdom in the present proposal.

There are positive elements in the proposal, in relation to transparency for example. Better transparency is an essential part of the solution to the issues raised by e-commerce but the other parts of any overall solution must also be appropriate and this is certainly not the case in the current proposal.

It is for business to decide if the current proposal is appropriate for business-to-business transactions but it is not appropriate for consumer transactions. We urge therefore that consumer transactions be excluded from the scope of the current proposal, for the time being at least, in favour of setting in motion a consultative and collaborative process to try to reach a wide measure of agreement on the type of overall framework needed to maximise the benefits and minimise the problems for consumers in electronic commerce.

Country of origin and e-commerce

Defending European consumer and business interests

The following organisations support the views expressed here: EAT (European Advertising Tripartite); EPC (European Publishers Council) and FAEP (European Magazine Publishers Federation)

Alastair Tempest
Director General
and
Asuncion Caparros
Director
European Affairs
FEDMA

The intrinsic borderless nature of electronic commerce has opened for some time now a false debate on the merits of the 'country of origin' or 'country of destination' principles and has given birth to some exotic arguments. One should not forget that the country of origin principle is neither an invention of 'liberal industrialists' or 'long-established bureaucrats', nor a frontal attack on consumer interests. The country of origin principle is a clear commitment from the founders of the European Economic Community. By 1957, Europe, its businesses and its consumers, needed an Internal Market not only to compete as a single entity with its major trading partners but also to provide its consumers with a whole range of choice, price and quality.

This article aims at clarifying some of the misunderstandings and myths that have arisen, especially during the debate on the unpublished (at the time of writing), yet widely known, draft E-commerce Directive.

Some legal background

The Treaties and the Cassis de Dijon judgement

In 1957, when the Treaty of Rome was signed, the immediate objectives of the European Economic Community was the creation of a common market where goods, services, capital and persons would be able to move freely between the different Member States. This meant that all customs duties, quantitative restrictions and measures having equivalent effect needed to be dismantled (this was established in Articles 30 and 59 in relation to goods and services respectively).

The only exceptions to these freedoms were for the free movement of goods enumerated in Article 36, and included the protection of health and life of persons and animals, public order, morals and public security, protection of plants, artistic and historical heritage, and the protection of commercial and industrial property. For the free movement of services (Article 56) exceptions were allowed to measures that apply a different regulatory framework for non-nationals, and which could be justified on grounds of public order, public health and security.

In July 1968, all customs duties were abolished but Member States were still reluctant to allow the entry of Community products and continued to impose national technical barriers.

In July 1968, all customs duties were abolished but Member States were still reluctant to allow the entry of Community products and continued to impose national technical barriers (sanitary rules, technical specifications, etc.) on imported products. Member States were therefore not imposing a different regime to imported products (discriminatory measures) but national specifications (non-discriminatory measures). For some years, the EC tried to eliminate these technical obstacles and facilitate the free movement of goods by harmonising all different national rules. However this approach proved to be too burdensome and slow, and could not achieve the objective of creating a common market. In 1985, this was recognised by the Member States which requested the Commission to propose an action plan to achieve an 'Internal Market'.

Before that, the European Court of Justice played a leading role in disman-

The Rome and Brussels Conventions

As a result of the creation of a common market an increased number of intra-EC transactions were taking place, and, independently of the fact that products or services could be moving freely across EC-frontiers, the law applicable to the specific contract and the jurisdiction regulating those transactions was subject to the different set of national rules that governed international private law which was outside the EC competence. In this framework, the **Member States of the Communities** and of **EFTA** (only in the case of the Brussels Convention) decided to harmonise these two aspects in order to facilitate the creation of a common market by way of two intergovernmental conventions.

The Brussels Convention on jurisdiction stipulates that the consumer can choose to sue a company either where the company is domiciled or where the consumer is domiciled in relation to contracts for the supply of goods or services **only if** 'the conclusion of the contract was preceded by a specific invitation addressed to the consumer or by advertising in the country of domicile of the consumer, and in that country the consumer took the steps necessary for the conclusion of the contract'.

The Rome Convention stipulates that a contract shall be governed by the law chosen by the parties and that in the absence of choice, the law of the country with which the contract is most closely connected. However, in the case of consumer contracts, it stipulates that 'a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence' **only if** the conditions (e.g. invitation addressed, etc) already covered in the Brussels Convention converge. The Rome Convention has also added a second condition which covers journeys to another country if those have been arranged by the seller for the purpose of inducing the consumer to buy.

Therefore, even if the Rome Convention states that the choice of the parties is the principle, the law of the country of residence of the consumer will basically apply for mandatory rights if the two conditions concur and the same will happen if there is no choice.

tling the technical obstacles to the free movement of goods, which was essentially reflected in its landmark judgement *Cassis de Dijon* of 1979. In this judgement, the European Court of Justice confirmed the principle of free movement of goods (Article 30) by stating that any product which was legally manufactured and marketed within one Member State could be sold in any other Member State. Therefore, Member States were obliged to accept products coming from another Member State even if those products did not comply with the national specifications of the importing country. This is the so-called 'principle of mutual recognition' or 'country of origin control' which stems directly from Article 30 of the Treaties. Only 'overriding' public interest objectives could be used to ban the entry of a product. However, the Court emphasised that such a ban must comply with certain conditions:

- the national measure had to be appropriate to the pursued objective;
- it had to be proportional to the alleged objective, and;
- the objective could not be attained by less restrictive measures.

Even if this principle was designed in the context of the free movement of goods, the European Court of Justice has confirmed in various subsequent judgements its full applicability to services.

The European Commission's White Paper on the Internal Market of 1985 established a seven year plan to achieve a truly 'Internal Market' by 1993 based on the principle of mutual recognition developed by the European Court of Justice and the so-called 'New Approach' to technical harmonisation. This plan was essentially based on two principles:

- national rules on production and marketing that relate to the protection of health will continue to be subject to Community legislation but this will only set some gen-

eral levels of protection. The standards organisations CEN (European Committee for Standardization), CENELEC (European Committee for Electrotechnical Standardisation) and ETSI (European Telecommunications Standards Institute) were charged to establish the detailed rules;

- instead of Community legislation to harmonise national rules (with the exception of the protection of health) the principle of mutual recognition/country of origin would apply.

This did not mean that once a sector was harmonised, the principle of country of origin control did not apply anymore: a harmonisation Directive was adopted in order to facilitate cross-border trade by establishing common rules for all the Member States and thus limiting the ability of any Member State to stop the entry of imported products/services. Therefore, even in a harmonised sector, the legal regime applicable to a specific product/service will be the one where the product/service originates and the Member State of destination would not be able to restrict its entry.

After the *Cassis de Dijon* judgement, many cases were brought to the European Court of Justice on the basis of the principle of mutual recognition and the Court adopted a liberal approach in interpreting Article 30 and thus helped to dismantle many technical obstacles.

However, in November 1993, the European Court, apparently overwhelmed by this type of case, decided to change its liberal approach in a judgement which has been widely criticised even by some judges. The so-called *Keck and Mithouard* judgement stated that national selling arrangements did not hinder trade between Member States and therefore the application of Article 30 and subsequently the *Cassis de Dijon* conditions did not need to be considered. Article 30 should be applied only if that national selling arrangement had a discriminatory effect.

This judgement had clear negative consequences for the completion of the Internal Market but its effects are not all-embracing. The Court has continuously refused to apply this case-law to the free movement of services[1], which obviously includes electronic commerce.

[1] Notably in the Alpine Investments, Bosman and De Agostini judgements.

Clarifying the myths of the E-commerce Directive

In an exhaustive legal exercise, the Commission is about, at the time of writing, to adopt a Directive which should set the principles for a regulatory framework for Electronic Commerce in the European Union. The Commission will show in this Directive that it is following the Member States' request that European consumers and businesses need an Internal Market. The draft E-commerce Directive therefore follows logically from the Commission's action plan to dismantle obstacles to the free movement of goods and services. It also clearly confirms and clarifies that existing consumer protection legislation applies to the on-line environment and adds specific on-line rules to the benefit of both the businesses and consumers. This statement is fully backed by the following:

This judgement had clear negative consequences for the completion of the Internal Market but its effects are not all-embracing. The Court has continuously refused to apply this case-law to the free movement of services, which obviously includes electronic commerce.

Completion of the Single Market

The draft E-commerce Directive confirms that the principle of free circulation of goods and services (country of origin control) in the EU territory applies to electronic commerce, on the basis of:

[2] Namely, Case C-34/95 (De Agostini); Case C-384/93 (Alpine Investments) and Case C-126/91 (Yves Rocher)

[3] Telecommunications Council of 26 February, Internal Market Council of 18 May 1998 and EP's resolutions on electronic commerce of May 1998 and on commercial communications of July 1997.

[4] Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/43/EC laying down a procedure for the provision of information in the field of technical standards and regulations.

1. *Legal arguments*, as it is based on Community law (Articles 30 and 59 of the Treaty of Rome); recurrent European case law[2]; and recent Community legislation such as the Television Without Frontiers and Data Protection Directives;
2. *Political arguments*, as the Council of Ministers and the European Parliament have confirmed the need to ensure a Single Market Information Society in numerous resolutions[3] and most recently in the so-called Transparency Directive[4];
3. *Economic arguments*, as companies, especially Small and Medium Sized Enterprises (SMEs) who can not afford separate establishments in each Member State, will be assured that they could sell on-line to consumers residing in countries where the company is not established without having to comply with 15 different sets of national requirements and regulations. Such a recognition will obviously have a major positive impact on the job creation capacity that electronic commerce should bring to SMEs.

(A) Member State is obliged to protect not only consumers resident in its territory but in the territory of the other 14 Member States

Enhancement of consumer protection

The draft E-commerce Directive not only confirms that existing consumer protection legislation[5], especially the Distance Selling Directive, applies to electronic commerce activities, but also constructs new provisions to fulfil the specific needs of on-line consumers in four essential areas:

1. *Control*: all EU consumers will be able to benefit from the policing activities and the protection of the Member State where the company is established since that Member State is obliged to protect not only consumers resident in its territory but in the territory of the other 14 Member States;
2. *Redress*: consumers will be able to use on-line alternative dispute resolution mechanisms; access to justice through electronic means and rely on speedy proceedings;
3. *Transparency*: consumers will be able to exercise an informed choice by clearly identifying the country of origin of the service provider, the moment of conclusion of the on-line contract and the address where complaints may be directed;
4. *Self-regulation*: the draft E-commerce Directive builds upon different adopted Directives to recognise the important role of industry in ensuring consumer trust of e-commerce by encouraging the development of codes of conduct.

It is obvious that this Directive is the solution to the present uncertainties of buying and selling on the Internet expressed by both the consumers and businesses: the Directive not only confirms that Electronic Commerce by its intrinsic nature is the best illustration of how the Single Market can function in practical terms but it also reassures Internet users/consumers that they can rely on the present EU consumer protection regulatory framework and some further initiatives to fill in the gap of the 'virtual' environment.

However, it is in the area of consumer protection where some myths have arisen: how can a consumer have knowledge of the 15 different laws of the 15 different Member States (country of origin principle)? Does the E-commerce Directive want to kill the principles of country of residence for mandatory rights established in the 1980 Rome Convention? Isn't it better to keep the present uncertain situation of buying on the Internet rather than giving the consumer the choice to buy in a safe environment from 15 different Member States?

Some research provides an answer to these myths:

1. Consumers are obviously not expected to have the knowledge of the 15 different laws of the 15 different Member

[5] Among others, Directive 84/450/EEC concerning misleading advertising; Directive 85/374/EEC concerning liability for defective products; Directive 92/59/EEC on general product safety; Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers; Directive 98/27/EC on injunctions for the protection of consumers interests and proposal for a Directive on the sale of consumer goods and associated guarantees (COM (95) 520 final).

States. However, it should also be remembered that most individuals now travel for holidays and have purchasing experience outside their own countries; an increasing number also live and/or work in other countries; and one of the great benefits of the web is that there are many public sources of information on consumers' rights[6]. What most consumers want to know and have the right to know is what their rights are in the EU in a case of conflict. A recent Eurobarometer[7] has revealed that 66% of EU consumers think that the EU could play a role in educating consumers, mainly by publishing information on consumer rights within the EU (and not in their country of residence). Consumers also urge, according to this Eurobarometer, the adoption of measures to ensure that every European citizen has an easy access to the legal system in other Member States (and not to the legal system of their country of residence) in case of consumer problems. It is therefore apparent that most consumers are aware that the only way they can continue to shop around for better prices, choice and quality is by supporting the completion of the Single Market, which intrinsically means to support the country of origin principle.

2. The draft E-commerce Directive is not intended to undermine either the Rome or the Brussels Conventions. Indeed, it is understood that the draft does not even make any reference to these Conventions. However, we believed that the draft E-commerce Directive, by confirming the potential of the country of origin principle, was sending a clear message that those Conventions may be somehow outdated, regardless of its applicability to web sites, for the on-line environment. Two more elements concur when evaluating these Conventions:

- First of all, when those Conventions were drafted, Europe had a non-existant EU consumer protection harmonised regulatory framework which may have prompted the drafters to make some exceptions to the Single Market in order to enhance consumer confidence when buying at a distance. Eighteen years later, this is no longer the case: the EU is clearly committed to take as a base in regulating the Single Market a high level of consumer protection. The cornerstone of the list of EU consumer protection legislation (please refer to the footnote for some examples) was the adoption last year of the Directive on contracts negotiated at a distance (the Distance Selling Directive). This Directive, as the recitals clearly show, has a two-fold objective, creating confidence for consumers when buying at a distance, while at the same time guaranteeing a truly Single Market[8]. Moreover, this Directive harmonises most of the mandatory rights that the Rome Convention was trying to protect when making an exception to the country of origin, such as a right of withdrawal of 7 days and performance of the contract within 30 days. It could also be argued that the Distance Selling Directive has precedence over the Rome Convention: Article 20 of the Convention establishes the precedence of Community law that lays down, in relation to particular matters, choice of legal rules relating to contractual obligations.

What most consumers want to know and have the right to know is what their rights are in the EU in a case of conflict.

- Secondly, the compatibility of these Conventions with Community law has been put into question, most recently by the Commission Declaration on the Consumer Council Resolution 'the Consumer Dimension of the Information Society'. Member States, in a controversial debate, have called for the application of the Rome Convention to the Information Society regardless of the advice of the Com-

[6] For example, the 'COLINE network: http://europa.eu.int/coline/html/engtheme.htm

[7] http://europa.eu.int/comm/dg24/library/surveys/eb47_pr_en.html

[8] Recital (3): "whereas, for consumers, cross-border distance selling could be one of the main tangible results of the completion of the Internal Market"
Recital (4): "whereas the introduction of new technologies is increasing the number of ways for consumers to obtain information about offers anywhere in the Community and to place orders; whereas some Member States have already taken different or diverging measures to protect consumers in respect of distance selling, which has had a detrimental effect on competition between businesses in the Internal Market."

mission and the Council's Legal Service. To minimise the effects of this Resolution and maybe hoping that the Internal Market Council would react, the Commission has declared that it reserves its opinion on the application of the principle of the law of the country of residence of the consumer to its next legislative proposals, for example in the case of the Information Society and the Audiovisual sector.

3. To try to convince policy makers that European consumers would prefer to continue living with the present uncertainties of electronic commerce rather than be faced with an universal country of origin principle shows a lack of understanding of the Treaties and a clear underestimation of consumers' interests. No one can deny that consumers are strong advocates of the completion of the Single Market since they have realised the opportunities offered, especially by the Internet, of purchasing world-wide at the best price and quality instead of remaining victims to national anti-competitive markets. The application of the country of destination principle will end the present choice that consumers are enjoying since companies, especially SMEs (the hard core of Europe) will be forced to sell on-line only to consumers residing in countries where the company is established.

The application of the country of destination principle will end the present choice that consumers are enjoying since companies, especially SMEs (the hard core of Europe) will be forced to sell on-line only to consumers residing in countries where the company is established.

Conclusions

Even if the fundamental principles of the Single Market have been long established and agreed, both businesses and consumers have always criticised the lure of protectionism still present when it comes to surreptitiously raising obstacles to the free movement of goods and services. The European Commission, as the guardian of the Treaties, has accomplished an extraordinary feat in stamping out some national anti-competitive attitudes. The draft E-commerce Directive, which at the time of writing still needs adoption by the College of Commissioners, is just another legislative instrument in the long list of Directives which aim to create a favourable environment for the completion of the Single Market, taking as a basis a high degree of consumer protection.

Hopefully, the principle of country of origin that the draft E-commerce Directive is defending for the benefit of both European businesses and consumers will be kept in its original form. The Commission should not fall into a false debate and try to reinvent the wheel by challenging the sacrosanct principles of the Internal Market just because Member States agreed a Convention 18 years ago whose compatibility with Community law is under question. Any explicit or implicit reference to this Convention should therefore be avoided in the E-commerce Directive, as it was avoided in the Distance Selling Directive and most recently in the Proposal for a Directive on the Distance Marketing of Financial Services. It would indeed be ironic, and confusing to the outsider, if the Commission criticises these Conventions in its Declaration on the Consumer Council Resolution, and yet, just a few weeks later, decides that these Conventions should be the basis for consumer contracts in the E-commerce Directive.

Finally, a question for reflection: why has this Directive and not others (e.g. distance selling of financial services) created so many emotional feelings? Who is afraid of the real Internal Market which electronic commerce promises?

Consumer protection in electronic commerce

Chris Scott-Wilson
The Scott-Wilson Partnership

Writing this article, I would like to start by emphasising that, as a consumer, I share the real concerns being expressed on my behalf and I would like to ensure that my interests are adequately protected when it comes to electronic commerce.

This is also very much in the interests of those who are investing heavily in the development of the medium. Unless they can quickly establish consumer confidence they are unlikely to see their businesses grow to their full potential.

The issue, to my mind, is not whether consumers' interests should be protected: it is how they can best be protected in the age of virtual shops. I have to say that I consider the proposal that one can just apply the law in the country of residence of the consumer to be simplistic and unenforceable.

As a consumer, I have three core interests:

a) To receive accurate and complete commercial communications about products and services I might want to buy, i.e. to be protected from and/or have redress against misleading communications.

b) To receive products which match up to my expectations and which are 'fit for their intended purpose', i.e. to have effective redress in the event that I am sold something which is no good.

c) To have some legal protection against products with hidden, and potentially dangerous, defects

The challenge is to find a way to protect these interests in the age of electronic commerce. A vendor may be established anywhere in the world: and need have no physical connection with the country of the purchaser.

Legal process

As soon as one is considering more than one legal jurisdiction the choice of the applicable law and the term 'legal protection' become highly complex issues. If one considers the extreme case of a consumer who wishes to sue a supplier there are three key issues:

- The jurisdiction in which the case is to be heard, i.e. where can the consumer bring proceedings. My understanding is that, today, a consumer can sue either in his own Member State or in that of the supplier: however, in either case the process must be served on the supplier. If the consumer sues in his own Member State then he must obtain an Order permitting service outside the jurisdiction and then arrange for such service.
- The law to be applied in deciding the case. The laws regarding contracts for the sale of goods or services are probably fairly similar in most Member States: however, there are sure to be residual differences which could alter the outcome.

Having got a Court Order, a consumer would need to enforce it on the supplier. To do this, his Order would have to be recognised and enforced by the Courts in the Country where the supplier is to be found.

- Enforcement of judgement, i.e. having got a Court Order, a consumer would need to enforce it on the supplier. To do this, his Order would have to be recognised and enforced by the Courts in the country where the supplier is to be found.

Legal protection at this level has always been very much the exception rather than the rule. Even within a single jurisdiction the cost and time involved is prohibitive in all but the most serious cases. This will be even more true with regard to multi-jurisdictional disputes.

Legal protection

The day-to-day policing of the vast bulk of consumer transactions, is actually un-

dertaken by local enforcement (in the UK 'Trading Standards') officers who enforce regulations directly on suppliers.

The key characteristic of this protection is that the regulations apply directly to the supplier. In the UK, for instance, the regulations might make it a criminal offence to produce or sell products that do not conform to prescribed standards.

I find it hard to see how Trading Standards Officers could effectively apply different laws to the same supplier depending on the residency of the consumer.

This procedure cannot be easily adapted to deal with multiple legal systems. I am not aware of any European Convention for the recognition or enforcement by one country of another country's criminal laws. Moreover, I find it hard to see how Trading Standards Officers could effectively apply different laws to the same supplier depending on the residency of the consumer.

If this system is to be able to deal with a huge number of multi-jurisdictional issues it would require there to be a very much higher degree of harmonisation of standards than we have at present.

Practical redress

The fact is that while these legal systems are absolutely necessary: the greatest benefit to consumers comes from the fact that the majority of suppliers are 'law abiding' and willingly give effect to, or surpass, the law. Modern businesses would generally see this not only as a duty to obey the law: but also as a necessary element of their customer relations.

Production in accordance with safety standards; honest and effective commercial communication; and effective voluntary redress (e.g. replacement or money back schemes) cover most of the day-to-day issues which arise.

Policing by Trading Standards or action through the Courts are fall-back options: there to catch the cheats.

Concluding remarks

I do not pretend to have an easy solution to the problem of consumer protection in electronic commerce: perhaps the only short-term conclusion is that no one else seems to have one either. The reality is much more complex that the politics.

In the final analysis, the people who have most to gain from establishing consumer confidence in electronic commerce are those in the industry. Consumers can always walk away: the industry needs to attract them. For this reason alone, it seems sensible to involve the industry in finding effective solutions.

To seek to impose a simple rule such as 'the law applicable in the Member State of the consumer' may have short-term political appeal. However, such a rule would be unworkable by law abiding suppliers and unenforceable by the authorities. Moreover, in seeking to enforce it we can anticipate a regulatory morass which would effectively bury electronic commerce for good.

The draft E-Commerce Directive

good news for SMEs and consumer choice

Mike Pullen
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On the 18th of November 1998 the European Commission adopted a draft Directive on electronic commerce. The object of the Directive is to guarantee the basic principles of the Internal Market in information society services whilst at the same time offering a high level of consumer protection.

The Directive incorporates the fundamental pillars of the Internal Market: country of origin control and mutual recognition. These principles have been reaffirmed by the European Court of Justice ('ECJ') in a number of cases on free movement of goods and services beginning with the landmark *Cassis de Dijon* case.

The Directive will mean that information society businesses will only have to deal with one law rather than potentially up to 15 different laws throughout the Member States of the EU. This will encourage the development of European hi-tech SMEs which would not normally be able to expand throughout the EU because of the cost of conducting legal surveys and attempting to comply with up to 15 different sets of regulations. This is because the concept of mutual recognition obliges each EU Member State to accept that the laws of other Member States provide an equivalent level of protection to its national law even if the laws are different or less restrictive.

Mutual recognition is an established and uncontroversial principle which is constantly applied in a multitude of sectors (e.g. the New Approach Directives on technical standards which apply to products including toy safety and low voltage). Despite this, consumer groups have attacked this aspect of the Directive. It seems surprising, if not perverse, that a concept which is uncontroversial when applied on a daily basis to product safety should become so when applied to the marketing of electronic services.

The Commission has chosen to use the principles of the country of origin and mutual recognition rather than full harmonisation as the basis for the Directive because it recognises Member States operate a number of different sets of rules regarding marketing promotions and commercial communications which are impossible to harmonise without killing off the electronic commerce sector in its infancy. As a case in point, under the unfair competition laws of several Member States (e.g. Germany) it is forbidden to offer three for the price of two discounts or loyalty bonuses. These types of restrictions are normally justified on the grounds of consumer protection. However, they are frequently characterised as restrictions on the freedom to trade which do nothing more than protect inefficient economic actors from fair competition. These laws have also been criticised as being damaging to consumers' interests as the restriction on the use of competitive tools such as promotions keeps prices at an artificially high level by discouraging new market entrants. This has been recognised by the Commission and it is taking a 169 complaint against Germany for restricting the free movement of goods and services by imposing a ban on loyalty bonuses.

The decision to base the Directive on the principles of mutual recognition and country of origin will also help to overcome the setback suffered by the Internal Market when the ECJ delivered its ruling in the Keck case. Here it was stated that restrictions on commercial communications which applied equally to both imported and domestic products, and did not discriminate in law or in fact against traders, fell outside the scope of Article 30 of the Treaty. This judgement has been used as a legal justification for the failure by the Commission to pursue infringement proceedings in respect of national laws that restrict the free movement of services. This is despite the fact that the ECJ has consistently refused to apply this principle to services under Article 59 (see Bosman, Alpine and de Agostini).

The ECJ's refusal to apply the Keck doctrine to the free movement of services is

Mutual recognition is an established and uncontroversial principle which is constantly applied in a multitude of sectors.

hardly surprising. The restrictions which the ECJ stated fall outside the scope of Article 30 in the Keck judgement are secondary restrictions in so far as the free movement of goods is concerned, i.e. goods can still enter the market even though they cannot be marketed effectively. However, if this concept were to be applied to the free movement of services, it would constitute a primary barrier to free movement because services would not be allowed to cross borders. This would have the effect of fragmenting the Internal Market and distorting trade flows.

The Directive is a major step forward in increasing Europe's competitiveness in this rapidly developing area. It will allow a great deal of consumer choice. For example, a consumer in Member State A who is not able to take advantage of a three for the price of two offer through normal retailing channels in that State due to the existence of the unfair competition law may dial up a web site in Member State B and receive such an offer as the web site established in Member State B will not be subject to the restrictions in Member State A.

The Directive is a major step forward in increasing Europe's competitiveness in this rapidly developing area.

Also, the consumers will continue to enjoy a high level of protection as the Directive does not affect the provisions of other legislation such as the Distance Selling Directive, the Unfair Contract Terms Directive and the Products Liability Directive which impose an approximated set of rules for consumer protection across the EU.

Consumers will also retain their right to sue suppliers in their country of residence under the provisions of the Brussels Convention. Furthermore, contracts concluded between suppliers and consumers who are living in different Member States cannot be used to take away the rights which a consumer would enjoy in his country of residence, which are protected under the terms of the Rome Convention.

The Directive also allows Member States to derogate from its provisions on a case by case basis to impose restrictions on information society services supplied from another Member State if necessary to protect public interest on the grounds of protection of minors, fights against racial hatred, sexual/racial discrimination, public health or security and consumer protection. However, such restrictions would need to be proportionate to their stated objective. Moreover, it introduces the important caveat that the restrictions can only be imposed after the Member State where the service provider is established has been asked to take adequate measures and failed to do so and the intention to impose restrictions has been notified in advance to the Commission and to the Member State where the service provider is established.

As stated above the Directive has been strongly criticised by consumer groups. In the author's view this criticism is based on a misunderstanding of the law. The consumer groups' view that the adoption of the Directive will have a negative effect on the present EU consumer protection legislation is mistaken. The fact is that the Directive actually strengthens EU consumer protection law by requiring, *inter alia*, transparency of commercial communications and increased co-operation between regulators. Therefore, the author finds it surprising that the consumer groups are taking such a negative view of a Directive which has many benefits for consumers whilst allowing the growth and expansion of SMEs providing information society services.

In conclusion, the Directive strikes a balance between applying a light regulatory framework which will allow e-commerce to develop within the EU, allowing European businesses to compete on a level playing field with US businesses in information society services while at the same time providing for a high level of protection for consumers and increasing consumer choice.

Reputation: at the heart of growth

Philip Sheppard,
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AIM - the European Brands Association

Reputation, built by advertising and other commercial communication, is a key driver of economic growth and employment. This is one of the findings of a new study commissioned by AIM and called *Of Brands and Growth*. The study shows how reputation and innovation contribute to the economy as a whole.

A renaissance in economic understanding

The research, conducted by London-based PIMS Europe, builds on work they did in 1995 for the European Commission. In that work PIMS helped in a review of competitiveness in EU industry. Their evidence showed:

- innovation and intellectual property are key determinants of growth both for individual businesses and for the economy
- investment in *intangible* assets such as reputation, quality and innovation are more effective as creators of growth and jobs than investment in fixed (*tangible*) assets.

These conclusions drew on independent sources. The PIMS database, developed at Harvard Business School and sustained by contributing companies, tracks market and financial data at the level where competition actually takes place – in individual businesses. It goes behind published company data and benchmarks business units with specific products and services, customers and competitors.

Brands give reassurance

The new study extends the 1995 research to look at 200 fast moving consumer businesses, to test how the principles apply to the brand investment in them. It focuses on the sort of brands which are bought every day in supermarkets and other shops, and which rely on marketing investment, such as advertising, to sustain the brand.

Branding benefits the way markets work. A brand enables producers to bring new products to market with a good chance that consumers will try them. Branding thus provides access to market for new ideas. A brand helps consumers choose value they can trust. This is because brands have *reputation*. And that good reputation gives consumers the reassurance they need to try something new.

Without a minimum number (a critical mass) of consumers to try a new product, it will fail and the producer will lose the substantial investment made in bringing that innovation to market. The producer must communicate with the consumer and that is the role of commercial communication.

Implications for commercial communication

For brands there is a natural link from the intangibles of reputation, value and innovation, to growth and jobs. And that link is sustained by investment in what sustains those intangibles. It is investment in commercial communication that sustains reputation.

There is thus a direct link from commercial communication through reputation and innovation to economic growth and jobs. Restrictions on any of these factors, such as restrictions on the ability of producers to communicate with consumers, may reduce their ability to bring new products to market, and this harms growth. Commercial communication to build reputation is particularly important for smaller firms challenging market leaders.

Reputation is also boosted by good service to channels of distribution. Investing in a brand isn't just about advertising to consumers, it also requires building relationships with immediate customers, the retailers.

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AIM is the European Brands Association. It represents the branded goods industries at European level on key issues which affect the ability of brand manufacturers to design, to market, to distribute and to sell their brands.
AIM's membership comprises 50 corporate members and 19 European national associations grouping 1600 companies most of which are active in the fast moving consumer goods industry.

Brands and innovation – together forever

The study shows that branded businesses bring more new products to market. Comparing businesses that invest in advertising and promotion for their brands with those that do not, we find more than a 2 to 1 difference in new product content of sales mix. Sixty percent of businesses that support brands by advertising and promotion have significant new products in their offer to the market. For those that don't the figure is under 30percent.

So branded businesses, that is those businesses which especially rely on commercial communication to succeed, innovate more, and they add more value from innovation. Other evidence shows the strong links between innovation and market growth, and that innovative firms in growing markets are the big providers of new jobs.

In addition the study shows that branded businesses make more out of innovation.

Looking at all PIMS business performance – across all types, geographies and sectors – there is a healthy positive correlation between the amount spent on R&D and the value added created. On average, in the economy, an extra Euro spent on R&D in businesses helps generate 1.3 Euros of additional value added.

But for brands the impact of R&D doubles. For each additional Euro spent on R&D here, there is 2.5 Euros extra in value added. This evidence shows that branding helps businesses turn R&D into value.

So branded businesses, that is those businesses which especially rely on commercial communication to succeed, innovate more, and they add more value from innovation. Other evidence shows the strong links between innovation and market growth, and that innovative firms in growing markets are the big providers of new jobs.

A virtuous circle

Putting commercial communication, consumer benefits and innovation together gives us the dynamic that leads to sustained growth.

Consumers are informed about benefits by commercial communication: this enhances reputation and leads to more innovation and economic growth.

A Single Market in marketing

Branding helps producers to innovate and consumers to choose. The economic case for brands stands up: the importance of commercial communication in promoting innovation and growth is proved by this study.

EU policy makers have increased efforts to make the Single Market in commercial communication a reality. European firms suffer the disadvantage that while they can move products around the Single Market, the marketing to support them is still seriously limited by national regulations.

American companies – in addition to their advantage of a single language for their domestic market – suffer fewer restraints on marketing and the use of brands. This helps to explain why US businesses have historically been better able to capitalise on quality advantages in their markets and been more innovative. Europe needs more than a Single Market in physical products to compete on equal terms. We need a Single Market in marketing.

Commercial communications
- a WFA view

Stephan Loerke
EU Affairs
The World Federation of Advertisers (WFA)

It is extraordinary that the 'commercial communication process' is actually underway. It has taken a long time to get to this point. But here we are, actively engaged in discussing the compatibility of national legislation on price discounts with European law and where it is not, considering what action to take.

It is a remarkable achievement and a very considerable credit to the Commission to have the courage not only to recommend but to follow through on a 'back to basics' approach. After more than ten years of relentless Single Market harmonisation, it is, in a way, revolutionary to stop, think and decide to measure what already exists against the provisions and principles of the Treaty.

We, as advertisers, are very glad that this rational framework has been adopted. For the first time, commercial communication has been recognised as a sector on its own. Moreover, the Commission has recognised that it is a sector which, like any other, must be allowed free movement across the EU, and to which the principles of country of origin and mutual recognition must apply. Indeed, commercial communication is so essential to the ability to move goods and services around the EU that it is obvious barriers in this sector can only mean barriers to free movement in all other sectors.

Clearly, there are different national sensitivities and ways of doing things which have to be taken into account. Equally clearly, they sometimes form a part of the barriers to free movement in this sector and are therefore part of the cause of the current initiative. They must be tested for compatibility with EU law.

We are disappointed that the system has few teeth. National governments have a tendency to allow themselves to be distracted, particularly if the problems they face are uncomfortable. However, we believe strongly that it is absolutely in the interests of consumers and business that Treaty provisions apply to this field, as to all others. For our part, we therefore guarantee Member States that we will work as hard and for as long as necessary to ensure that national regulation touching this sector is compatible with the Treaty and that Single Market principles are applied.

The first topic is price discounts. It is the first opportunity for Member States and the Commission to demonstrate their commitment to applying the process rigorously. If national regulation is found wanting, we shall make every effort to ensure that the Member States in question rectify the problems as swiftly as possible.

There should be no underestimating the size of the task that the Expert Group and the Commission has taken on. It is an extremely tall order to make expeditions, however well organised, into the forest of national regulation in this field where there are literally thousands of measures touching on different aspects of commercial communication. It will take a very long time before order is restored to this field.

It is terribly important that the Expert Group works well and effectively, particularly at this early stage in its development. The proportionality assessment methodology and the Expert Group were established specifically to inject objectivity into an area that can be politically difficult. To retain the credibility and the effectiveness of the new system, I strongly believe that it would be a mistake to allow the agenda of the Expert Group to be hijacked by the whim of the day. As it finds its feet, the Expert Group must stick remorselessly to the job in hand and tackle its task methodically item by item. We will do everything we can to help them and to rally the industry to support their efforts. We therefore look forward to a solution to the Single Market in price discounts by December!

For the first time, commercial communication has been recognised as a sector on its own.

National contact points for commercial communications

The European Commission Contact Point emphasises that national contact points should not be regarded as sources of specific legal advice.

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