

---

## Commission of the European Communities Green Paper: Commercial Communications in the Internal Market

---

### INTRODUCTION

In November 1992 the Commission decided that it should prepare a Green Paper to consider its overall appraisal of policy making in the field of Commercial Communications.

The Commission's strategic programme "Making the Most of the Internal Market"<sup>1</sup> recognised the specific role that the commercial communications play in the development of the European area without internal frontiers. The Commission's policy on the Information Society<sup>2</sup> brought out the importance of developing a coherent policy for the European Information Society service industries.

Commercial communications can be defined 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.*" The term includes all forms of advertising, direct marketing, sponsorship, sales promotions and public relations. It also covers the use of such commercial communication services by all goods and service industries as well as public and semi-public bodies, charities and political organisations.<sup>3</sup> Packaging is not included.<sup>4</sup> This does not imply that problems do not arise in this field and does not therefore preclude consideration by the Commission of the regulatory framework existing in this domain.

Within this service sector, the following two general types of service may be identified:

- (i) The range of services offered by the commercial communications industry ("*suppliers*"). Suppliers include *advertising agencies, direct marketing companies* (all forms), *sales promotion designers, media buyers, sponsorship agents, public relations companies*. Other services are supplied by "specialised suppliers" such as *market research companies, advertising film producers, mailing*

*list brokers*. The services of both kinds of supplier are provided to clients (“users”) interested in making such communications to the public or to a part thereof.

- (ii) The range of delivery services offered by “carriers” of commercial communications. The providers of these services cover a wide range of organisations including the *media* (TV, radio and printed word), *organisers of sports and cultural events*, *postal and telecommunication service providers*, *billboard site operators* etc., and may work for both suppliers and users.

### *The Commercial Communications Sector*

It is not possible to put precise figures on the operations of the whole commercial communications service sector. Its importance, on the other hand, is manifest. Limited data are available for a number of activities: in 1993 advertising expenditure reached ECU 45,557 million in the European Union; the market for direct marketing was worth ECU 26,760 million;<sup>5</sup> and the total turnover for public relations companies was ECU 1,800 million.<sup>6</sup> The total number of employees in the sector is again difficult to estimate, not only because it is a highly fragmented sector, but also because many involved in this field work on an independent or freelance basis. Figures advanced range between 155,000 and 250,000 for the Union as a whole.<sup>7</sup> In addition to the employment generated within the various parts of the sector itself, many more jobs within the marketing departments of users should be added to this total. The economic importance of the sector in terms of both output and employment is therefore considerable.

In the modern industrial and service economies of the Union, commercial communications serve the role of *promoting brand identities* and *informing potential clients*, by strengthening the market presence and the desired “positioning” of the brand or company, and providing in appropriate detail, information on the product or service offered.

Commercial communications can be a powerful factor in the integration of national markets. Successful trans-border branding strategies within the Internal Market underpin international trade by ensuring consumers in export markets are kept informed of products and services being offered by suppliers in the exporting Member State. At present, in a number of areas, the marketing of goods and services is handled exclusively by local agents or subsidiaries of the brand owner. But, in future, as existing trans-border media expand, and new,

more effective trans-border communication channels are opened, it seems highly probable that more and more brand owners will seek to communicate directly across borders with their consumers.

It should be remembered that commercial communications are not, as is often implied, the only means by which goods and services are marketed. They are in fact one of the four elements in a company's set of marketing tools – its “marketing mix.” (The others are: the *product or service itself*, its *distribution* and its *price*.) The marketing mix is determined by the branding strategy, which in turn reflects the type of market in which the manufacturer or service provider operates. Six types of branding markets have been identified,<sup>8</sup> each with its typical marketing mix and combination of commercial communication tools adapted to the relevant competitive environment. The relative need for targeting, the competitive power of distributors, and the types of consumer values attached to the brand all help to shape the mix of commercial communications used.

#### *The Commission's Study Programme*

Given the wide scope of commercial communications, the Commission decided to launch two analyses during 1993 and 1994. The first was a *comparative study of national regulations in the field of commercial communications*.<sup>9</sup> The second was an *economic/market analysis of commercial communications and branding strategies*.<sup>10</sup> In addition to these two studies, in order to check whether regulatory divergences were creating barriers in the Internal Market, the Commission undertook *two further surveys* in which the views of interested parties were canvassed.<sup>11</sup> One of these<sup>12</sup> was aimed at the collection of detailed written information on the effects of the Internal Market on commercial communication activities and on any obstacles that the companies could identify.<sup>13</sup> This also canvassed the views of consumer associations on problems that consumers had or might be expected to experience with the growth of cross-border commercial communication services. More than 300 detailed replies were received, and the evidence they provide has been extensively drawn on in Parts I and III of this Green Paper.

The second<sup>14</sup> was carried out by MRB International Ltd and was conducted by fax/telephone. This was done with the express purpose of avoiding a situation in which the only respondents to the “call for written comment” were companies committed to achieving

an Internal Market for commercial communications or consumer associations focusing on European rather than national or regional issues.<sup>15</sup>

During this period another independent study unrelated to the current Green Paper was launched by the Commission on the "Future of Media and Advertising." This concluded that the development of new media would require a review of the existing European regulatory framework in the field of advertising.

### *Organisation of the Green Paper*

This Green Paper is organised in four parts. Part I sets out the role of the Community in the field of commercial communications. In Part II the Commission argues the need for action. Part III provides a preliminary review of specific areas where that action could be taken. Part IV draws certain conclusions on which comment is invited.

The accompanying "Working Document of the Services" supplies the detailed analysis on which the proposals made in the Green Paper are based. Part I of the Working Document uses economic and business principles to explain the role of commercial communications in the Internal Market in the framing of a reliable impact analysis. Part II of the Document provides a detailed comparative review, in tabular form, of national laws and the objectives they seek to meet.

## **PART I. COMMERCIAL COMMUNICATIONS IN THE EUROPEAN COMMUNITY**

### INTERNAL MARKET OBJECTIVES

#### *Internal Market Law*

*Commercial communications and the free movement of goods.* In certain circumstances commercial communication activities could 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 communication services and the sale of goods is clearly explained in the Oosthoek's Uitgeversmaatschappij judgement concerning the restriction of a sales promotion by a Belgian firm into the Dutch market. The Court stated

that this measure led to a measure equivalent to a quantitative restriction as follows:

Legislation which restricts or prohibits certain forms of advertising and certain means of sales promotion may, although it does not directly affect imports, be such as to restrict their volume because it affects marketing opportunities for the imported products. The possibility cannot be ruled out that to compel a producer either to adopt advertising or sales promotion schemes which differ from one Member State to another or to discontinue a scheme which he considers to be particularly effective may constitute an obstacle to imports even if the legislation in question applies to domestic products and imported products without distinction.<sup>16</sup>

In *GB-INNO*<sup>17</sup> where the restriction bore on the content of advertising leaflets distributed in Luxembourg by a Belgian retailer, the Court made the link to Article 30 by way of the reminder that the free movement of goods across frontiers also depended upon the free movement of people. Since the banning of advertising directed at individuals from a neighbouring State would deprive them of the incentive to cross the border it would therefore limit the possibilities for the goods to cross the same border. This judgement shows that the informational role of commercial communications is recognised in law. It also shows that restrictions in advertising related to goods are to be assessed under Article 30.

This informational benefit was stressed in the “*Yves Rocher*” judgement.<sup>18</sup> In deciding that price comparisons were not misleading, the Court remarked that such advertising practices could be considered as:

... extremely useful to enable the consumer to make his choice in full knowledge of the facts.

Restrictions on commercial communications may therefore be open to challenge under Article 30 of the Treaty. In *Keck and Mithouard*<sup>19</sup> the Court imposed certain limits on the application of Article 30, in that it held that Article 30 would not apply to national measures prohibiting or restricting “certain selling arrangements”<sup>20</sup> provided such measures apply to all relevant traders operating within the national area and so long as they affect in the same manner, in law or in fact, the marketing of domestic products and of those from other Member States. This case has been followed by a number of other cases in which the same line has been taken by the Court.<sup>21</sup> In order to decide whether Article 30 applies, an examination of restrictions on commercial communications should therefore be undertaken on a case by case basis.

*Commercial communications and free movement of services.* The freedom to provide services is guaranteed by Article 59 and 60 of the EC Treaty. Within the meaning of these articles as interpreted by the Court,<sup>22</sup> commercial communication activities involve the provision of different “services” which can be classified according to whether they are provided by the supplier (e.g. advertising agencies), the carriers (e.g. media) or the specialist suppliers (e.g. list brokers). All these services could be provided on a trans-border basis and against remuneration.

The Court has already held that advertising is a service.<sup>23</sup> For example, in a recent judgment, concerning “cold-calling” (unsolicited telephone advertising),<sup>24</sup> it ruled that the prohibition of this practise: “deprives the operators concerned of a rapid and direct technique for marketing and for contacting potential clients in other Member States. It can therefore constitute a restriction on the freedom to provide cross-border services.”<sup>25</sup>

The principle of freedom to provide services guarantees that a Member State cannot restrict services emanating from another Member State unless such restrictions fulfil certain specific conditions. Therefore, if these conditions are not fulfilled, such services only fall under the legislation of the Member State from where the provider of services is established (country of origin legislation).<sup>26</sup> However, restrictions on the freedom to provide services can, subject to certain conditions, be justified. Here, the Court draws a clear distinction between discriminatory and non-discriminatory measures.

*Discriminatory measures* are compatible with Community law only if they can be brought within the scope of the exemptions contained in Article 56 of the Treaty, namely; public policy, public security, or public health; and if they comply with the principle of proportionality.

*Non-discriminatory measures* may arise as a result of the additional application of national rules to persons providing services established in the territory of another Member State who already have to satisfy the requirements of that State’s legislation. Such restrictions could be justified under Article 59 only if they are justified by overriding reasons relating to the public interest and if the requirements embodied in the restrictive measures are not already satisfied by the rules imposed on those persons in the Member State in which they are established (mutual recognition).<sup>27</sup> “Overriding reasons relating to the public

interest" (henceforth referred to as "public interest objectives") include: the protection of workers;<sup>28</sup> the protection of consumers;<sup>29</sup> the protection of intellectual property;<sup>30</sup> the protection of fair trading; the conservation of the national historic and artistic heritage; the widest possible dissemination of knowledge of the artistic and cultural heritage of a country;<sup>31</sup> professional rules designed to protect recipients of services;<sup>32</sup> the protection of pluralism<sup>33</sup> and linguistic policy.<sup>34</sup>

In addition restrictions on the free movement of services cannot be imposed merely because of the existence of such public objectives: in order to be justified under Community law they must furthermore be proportionate to these pursued objectives. The Court has specified the meaning of proportionality: "it is settled case law that requirements imposed on the providers of services must be appropriate to ensure achievement of the intended aim and must not go beyond that which is necessary in order to achieve the objective."<sup>35</sup> In other words, it must not be possible to obtain the same result by less restrictive rules.<sup>36</sup>

It cannot be excluded that the ECJ will extend its reasoning in the Keck case (see above) to Article 59. At this stage, it is not possible, however, to state in general terms what would be the precise impact of such an extension, since much will depend on the type of service involved.

*Commercial communications and freedom of expression.* Commercial communications could benefit from the principle of freedom of expression as enshrined in Article 10(1) of the European Convention of Human Rights (ECHR) and in Article 19 of the International Covenant on Civil and Political Rights (henceforth referred to as the UN Covenant). Indeed, commercial communication services include opinions, information or ideas and therefore may benefit from the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. Interference by public authorities can be justified if it complies with the conditions set out in paragraph 2 of Article 10 of the ECHR or Article 19 of the UN Covenant. In this context the specific nature of commercial communications is accounted for through the application of the principle of proportionality.

The European Commission and Court of Human Rights and the

United Nations Human Rights Committee<sup>37</sup> have recognised that commercial communications can benefit from freedom of expression as thus defined.<sup>38</sup>

As regards the links between, on the one hand Article 10 ECHR and Article 19 of the UN Covenant and, on the other hand, the EC Treaty, restrictions on the free movement of services should be interpreted in the light of Article 10 of the ECHR<sup>39</sup> and Article 19 of the UN Covenant.<sup>40</sup>

*Internal market secondary legislation.* Wherever the application of the principles of free movement enshrined in the Treaty is not sufficient to remove restrictive barriers (e.g. where national restrictive measures are justified under Community law), secondary legislation is necessary. The aim of this legislation is to establish an equivalent level of protection of the relevant public interest objectives (e.g. consumer protection, protection of minors, protection of public health) in order to remove the legal barriers resulting from disparities between national regulations. A certain number of existing directives are relevant to commercial communications. They concern inter alia misleading advertising,<sup>41</sup> foodstuffs,<sup>42</sup> financial services,<sup>43</sup> medicinal products,<sup>44</sup> data protection<sup>45</sup> and television broadcasts.<sup>46</sup>

#### *Potential Internal Market Benefits*

The Internal Market offers a significant potential for individuals and organisations involved in commercial communications. However, the Commission's surveys<sup>47</sup> indicated that these opportunities could not always be fully exploited in practice. Five categories of benefits are identified from these surveys: those to the suppliers, to the users, to the carriers, to the consumers and to the self-regulatory bodies.

1. *For the suppliers of commercial communication services*, the very nature of the Internal Market implies that any service lawfully provided in the country of establishment, should in principle be freely available to other users in other Member States, without the need to verify in each instance whether it is compatible with the regulatory provisions of these host countries. The likely reduction that this would bring about in the costs of complying should assist service providers in extending their activities beyond their national borders. In so doing,



they increase competition within the Internal Market, stimulating yet more efficient provision of commercial communication services. The increased efficiencies may come from exploiting new economies of scale or scope that become attainable because of the increase in market size, or, simply by reorganising and reviewing existing methods revealed as inefficient in the light of the new competition.

Given that there are scarce *creative services* at the core of advertising and direct marketing services, suppliers trading in more than one country appear to have an interest in drawing on centrally based creative teams.

*The survey<sup>48</sup> results.* The survey results show that service suppliers are seeking to operate across the Internal Market but are confronted by a significant number of barriers (other than those of a cultural nature). 23% of respondents, when asked to respond spontaneously about problems in providing trans-border services, placed regulatory problems high on their list of "very serious" barriers (30% cultural and 13% economic). Moreover, when prompted, 99% of respondents identified specific regulatory difficulties. 40% of respondents noted that the only way to tackle the problem was either to adapt at the local level, or undertake totally different campaigns in each country. Respondents were unanimous in considering that it is far less costly to offer effective large scale commercial communications services in the U.S.A. than in Europe.

2. *The users of commercial communications* (whether manufacturers of major branded goods or services or small or medium sized enterprises trying to break into markets) could benefit from efficiencies achieved in the commercial communications business, the extent varying according to the type of marketing mix which they use.

Branding strategies will inevitably be sector – but not country – specific. This explains why, in principle, users seek to apply the same branding strategies and mixes of commercial communications when they trade in a new national market. Although the way of applying the strategy might have to be adapted to local culture, its underlying core values, messages and commercial communication tools should preferably be similar and consistent, and its planning needs to remain centralised at the headquarters of the company. For this reason, users are likely to be keen to develop trans-border campaigns within the Internal Market and will benefit from a greater choice of service providers. This choice can help them to achieve a

*better quality of service at a more reasonable price* and, perhaps to grow sufficiently to benefit from economies of scale or scope. In addition, three types of *cost savings* could result;

- (i) First, *legal search costs* are reduced. The lesser the regulatory divergence, the less need there will be for the user to check each set of national regulations. Another reason why legal costs can be significant is that branding investments are vulnerable to any adverse publicity that might arise as a result of legal actions.
- (ii) Secondly, *marketing costs* are reduced as firms are allowed to standardise campaigns across markets.
- (iii) Third, *distribution costs* will fall. Commercial communications are used as competitive weapons between manufacturers and retailers. If regulatory divergence prevents manufacturers from effectively using this competitive tool in their negotiations with importing retailers then they will have to pay relatively more to access the relevant retail chain. The efficient operation of the Internal Market would redress such an imbalance.

Planning and overall strategy for the Internal Market are increasingly co-ordinated centrally. This is for two reasons: *Efficiency*: planning, designing and executing different national campaigns push up costs cutting competitiveness since potential synergies of a co-ordinated trans-border campaign are lost. *The need to maintain brand credibility throughout Europe*: the increasing ease with which information flows freely across national borders means that differing national campaigns conveying potentially conflicting messages could undermine the company's competitive position.

*The survey results.* There are a multitude of trans-border commercial communication services across a number of borders rather than across the whole Union. Subject to cultural and regulatory limitations, companies are increasingly attempting to use similar strategies for their non-domestic markets.

When users were asked which of the three types of problems (cultural, regulatory or economic) were the most serious in impeding trade, 24% named cultural and 19% regulatory, while a further 11% mentioned structural economic problems. (Only 13% stated they had no problems, and 23% said that it was not possible to identify which of the three was the most significant.) When prompted to consider a

whole range of such difficulties, 92% felt that they had encountered cultural difficulties (a heading which, for them, covered issues such as business ethics or distribution techniques including regulatory restrictions).

In addition to tackling these cultural difference, when prompted, 88% of the users (with no difference from one Member State to another) claimed that regulatory differences and restrictions were adding to their difficulties in conducting cross-border commercial communication services.

Regulatory problems were associated with all forms of commercial communications, the most serious relating to sales promotions, direct marketing and sponsorship.

3. *The media and other carriers* (including cultural and sports events organisers) also benefit from the Internal Market. Improved efficiency in the European commercial communications business should allow for growth of this media sales business, particularly across borders.

*The survey results.* When carriers were asked to respond spontaneously, culture was deemed to be the key concern in terms of Internal Market problems. Nevertheless, 45% highlighted the existence of regulatory barriers and 30% believed such barriers to be the most serious. 35% thought that the difference directly affected the level of their businesses but 60% recognised that they affected that of their clients.

Interestingly, although the users and suppliers indicated reliance on the Press when communicating abroad, it was the TV and radio operators who stated they received the most "imports" of trans-border commercial communications. (This probably reflects the Press's tendency to rely on national media buyers; this could be indicative of their underestimating the amount of advertising revenues that originate from non-domestic markets). 80% of respondents sold advertising space to users of commercial communications in other Member States and 60% carried advertisements that had been launched in other Member States. Most of the operators expected more trans-border commercial communications in the future but especially in "non-classical advertising" and particularly in "below the line activities."<sup>49</sup>

4. *Consumers* stand to gain as intra-Community trade increases and fragmentation effects are reduced. Lower marketing costs and a more competitive business environment are likely to be passed on to con-

sumers in greater choice and more competitive pricing. Individuals, businesses or other professionals should be able to make better informed decisions over a wider choice of promoted goods and services. The Internal Market regulatory approach should lead to more effective direct redress from the country where the service originated when such communications infringe laws and codes.

*The survey results.* For *consumer associations* (of which ten responded), although cultural problems were not deemed to be insignificant, the key concerns related to inaccurate translations that could mislead consumers in the non-domestic market. Consumer associations recognise the opportunities of an Internal Market, but are clearly concerned that it is not operating effectively as a result of differences in regulation which prevent effective redress for consumers in host countries and, as a consequence, call for stricter harmonisation. The call for tighter regulations stemmed from a feeling that it was impossible for consumers to achieve protection from harmful commercial communication services originating abroad. This again confirmed their view that the Internal Market is not currently offering the benefits they would expect to see.

5. Community law does not affect the distribution of competences between authorities and *self-regulatory bodies*. It allows self-regulators to continue their regulatory function at the national level but it also implies that like public authorities they need to account for Internal Market principles when seeking to control commercial communication services coming from other Member States.

*The survey results.* The views expressed by *self-regulatory authorities* differed from all other respondents. Ten responded indicating that trans-border problems arose particularly in the area of direct mail (where it was not always clear to them where action should be taken) and also with pan-European TV and Press campaigns. Here it was felt that a lack of understanding of "culture" tended to be the key problem. Unlike the other respondents (who tended to highlight the differences in regulations, rather than their restrictive nature) these respondents felt that laws were generally too restrictive, and that more should be left to self-regulation. However, most felt that advertisers should be better "educated" about cultural divergence, and tended to believe that there was no need to standardise codes across the Community.

### *The Advent of the Information Society*

Broadly, the advent of the Information Society has four implications for commercial communication services.

First, the new digital communication infrastructures represent *a new carrier* for such services, which allows for the fusion of direct marketing techniques with creative advertising skills. Forecasts of current marketing activity over the Internet vary widely but they all predict significant growth.<sup>50</sup> Users will certainly use these new carriers and commercial communications tools to complement their existing methods.

Secondly, speed of transmission and targeting possibilities will *greatly facilitate trans-border commercial communications*. All these services will be offered point to point, in principle on a transfrontier basis. Unlike postal direct marketing, such interactivity is practically instantaneous. In comparison with existing video text or teleshoping services, the creative potential of multimedia tools is highly promising, if still expensive to run. Cultural resistance is likely to be relatively low because the communication will be of a totally new international form.

Thirdly, they will lead to an *integration of commercial communication services with distance retailing*, allowing for interactive distance shopping, which is likely to revolutionise the whole concept of teleshopping;<sup>51</sup> indeed suppliers are already investing in such concepts as interactive on-line sales catalogues and shopping malls.

Finally, the operators of other new Information Society services will seek out certain new commercial communication (e.g. interactive advertising) services to offer in order to *make their services affordable* (in practice, commercial communications will underwrite the other new services).

These new developments in commercial communications will sharpen the need to resolve existing trans-border regulatory problems. The nature of these new networks increases the need for a regulatory framework based on Internal Market principles and, more specifically, where possible and appropriate, based on country of origin control. This can best be demonstrated with the example of the Internet. Once a message has been sent on the Internet it can be received instantaneously anywhere in the world. A regulation based on country of origin control will enhance the possibility of tracking down offenders.

The existing regulatory approach could prove to be increasingly ineffective for consumers as well as providing insufficient security for users, who realise that branding investments are the most vulnerable to adverse publicity. Both factors would reduce the potential demand and supply of new on-line interactive commercial communication services. Not only would this weaken the competitiveness of European business, it could undermine the development of the European Information Society infrastructures.

Although they are clearly of importance to this activity both now and in the future, the Internal Market principles are not the only Community objectives that could be applied in the field of commercial communications.

#### MEETING OTHER COMMUNITY OBJECTIVES

Other objectives established by the EC Treaty, notably public health (Article 129) and consumer protection (Article 129A) can influence commercial communications. In the remainder of this Part of the Green Paper these and other relevant Community objectives are briefly reviewed.

#### *Consumer Protection Policy*

Article 129A of the Treaty clearly requires the Community to deal with the whole range of consumer issues, not just those related to the Internal Market. Such an obligation implies careful consideration of subsidiarity at all stages so that appropriate solutions are adopted. With the advent of the Information Society, it is possible that effective consumer protection may require increased trans-national regulatory co-operation. For those regulatory areas that fall beyond the remit of the Internal Market the globalisation of supply which the information society heralds calls for a comparable adjustment of the regulatory system. This adaptation will be of crucial importance to consumers' willingness to partipate: the Commission and the Member States must address these issues. In this context, attention should be drawn to the fact that all measures based on Article 129A can take a minimal nature, i.e., such that Member States may adopt stricter provisions to ensure a higher level of consumer protection.

### *Industrial Policy*

The EC Treaty incorporates legal bases for implementing industrial policy to "ensure that the conditions necessary for the competitiveness of the Community's industry" exist (Article 130(1)). Article 130(2) adds that in order to attain these objectives the Member States "shall consult each other in liaison with the Commission and, where necessary, shall co-ordinate their action." The Commission is assigned the specific duty to "take any useful initiative to promote such co-ordination."

To support their national action, the Community will generally help to achieve this objective of improving competitiveness by taking horizontal measures under a series of common policies (on research, cohesion, vocational training, networks and foreign trade). The Council may also, ruling unanimously on a proposal from the Commission, "decide specific measures destined to support actions taken by Member States in order to attain stated objectives" according to Article 130, paragraph 1 of the Treaty.<sup>52</sup>

Since efficient commercial communication services would generally, by improving marketing efficiency, assist industry in meeting these competitive goals, they could be covered by initiatives in this field.

### *Competition Policy*

In general commercial communication "suppliers," "users" and "carriers" activities are all covered by the competition rules of the EC Treaty. Given the competitive role of commercial communications in the Internal Market, anticompetitive agreements in the meaning of Article 85(1) of the Treaty, which restrict the freedom of the parties to supply, to carry, to use or to buy such communications are prohibited.

Nevertheless, anticompetitive agreements on commercial communications can be granted an exemption if they satisfy the conditions set out in Article 85(3) of the Treaty. An example, which also illustrates the direct relevance of commercial communications in the market relationship between manufacturers and distributors, is clause 8(b) of Article 3 of the Commission regulation on the application of Article 85(3) of the Treaty to certain categories of motor distribution and servicing agreements. This clause allows manufacturers

to prohibit dealers from soliciting customers for contract goods or corresponding goods, outside their territory, by personalised advertising.

### *Protection of Public Health*

Article 129 of the Treaty calls upon the Community to contribute to a high level of health protection, particularly by preventive action. It is to address the major health scourges and particularly mentions the fight against drugs.

The Treaty stipulates that health protection requirements shall be an integral part of other Community policies. This obligation is also valid for Community action in the field of commercial communications.

Central to the Commission's role in the implementation of Article 129 is the obligation to liaise with the Member States in the co-ordination of their policies and programmes concerning prevention, including drug prevention, investigation and analysis of causes and modes of transmission of health scourges, health information and health education. In its Framework of Action in public health, the Commission has foreseen eight programme proposals, of which three on

- Cancer
- AIDS and other Communicable Diseases, and
- Health promotion

have already been adopted. Two proposals are currently under discussion in the Council and the European Parliament, on

- drugs, and
- health monitoring.

The Commission intends to put forward three further proposals shortly on:

- pollution-related diseases,
- rare diseases,
- accidents and injuries.

In addition, the Commission publishes annual reports on the integration of health requirements in other Community policies on



the Health status in the Community. It has also put forward a Communication on Surveillance Network for Communicable Diseases.

General public health policy, particularly concerning health information and promotion, generates a number of commercial communication-related measures, particularly in Member States. The Commission has put forward a draft Directive on tobacco which proposed to ban advertising for tobacco and tobacco products under certain circumstances. In the framework of the public health programmes, major Community-wide campaigns such as European Cancer Week are organised. On Member State level, there are numerous other public health campaigns. Although funded by the State these are commissioned from commercial communication service providers. Likewise, public health considerations have led Member States to require health warnings to be placed on commercial communications that promote certain products. The use of commercial communication related measures in this area can be expected given the key role of health information and education.

### *Audiovisual Policy*

The Community's Audiovisual Policy has two main goals:

- to put in place and ensure the working of a true "European Audiovisual Area," in particular by ensuring the free movement of broadcast services; and
- to strengthen the competitiveness of the European film and television production industries.

Both objectives are pursued taking full account of the specific cultural aspects of the audiovisual sector.

Audiovisual Policy is implemented through two types of Community instrument. These are, on the one hand, legal measures such as the "Television without frontiers" Directive and on the other, financial support initiatives such as the MEDIA II programme.

The "Television without frontiers" Directive (Council Directive 89/522/EEC "on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities") is the cornerstone of the legal arrangements for the "European Audiovisual Area." Its primary objective is to create the legal framework condi-

tions needed to ensure the free movement of broadcast services and thereby to encourage their development throughout the Community.<sup>53</sup>

Free movement is ensured through the following mechanisms:

- Each broadcaster can only be subject to the law of the Member State under whose jurisdiction it comes (that of the place where it is established) and must comply with a minimum set of common rules (the “co-ordinate fields”),
- Member States must ensure freedom of reception and may not hinder the retransmission of broadcasts from other Member States for reasons that fall within the co-ordinated fields.

As one of the co-ordinated fields is television advertising and sponsorship, this Directive is of particular relevance to the area of commercial communications. Advertising and sponsorship are integral parts of, and constitute the main source of, funding for many television broadcasts whether they emanate from public or private broadcasters. The full implementation of this Directive, based as it is on the “country of origin” principle which is the only workable way in which transnational broadcasting can be developed, is therefore of fundamental importance for the development of commercial communications. In turn, the maximisation of the resources broadcasters earn through advertising and sponsorship revenues will contribute significantly to the attaining of Audiovisual Policy’s other main goal i.e. the development of the film and TV programme production industries. The economic inter-linking of these sectors – broadcasting, commercial communications and programme production – means that the development of effective Audiovisual and Commercial Communication policy instruments is in the interest of all three of them.

The Directive is currently being up-dated and clarified. In the commercial communications services sector, one of the main objectives of this review is to liberalise the rules that apply to teleshopping. Otherwise the 1989 rules on advertising and sponsorship have proved robust and have provided a suitable framework for the development of television advertising and sponsorship while providing a satisfactory level of consumer protection. The Commission has therefore proposed to leave them largely unchanged. It has also proposed to strengthen the “country of origin” principle established by the Directive by clarifying the rules on how jurisdiction is determined.

### *Cultural Policy*

In the area of cultural policy, the Commission has recognised how commercial communications can act as an important additional source of revenue to State funds and therefore again, cultural policy could have an impact on such services. In its 1992 Communication<sup>54</sup> the Commission made clear that although the basic responsibility for culture and its main source of financing remain with the authorities in the Member States, the complementary role of sponsorship must not be neglected. The Community has looked with interest at the question of sponsorship and initial attempts have been made to try out the network approach.<sup>55</sup> More generally, and with an eye to the frontier-free area, the Community might: improve information on incentives to finance the arts in the Member States, given their diversity and complexity; promote the exchange of information and the highlighting of original initiatives for making optimum use of cultural resources (structural, economic or human) in the Member States and encourage sponsorship and promote meetings between creative artists, project promoters and sponsors without in any way interfering with respective individual freedoms.

## PART II. EVALUATION OF THE NEED FOR COMMUNITY ACTION

### REASONS FOR EXISTING OR NEW INTERNAL MARKET BARRIERS

#### *The Existing Regulatory Environment Is Based on Differing National Legal Traditions*

National measures in the area covered by this Green Paper derive from three main families of law: unfair competition law, consumer protection law, and specific legislation for the protection of the wider public interest. The disparity of aims pursued by the Member States, reflects, in part, their differing emphasis on these sources of national law.<sup>56</sup>

(i) *Unfair competition law.*<sup>57</sup> The objective of these laws<sup>58</sup> is to prevent abuses of the commercial and industrial freedom to compete. Thus, for example, all Member States tend strictly to control, and often prohibit, commercial communications that cause confusion or disparagement (libel and slander), or that exploit or dilute the reputation

of competitors (for example, unauthorised use of trademarks). By contrast, the treatment of comparative advertising (which entails the comparison of products or services with the same products or services offered by another competitor) differs between the Member States. It tends to be most tightly controlled (often entailing bans) in those countries where the definition of “truthful” or “misleading” is most limited in scope.

Unfair competition legislation has developed in different ways across the Community, into either a broader law of market behaviour (*Denmark, Finland, Sweden*) or commercial practices (*Belgium*) or alternatively, sections of the original unfair competition law have been separated and developed independently (e.g. *Portuguese* and *Spanish* advertising laws or the consumer protection laws of *Greece*). Certain Member States’ legislation is based mainly on unfair competition law. Some indeed are tightening their laws. Sweden, for example, is attempting to reinstate the concept of the protection of competitors.

(ii) *Consumer protection law*. This relatively recent branch of law<sup>59</sup> is becoming the source of new regulations in relation to commercial communications in some Member States (*Sweden* and *Greece*). The link between these laws and those of unfair competition needs to be kept in mind, since in many instances the laws seek to protect consumers by regulating competition between manufacturers and retailers.

Consumer protection law applies to: misleading advertising; improper influencing of the consumer; undercutting; discounts; “free gifts”; and promotional offers. A number of these areas are also covered by Unfair Competition law, which may lead to a conflict of interests between the two objectives; for example comparative advertising may be seen as providing useful information for consumers, but will be seen as undesirable from the point of view of those competitors who are shown to be promoting less advantageous products or services.

(iii) *Specific legislation for the protection of the wider public interest*. Certain laws have come into being which seek to protect interests of society rather than those of the hypothetical final consumer. These laws have a wide scope, although they may also be product-specific. They include the protection of fundamental human rights, as laid down

in the European Convention of Human Rights<sup>60</sup> (such as the right to freedom of thought, conscience and religion, the right to respect for private life, etc.) and extend in addition into the following categories: protection of public health and safety; protection of minors; protection of pluralism in the media; protection from anti-social behaviour (this would cover issues such as taste and decency, and those general laws and self-regulatory codes which seek to safeguard human dignity and prohibit discrimination on grounds of race, sex or nationality); protection of culture and of national spiritual heritage, notably in Greece (within the context of the broadly defined Consumer Protection Law), and in France and Belgium, where specific measures concerning language exist. Specific product laws have been developed with these categories in mind. For example, the various restrictions on the advertising of food, dangerous products (e.g. firearms) and those on commercial communications relating to pharmaceuticals and on medical and paramedical services fall under public health and safety as would restrictions on tobacco and alcohol advertising.

*A Variety of Differing Types and Levels of National Measures  
Result*

The choice of instrument by a Member State will depend on both its regulatory tradition and its current political priorities. The measures taken by the Member States clearly follow a wide range of national policy objectives. These already coincide with some of the public interest objectives recognised under Community law. A scrutiny of current national measures<sup>61</sup> leads to three conclusions:

(i) *Member States justify their legislative initiatives in different ways.* Similar types of measures in different Member States which deal with the same activity are justified under different public interest objectives. For example, measures concerning misleading advertising relate to several different public interest objectives: consumer protection (the United Kingdom and Ireland); consumer protection and the protection of Industrial Property Rights (IPR) (Denmark, France, Austria, Belgium, Luxembourg, Germany, the Netherlands, Greece); consumer protection, the protection of IPR and the protection of professional ethics (Finland); consumer protection, the protection of IPR and the protection of minors (Spain, Sweden and Italy); consumer protection, the protection of IPR and the protection of public health

(Italy). Within the Member States, different emphasis is given to the two main objectives of consumer and IPR protection; those with a strong tradition of unfair competition law tend to frame laws on misleading advertising from within a perspective of IPR protection.

(ii) *The level of restriction tends to reflect the objective pursued.* According to the objective pursued, the level of restriction can vary significantly between Member States. For example, sponsorship restrictions are justified under several different public interest objectives across the Member States. Although many seek the protection of pluralism (all except Finland, Luxembourg, Belgium and Austria), others pursue; consumer protection (in Sweden, Finland, the United Kingdom, the Netherlands, Belgium and Austria); the protection of minors (Sweden, the United Kingdom, Ireland, Italy and Spain); the protection of public health (Italy, the United Kingdom, Sweden, Denmark, Germany, France and the Netherlands); IPR protection (Austria, Belgium and Sweden) and the protection of public morality (the United Kingdom). The restriction itself varies both in scope of application and degree of restriction. For example, the protection of pluralism leads to a wide application (e.g. all TV/radio programmes) but a limited degree of restriction (i.e. clear identification). By contrast the protection of public health leads to narrowly defined ranges of application (e.g. tobacco or alcohol sponsors) and very high degrees of restriction (including total bans).

(iii) *Account has to be taken on how a measure may have spillover effects into other objectives.* A measure directed at one objective may encroach on and even contradict other objectives. Thus, at a general level, a Member State which feels strongly that commercial communications are unduly influencing consumers' behaviour may regulate the activity restrictively, even though it recognises that this might have adverse effects on competition. The reverse situation may also occur. National regulators are continually having to balance the achievement of one objective with the effects, both direct and indirect, that the relevant measure may have on other policy areas.

In view of the variety of legal traditions, and the divergences in priorities and political choices, it is hardly surprising that when commercial communications cross a border they can be confronted with a regulatory framework utterly unlike that of the country from which

they originate. This may hinder or make less attractive the exercise of fundamental Internal Market freedoms.<sup>62</sup>

### *A Risk of Future Internal Market Barriers*

The Information Society will bring new forms of commercial communications into the market. In response changes in national legislation could lead to re-fragmentation of the Internal Market. Furthermore, given that these communications will tend to be of a cross-border nature, existing regulatory differences which have not posed problems to date could become new Internal Market barriers. Again therefore preventive Community action at a Community level may be required.

### THREATS TO THE COHERENCE OF COMMUNITY MEASURES

As shown immediately above, commercial communications are covered by various legal viewpoints and a wide range of public interest objectives depending on the relevant Member State. Given the increasingly transborder nature of commercial communication services, these differing regulatory approaches will increasingly confront each other. In the future, at the Community level, this confrontation could lead to pressure to propose Community actions each seeking to pursue one of these public interest objectives in isolation without giving due consideration to the other policies. Such actions, whatever their legality, could be questionable in terms of coherence and efficiency, in particular when they may disproportionately prevent the development of the commercial communications services.

For example, in the interests of preventing consumers from being unduly influenced (consumer protection) there might be a call for a ban on all sales promotions and advertising on new on-line services. Since the development of on-line services will largely depend on sales promotions (discounts, concessionary offers, etc.) and advertising, unconditional assent to this call for consumer protection would have harmful effects on the industrial policy of seeking to develop new Information Society services.

If there is to be coherence, all relevant objectives must be taken into account.

### PART III. EVALUATION OF SPECIFIC AREAS FOR COMMUNITY ACTION

#### A PRELIMINARY REVIEW

The legal reviews and survey results indicate that a number of measures dealing with specific types of commercial communications vary considerably across Member States particularly in respect of type and degree of restriction. Measures run from total bans through restricted or limited bans to no bans whatever. This unevenness, and the Internal Market problems that it could give rise to are best illustrated by the following preliminary review of key types of bans and/or restrictions on commercial communication services.

The Commission wishes to stress that the purpose of this preliminary review is to provide a general description of the existing regulatory framework in the Union and the problems that interested parties perceive within it. In this manner the Commission wishes to stimulate debate and encourage respondents to provide further views and information to help it focus on key problem areas. The survey results do not prejudge the Commission's position as to the question of whether these identified barriers are restrictions within the meaning of Article 59 or whether they infringe the latter. It will be subsequent to the responses to the Green Paper that the Commission will be able to consider, on a case by case basis, whether there are obstacles to the functioning of the free frontier area; whether these obstacles are compatible with the Treaty and whether secondary legislation could be needed to address such restrictions under either Articles 30 or 59 of the EC Treaty.

Likewise in the preliminary review that follows, due reference is given to Community secondary legislation in the form of existing and/or proposed Directives. Again, it should be noted that the views of respondents are not to be taken to be those of the Commission at the current stage of the launching of this consultative process.

(i) *Misleading advertising.* The wide differences in national measures in this area are reflected in the Directive on misleading advertising.<sup>63</sup> Certain differences remain between Member States, which to some extent may be explained by the directive's minimal harmonisation or by its definition of "misleading," which some survey respondents claim is lacking in precision. But the different degrees of restriction



arise too from different national definitions of "misleading." In Member States where the definition is narrow, advertising may be banned which, in another Member State, would precisely be seen as informative advertising. Survey results suggest that these differences in interpretation across a number of Member States are creating real barriers to the flow of advertising services.

Measures which regulate the advertising of the professions (such as lawyers and doctors) seek to protect the consumer from being misled. They vary from a total ban on advertising, often imposed by self regulation, as for example in the United Kingdom in respect of barristers<sup>64</sup> and Belgium, to limited restrictions in other countries such as in France, where Bar Associations forbid advertising by individuals, but not by the profession as a whole. Survey respondents claim that such differences prevent trans-border commercial communications. This problem will become more widespread as the possibilities for offering such services at a distance increase with the advent of the Information Society.

Numerous users of commercial communications also complain that they cannot use comparative advertising in certain Member States, and are therefore forced to redesign entirely their commercial communication campaigns in those territories. The complaints focus on Germany, Belgium, France and the Netherlands. On this, the Commission has proposed that comparative advertising should be permitted as long as it is based on objective comparisons that are not used to denigrate the trademark or reputation of a competitor.<sup>65</sup> At the level of the Council, political agreement on this proposed directive was reached in November 1995 and the formal adoption of a Common Position by the Council is expected imminently.

(ii) *Price advertising: discounts, undercutting etc.* A wide divergence in degrees of restriction characterises this area. For example, Germany, under its rebate law (Gesetz über Preisnachlässe (RabattG)), limits cash discounts to "end" consumers to 3%, and the advertising of special offers is also restricted. Austria, Belgium, and Italy also have relatively strict regimes (often limited bans), whilst France has limited restrictions. Other Member States generally permit price advertising, subject to restrictions linked to the general Misleading Advertising provisions and those against anti-competitive practices such as dumping. The Scandinavian countries, whose legal tradition is far more closely linked to consumer protection than to legislation on unfair

competition, tend to encourage such advertising. For example, Swedish law promotes comparative price advertising between traders.

A large proportion of respondents felt that the measures were so disparate that they effectively prevented any form of trans-border campaign using this technique. A number of specific examples were given, such as the extremely detailed and different regulations on trading stamps and discounts in Greece, Portugal, Spain and Italy, and the effective ban on "three for the price of two" campaigns in those countries with very low value thresholds, such as Germany and Denmark.

(iii) *Intrusive advertising: telephone/mail advertising.* Measures in respect of "cold-calling" (unsolicited telephone advertising) vary in degree of restriction from no specific measures (Spain) to limited bans (e.g. in Denmark, where cold-calling is only permitted for books, subscriptions to newspapers and periodicals, and insurance contracts, although resulting orders are not legally binding), through to total bans (e.g. in Germany, where telephone solicitation is not allowed even if individuals are first informed in writing). In respect of direct mail, the Netherlands (through a self-regulatory code) and Italy have the most restrictive measures (often bans). The Council has recently reached a common position on a proposed Directive in respect of distance contracts<sup>66</sup> which harmonises consumer protection provisions, to allow for the development of trans-frontier distance sales techniques. However, Member States may apply stricter provisions in the interest of consumer protection. Another relevant Directive has recently been adopted by the Council,<sup>67</sup> on data protection. It will allow the free circulation of personal data, essential for the efficient operation of the European direct marketing business, on the basis of a common set of rules protecting individual privacy. In particular individuals are guaranteed the right to "opt out" of the use of their data for marketing purposes.

Respondents to the survey specifically identified the problem of differing regulations, which they claimed put obstacles in the way of effective trans-border direct marketing. Consumer interests highlighted the problems arising from non-domestic direct mail offers.

(iv) *Intrusive advertising: promotional gifts/offers and prize competitions.* The measures relating to promotional gifts and offers again differ greatly in form and restrictive effect. In Germany the practice

is heavily restricted. In France "free of charge" gifts are banned; couponing (for example, "money off next purchase" offers) are regulated in a less restrictive manner. Belgium bans all tie-in offers (for example, the possibility of buying a product/service at a reduced price after making a commitment to future purchases), whereas in the Netherlands (through self regulatory codes) such offers are permitted, although subject to restrictions.<sup>68</sup> Denmark has similar provisions requiring that promotions be of low value, and that the gift must be closely associated with the product purchased (as in the Dutch system),<sup>69</sup> although couponing is permitted. Sweden and Finland have a less restrictive approach to this activity, although there are restrictions in relation to alcohol.

The remaining Member States have more liberal approaches towards sales promotions, but even here certain peculiarities exist, such as (a) the manner in which all such promotions in Italy have to be agreed to by the Ministry of Finance and (b) the specific regulation on trading stamps/coupons found in the United Kingdom.

As with promotional offers, there tend to be significant differences in relation to prize competitions. These range from broad bans, for example, in Denmark, Belgium and Finland where games of pure chance (lotteries) are generally prohibited, and bans on lotteries without State permits (e.g. in the Netherlands or in Italy, where the Ministry of Finance must be notified before any lottery is launched), to restricted bans such as bans on games involving stakes or requiring purchase for participation (e.g. France and Germany). Other detailed restrictions relate to the types and values of prizes.<sup>70</sup> The survey results for both sets of activities made reference to the very marked differences in regulations across the Community, and the barriers created. The common complaint from the detailed commentaries was that it was impossible to run any form of trans-border competition because of the very detailed and different nature of prize and lottery rules.

(v) *General media and "carrier" restrictions.* The levels of restriction vary significantly in relation to television advertising from no advertising (for example, the BBC in the United Kingdom) or an advertising monopoly (in Belgium-Flanders and Denmark) through to those Member States (such as Greece and Portugal) who have copied the provisions of the "Television Without Frontiers" directive (TVWF);<sup>71</sup> i.e. a maximum of 15% daily and 20% of advertising spots per hour. This directive provides for a minimal harmonisation

clause which allows Member States to apply stricter or more detailed rules to the broadcasters under their jurisdiction. For broadcasters, the Directive has the advantage of ensuring that they only have to comply with the advertising measures applicable in the Member State of their establishment. It is clear, however, from the survey results that the adoption of stricter measures by the Member States is seen as creating barriers to the free movement of audiovisual advertising as such.

Respondents to the survey, representing a wide variety of interests, raised both specific and general points. In general, divergence of national practices was seen as problematic, and certain States were criticised for being over restrictive. Supply restrictions, such as certain monopoly situations were criticised (e.g. Denmark and Belgium-Flanders). Extreme variations in the permitted advertising time were felt to lead to problems in planning and executing trans-border media buying campaigns. Apparent restrictions on the sales of airtime into neighbouring "overspill" markets (into which the signal either naturally falls or is retransmitted by cable) were felt to be a regulatory problem. Teleshopping operators criticised the classification of their programmes as advertisements. Likewise the producers of "informercials" (i.e. short promotional product presentations) objected to the fact that broadcasters cannot sell them "downtime" (i.e. programming periods which are either replaced by the test card or have very low audience ratings) because of their categorisation as advertisements. Specific points were made about restrictions, particularly in France, preventing certain sectors from using TV advertising.

(vi) *General sponsorship restrictions.* Such restrictions apply to both TV and event sponsorship. Restrictions in this area are often detailed and disparity between the Member States is large. Aspects of sponsorship tightly controlled (or indeed banned) in some countries are treated not as requiring regulation at all in others. The difference extends as far as the applicable tax regime. The TVWF directive lays down certain conditions on sponsoring TV programmes (Article 17), which have been supplemented in many cases by the Member States either by legislation or through self regulatory codes.

Respondents to the survey were concerned about the lack of information on the relevant codes or laws, in view of the significant divergence of measures. The general opinion was that, although certain measures were necessary, the differing, and sometimes diametrically

opposed measures, created problems. In events sponsorship, the Netherlands was singled out as having restrictive measures (often such activities were effectively banned), whilst for broadcasting the United Kingdom and Denmark were felt to be restrictive.

(vii) *Product restrictions: commercial communications for tobacco.* Particularly restrictive regimes were felt to exist in: France which only permits advertising at the point of sale, and bans all reference to trademarks/brands in other product/service categories; Finland, which permits advertising only in foreign publications not specifically linked to tobacco issues; Italy, which only allows for references to brands/trademarks when they are used to promote other product/service lines; Sweden and Ireland, which only permit advertising in certain publications.

All Member States have a ban on TV,<sup>72</sup> and radio advertising (except Spain and the United Kingdom where radio advertising is permitted). TV sponsorship is also banned in all the Member States. A ban is also applied to radio sponsorship in most Member States.

Measures on the Press differ across Member States. In Belgium there is a targeted ban on such advertising in publications aimed at children. In Germany a more general provision prohibits any advertising of tobacco that would incite children to smoke. Likewise, in the United Kingdom, publications aimed at children cannot carry such advertising, and there are voluntary agreements on limitations on outdoor advertising in the neighbourhood, for example, of schools. Most countries also have strict restrictions on the content of permissible advertising.

A Commission proposal,<sup>73</sup> which would harmonise national approaches by imposing a ban for all direct and indirect advertising of tobacco products, is currently under discussion in the Council.

Respondents to the survey did not dispute the need for control, but questioned the spread of restrictions into media and forms of direct marketing not aimed at young people. Certain respondents criticised in particular the broad definition of "indirect advertising" which by including brand diversification prevents the use of internationally licensed brands to launch new non-tobacco products and services.

(viii) *Product restrictions: commercial communications for alcoholic beverages.* Three groups of countries can be distinguished.

The *first group* consists of those countries with stringent rules. In

Sweden and Finland, spirits and non-light beers cannot be advertised in periodicals or on radio and television. Class II beer<sup>74</sup> can be advertised in print but not on audio-visual media. Direct advertising and outdoor advertising are banned. Denmark allows such advertising only in the press. In addition, restrictive measures are found in France and Austria.

A *second group* of Member States (the United Kingdom, the Netherlands, Spain and Portugal) place restrictions (often bans, imposed or voluntary,) on the content and style of TV advertising of spirits (in the Netherlands this covers all alcoholic beverages). Such measures are, however, less restrictive than those in operation in the first group of Member States. (The United Kingdom has recently lifted its voluntary ban on advertising spirits on TV.)

Finally, Member States of the *third group* generally permit the advertising of alcohol, subject to conditions (on content of such advertising or the audience for whom it is intended).

Article 15 of Directive 89/552 harmonised rules on television advertising for alcoholic beverages. A Council Resolution<sup>75</sup> requested interested parties to submit views on how to limit and reduce disparities in the other media. The Amsterdam Group<sup>76</sup> responded to this by calling for greater co-operation through self-regulation.

Many detailed responses to the survey expressed concern at the extent to which these differences are creating new barriers. It was felt that trans-border campaigns would be legally hazardous, under present conditions. Specific complaints were aimed at measures affecting the advertising of spirits in the audiovisual media, which were said to cause a shift on to price competition, which favoured cheaper "own-label" domestic brands. The spread of restrictive measures was also of concern; radio stations said that restrictions on beer advertising in Germany could reduce their total advertising revenue by 10%. The effect on sports sponsorship was also raised, in the context of bans in France and the Netherlands.

(ix) *Product restrictions: commercial communication to children.* The strictest rules are found in Sweden (where advertising, and sponsorship of programmes aimed at children below the age of 12, is prohibited) and in Greece (where TV advertising of toys to children is banned between 7.00 a.m. and 10.00 p.m.). Generally there are specific (often differing) measures aimed at ensuring that children are not excessively influenced by advertising (mainly related to the

content or standard of such advertising). Provisions also apply to sponsorship of sports events. At the Community level, the rules on TV advertising are co-ordinated to the extent needed to ensure the free circulation of television broadcasts by Article 16 of the TVWF directive.

Generally, the survey results highlighted the variations between Member States, and the problems resulting from the method of applying local copy clearance to such advertising. Specific problems were raised in relation to bans on toy advertising in general, and for specific types of toys (in Germany and Denmark). Concerns were expressed about the manner in which such restrictions reduce sponsorship and advertising revenues for children's programmes, and also about the restrictions on the use of sales promotions (merchandising).

(x) *Product restrictions: commercial communications for food products.* None of the Member States prohibits such commercial communications, but there are wide differences in the complexity of codes or laws that regulate the contents of such advertising, particularly with respect to claims. Certain differences in approach are interesting, the first being Member States extending labelling measures into advertising (notably Germany, Austria, the United Kingdom, Ireland and the Netherlands) and those that limit them to "pack" display (i.e. restrictions that relate only to the packaging of products). These countries sometimes have restrictive content provisions; for example, in Belgium, references to health/illness are banned in such advertising.

Community legislation in this area includes the directive on the labelling, presentation and advertising of foodstuffs.<sup>77</sup> However, the scope of the harmonisation is limited given that Article 15 of this Directive makes it clear that the text applies only to national rules on labelling and presentation and, in spite of its title, not to provisions relating to commercial communications. The Council Directive on infant formulae<sup>78</sup> contains a minimal clause in relation to provisions taken by the Member States in relation to advertising for such products. The survey results have highlighted the barriers resulting from diverse restrictions on baby foods in general.

Specific problems highlighted in the replies include; measures requiring the same information content that is imposed "on-pack" to be used for commercial communications (respondents suggest that this prevents the use of common visuals in cross border campaigns); problems relating to very diverse self-regulatory codes and laws for



baby foods; very significant differences that cause problems for advertising of confectionery products (for example, requiring additional images of toothbrushes which means that a separate TV advertisement needs to be produced in the relevant country).

(xi) *Product restrictions: commercial communications for pharmaceuticals.* National restrictive measures in this area are complex, but certain general points arise; a group of Member States ban non-prescribed (over the counter: OTC) pharmaceuticals advertising on audiovisual media (including Belgium and Denmark); another group requires pre-notification for OTC advertising (Sweden, Italy and France); and a third group prohibits sales promotions, for these products (including Belgium and France). Respondents complained that, because the lists of prescription drugs and those on the national insurance lists are not the same from one Member State to another, it was only possible to advertise those OTC drugs that were not on either list on a pan-European basis. In addition, specific problems related to information “tag” messages (warning messages about the product), that varied across the Member States. Spain and Germany were stated to have strict requirements, that extended the required length of TV advertisements by up to 25%. Media respondents also stated that these restrictions dissuaded potential advertisers. The length of time required for copy clearance was also raised as a problem. The prohibition of the use of umbrella brands (these are corporate or product type brands which are applied to both non-prescribed and prescribed pharmaceuticals) by some Member States was criticised as it results in the obligation to launch a completely new brand (involving considerable expense).

The directive on the advertising of medicinal products for human use<sup>79</sup> harmonises this matter by banning the advertising of prescribed pharmaceuticals, and of those containing psychotropic or narcotic substances. Member States are permitted to ban the advertising of pharmaceuticals that could be reimbursed under State insurance schemes. Advertising for non-prescribed pharmaceuticals is subject to the need for market authorisation of the relevant product. Prescribed pharmaceuticals may only be advertised in media aimed at medical professionals, whereas OTC pharmaceuticals may be advertised but are subject to stringent conditions. As regards the rules on TV advertising, these are co-ordinated to the extent needed to ensure the



free circulation of television broadcasts by Article 14 of the TVWF directive.

(xii) *Product restrictions: commercial communications for financial services.* Although measures in this sector are generally restrictive, there are significant differences between each of the Member States. For example, the details required in relation to financial service "products" differ greatly. These provisions are extremely detailed, being contained both in laws and in self-regulation. Community legislation tends to concern the right to establish branches and offer services in the other Member States. However the directives in this area allow Member States to impose their differing national rules justified by the "general good" on the commercial communications of such companies. (For example; Article 41 of both the third life insurance<sup>80</sup> and third non-life insurance directives,<sup>81</sup> Article 44(2) of the Council Directive on the co-ordination of laws, regulations and administrative provisions relating to the undertakings for collective investment in transferable securities (UCITS)<sup>82</sup> and Article 21(1) of the Second Banking Directive.)<sup>83</sup>

From the survey responses, it was clear that the disparity between the measures prevented the development of trans-border commercial communications services. Copy clearance (pre-vetting of Press and TV advertisements) is required in some Member States (e.g. in Italy prior approval by the national supervisory commission for businesses and the stock exchange (CONSOB) is required for investment advertising, including advertising of financial products and in the UK it is an offence in the Financial Services Act of 1986 to issue an investment advertisement which has not been approved by an authorised person) and not in others. It was suggested that the intricacy of detail of the relevant laws and codes was making their interpretation difficult and thus resulting in inconsistencies between positions taken in specific cases. This was said to lead to significant legal uncertainty as to what could or could not be undertaken in this market.

(xiii) *Restrictions on commercial communication for reasons related to societal values.* This area covers such diverse subjects as political advertising and issues of "taste and decency." In relation to all these areas, both the levels of restriction and the measures themselves vary enormously across the Member States. For example, political adver-

tising in the United Kingdom is banned for audiovisual media (this applies to both advertisers and advertising content). This ban stems from a self regulatory code. However, it does not apply to the press or to outdoor advertising. In Finland, by contrast, political advertising is permitted on television. Article 12 of the Television Directive (89/552/EC) was considered to incorporate the essential features of the rules generally accepted in the Member States by the circles concerned. It was not, therefore, considered necessary to ban advertising for any sector or issue (other than for tobacco and prescription drugs) but rather to apply controls on its content and standard.

Respondents to the survey covered many different issues. With respect to *sex discrimination* the use of the female body in advertising is strictly controlled in certain Member States (such as the United Kingdom, the Netherlands, Spain and Denmark). In respect of *sanitary products and contraceptives*, restrictions differ in relation to showing the product, and the timing of such advertising. *Political advertising* is strictly controlled on audiovisual media in relation to political parties. However, respondents raised the issue of wide interpretations of "political" advertising in certain Member States which prevented charities and pressure groups from advertising (such as the United Kingdom and Germany). As for the *protection of the professional ethics of commercial communications* respondents were concerned that certain regulations (notably self-regulatory codes) in the area of taste and decency were, in their application, seeking to achieve another objective, viz. the "good repute" or "professional image" of the commercial communications (notably advertising) industry. This was felt to make regulation diverge from country to country such that it became difficult to create trans-border campaigns. The difference in measures affecting public relations was highlighted, despite the existence of an agreement between national PR trade associations to a common international code. For reasons of *language/cultural protection* certain Member States were identified as imposing language restrictions that created Internal Market barriers (notably Belgium and France).

The key finding arising from this preliminary review is that *there is a growing divergence between certain Member States in the way in which they develop their national regulatory frameworks*. It has shown how Member States, when regulating commercial communications, pursue a wide range of policy objectives which, at times, rely on approaches that are not entirely coherent or indeed contra-

dictory with those adopted by other countries. This leads to different types of regulatory measures as well as differing levels of restrictions and the laws and codes may be applied in such a way as to impede the flow of cross border commercial communications.

#### THE NEED FOR A FURTHER REVIEW OF POTENTIAL REGULATORY BARRIERS

What is the impact of the significant variations between national commercial communication regulations on the functioning of the Internal Market? Specific national restrictions, in themselves, are not at issue. Instead the concern is the application of these restrictions to services originated in other Member States. Intervention at Community level could rely on the efficient application of the existing Community law which safeguards the free movement of goods and services within the Internal Market. Alternatively action at Community level could involve harmonisation where the restrictions are justified and therefore create legal barriers within the area without frontiers.

The preliminary regulatory review indicates that potential Internal Market barriers arise from the existence of non-discriminatory rather than discriminatory measures based on nationality. To the extent that such measures give rise to impediments of free movement, their compatibility with Internal Market law depends principally on the nature of the objectives these pursue and on the proportionality of the presumed restrictions. Given that the safeguarding of general interest objectives is the key aim of these measures, any assessment of the need for Community action therefore will normally focus on the application of the principle of proportionality. However, the range of potential actions in this field is very wide: the assessment of proportionality therefore requires a case by case approach.

Two joint Community actions could nevertheless be required to assist this step by step approach. First it would be useful to have a framework on which the assessment of the proportionality of measures in the commercial communications field might be based. A proposal for such a framework is made in Part IV. Second, a more extensive review of the types of measures that could give rise to problems in terms of proportionality would be useful.

From the preliminary review three types of national measures have been identified as needing to feature in this review:

### *Category I: Regulatory Bans*

Certain Member States ban particular types or content of commercial communications which are permitted in others. Such measures could give rise to a problem of disproportionality if applied to services originating in another Member State. Regulatory bans might include:

- Regulations *banning the use of discounts, loyalty premia and other price discounting* forms of commercial communications. These relate to introductory or other price promotional offers (e.g. 10% off), package offers (e.g. “three for the price of two”) or loyalty offers (whereby repeat purchase allows the consumer to benefit (for example with coupons) from a price reduction on a subsequent purchase).
- Regulations *banning the use of concessionary gifts*. These cover “free gifts” which are given with the purchase of a product or independently.
- Regulations *banning broadcasters from selling overspill audiences* to media buyers and advertisers. This kind of ban is found within TV/radio licensing procedures and applied to “overspill audiences” which are audiences in neighbouring markets that fall within the footprint of a transmission or via re-transmission over a cable network.
- Regulations *banning the use of certain media by specific categories of advertisers* in order to preserve pluralism in other media. Such regulations typically seek to divert certain advertising revenues away from television to support other media such as the regional press.
- Regulations leading to *bans in the use of commercial communications for the professions*.
- Regulations *banning advertising on teleshopping channels or on-line services* for reasons of protection of pluralism. These typically seek to ensure that TV advertising revenues are not adversely affected.
- Measures *banning the use of foreign languages* in commercial communications.

### *Category II: Horizontal Regulatory Limitations*

Some Member States have chosen to apply strict limitations on general forms of commercial communications. These include:

- Regulations *limiting the use of discounts, loyalty premiums and other price discounting* forms of commercial communications.
- Regulations *limiting the value and nature of concessionary gifts.*
- Regulations *limiting advertising to children.*
- Regulations *limiting the content of teleshopping or on-line services* for reasons of protection of pluralism.
- Regulations on media buying *limiting the possibilities for cross-border media buying services.*
- Regulations on misleading advertising *limiting competitive advertising.*
- Regulations *limiting the use of brand diversification.*
- Regulations (other than fiscal) *limiting the sponsorship of both events and audio-visual programmes.*

### *Category III: Specific Regulatory Limitations*

A number of Member States have applied strict limitations on specific sector or product/service related forms of commercial communications.

- Regulations *limiting advertising by professions* which could severely hamper their provision especially when using the new on-line techniques being developed in the Information Society.
- Regulations *limiting non-prescribed pharmaceuticals advertising.* These measures appear, in certain cases, to prevent the effective use of umbrella brands across borders.
- Regulations *limiting alcohol advertising.*
- Regulations *limiting commercial communications related to baby foods other than infant formulae.*
- Regulations *limiting commercial communications associated with TV advertising of retailing.*
- Regulations *limiting the use of commercial communications by the financial services sector.*

### THE NEED FOR AN EARLY NOTIFICATION MECHANISM

Since the advent of the Information Society will lead to an increase in cross border forms of commercial communications that could incite regulatory reactions it could be appropriate to put into place a mech-

anism aimed at avoiding that a re-fragmentation of the Internal Market takes place. A communication proposing a regulatory transparency mechanism for Information Society services will explain how a *notification system* for such services could help detect and, where necessary, diffuse the pressure to regulate. Such a mechanism could in particular involve an obligation for the Member States to notify their draft legislation (including that pertaining to commercial communication services) to all other Member States and to the Commission for possible reactions. Any problems that are identified could then be analysed in terms of their compatibility with Community law.

#### PART IV. PROPOSALS FOR CONSULTATION

The previous parts of this Green Paper have demonstrated the need for an efficient assessment of proportionality so that the Community, once a restriction on transborder services has been identified, on a case by case basis, can accurately assess (i) the compatibility of national regulations with Internal Market principles and (ii) the coherence and proportionality of its own initiatives. (This latter requirement also corresponds with the obligation to apply the principle of proportionality as enshrined in Article 3B §3 of the Treaty of the European Union.) Furthermore, it is evident that for Community intervention to be of the highest quality in this rapidly evolving field the dialogue with all interested parties must be improved. The Commission therefore invites comments on the following proposals.

##### A METHODOLOGY TO DELIVER A MORE UNIFORM ASSESSMENT

According to the case-law of the Court,<sup>84</sup> the proportionality test 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*; secondly, testing that the national restrictive measure *does not go beyond that which is necessary in order to achieve that objective*; the Court adds that, in other words, *the same cannot be obtained by less restrictive rules*.

The jurisprudence of the Court has not, as yet, provided more precisely defined elements that would allow the assessment of the

proportionality of national or Community measures. The Commission believes that, in the absence of such precision, it would be helpful to develop a methodology which could help to appreciate the proportionality and coherence of national or Community measures in the field of commercial communications. However, it is important to underline that the Commission is not proposing an automatic and obligatory assessment system: rather a number of criteria are suggested which could contribute towards the evaluation of the proportionality of a measure. Indeed, criteria could help in achieving greater transparency and improving the quality of a proposal. This methodology is aimed to be a useful "tool" for policy-making. For that reason, it should be stressed that if it is favourably responded to, the Commission would propose that it is applied where useful to enhance efficient policy-making. This methodology could help Member States in designing coherent measures. The same analytical framework could be used for assessing coherence of proposed Community legislation.

The proposed methodology would comprise essentially two steps. First, the main characteristics of the measure could be identified in accordance with specific defined criteria. In turn, these characteristics could be used in assessing the proportionality of the measure or proposal. The approach would thus focus on the set of indices on which the final decision regarding proportionality could be taken rather than on the decision as such. It does not prejudge the outcome.

#### *Step 1. The Assessment Methodology to Characterise the Measure*

The objective of this first step is not to make the proportionality test as such but to set out a complete "picture" of the characteristics of the measure. The aim is not to identify restrictions but to provide a factual overview of all possible effects of a measure in the market in particular on activities that the measure is meant to regulate.

The five identified key assessment criteria are as follows:

*Assessment criterion A.* What is the potential "chain reaction" caused by the measure?

Essentially this criterion involves an examination of the potential market reactions to a measure. For commercial communications the relevant market forces are centred on three, inter-linked, groups of economic actors (users, suppliers and carriers).<sup>85</sup> Together they make

up what can be referred to as the “*commercial communications chain*” which links the user to the final receiver or viewer of the commercial communications.

In any commercial communications activity all three groups will be involved either directly or indirectly. Hence, the assessment must, systematically, cover the linkages between these three groups. The assessment of the reaction through this chain (the “chain reaction”) comprises two elements: (i) the identification of the key group that the measure is intended to affect and (ii) the identification of the most likely reactions within the commercial communications chain to the existing or proposed regulatory measure. These factors are fully examined in the Working Document.

Within each group of economic actors the following issues will need to be considered:

*The impact on the user group* requires an estimation of the probable type of reaction of users that could result from a restriction applied to a particular form of commercial communications. Of course each and every sector or firm might be expected to react differently. However, as explained in the Working Document (see Table 1 of Part 1), it is possible to identify six typical branding strategies from which logical strategic reactions by users to restrictions on one or other form of commercial communications can be defined.

*The impact on the suppliers’ group* requires the assessment of (i) the ease with which different forms of commercial communications services can be combined or substituted for each other, (ii) the scale effects that could be threatened by a measure and (iii) the location of these economies of scale/scope possibilities within the commercial communications sectors (see Table 2 of Part 1 of the Working Document). The resulting potential loss of scale or scope economies and substitution effects can then be used to first, measure how the restriction on the targeted type of commercial communications might spill over into the demand for other commercial communication services and, secondly, to assess whether the restriction is such that it reduces the efficiency of the targeted service provision and makes it more costly. Such changes in demand and/or costs of supply would lead to follow-on reactions at the levels of users and carriers.

*The impact at the level of the “carriers” group* requires evaluation of how a commercial communications regulatory measure on a media or cultural/sporting event will effect the behaviour of that carrier. This will depend on the commercial reactions that it will adopt



in order to compensate for the resulting restriction (see Table 3 of Part 1 of the Working Document).

The chain reaction will thus be assessed and the overall impact on the final receiving group (the general public, minors, consumers etc.) can be evaluated.

*Assessment criterion B.* What are the objectives of the measure?

It is necessary to identify and specify the target objective of the measure. In addition all other indirectly implied objectives must be considered. For a national measure such identification permits the evaluation of whether the legal principles of proportionality and non-duplication are met. For any proposed Community regulatory action the identification of objectives allows the appropriate legal basis to be determined and permits compliance with the principles of subsidiarity and proportionality to be checked.

Any proposed action justified on public interest grounds will almost certainly be targeted at a particular group (minors, consumers, the general public, competitors, distributors etc.). This group needs to be specified together with the objective which the measure (at national or Community level) is seeking to achieve. The chain reaction needs to be used to identify which target (receiving) group will in practice benefit from the national measure or the proposed Community regulatory action and consequently which kind of objective is actually being pursued.

*Assessment criterion C.* Is the measure linked to the objectives?

The specifications, definitions, distinctions, criteria etc. that are used to determine the content of the proposed measure should be directly linked to its objective. If they were not, the measure could be presumed to be arbitrary. It would therefore be essential to have access to information regarding: analysis undertaken prior to the measure being adopted; its explanatory memorandum; the justification of its content; the context within which it was adopted and all other data on relevant decisional factors.

*Assessment criterion D.* Does the measure affect other objectives?

The proposed measure could work against another general interest or Community objective. To measure this the indicator of selectivity could be helpful (i.e. whether the measure is precisely targeted at the objective pursued). The less specific the measure the greater the

risk of counter productive effects. The application of the chain reaction of the measure will help assess both the selectivity and therefore adverse effects of the measure. By identifying unwanted potential market reactions a direct check on possible negative effects on other policy objectives can be drawn. (See Table 4 of Part 1 of the Working Document.)

*Assessment criterion E. Efficiency of the measure.*

The final criterion is designed to test whether the specific type and the degree of restriction of the measure are able to achieve the objective. The chain reaction assessment should be used to determine how the target group is affected and whether the key reactions might work against the pursued objective. More detailed information could be collected to allow for an assessment of the level of restriction beyond which the negative reactions would be likely to outweigh the desired reactions.

*Step 2. Applying the Results of the Assessment to the Decision on Proportionality and/or Coherence*

By knowing the key characteristics of the measure, these five criteria will allow a relevant authority to be in a better position to assess its proportionality and coherence.

*In relation to national measures*, the characterisation of the chain reaction assessment criterion (A) could demonstrate that the objectives met by the measure differ from that or those which are implied (according to assessment criterion (B)): Should these analyses reveal that the objective sought is missed and no other recognised public interest objective can be identified, the measure could be incompatible with Community law. With regard to whether the measure is "appropriate," the evaluation of the chain reaction (assessment criterion A), "the link with the objective" (assessment criterion C) and "counter productivity" (assessment criterion D) will help to appreciate whether this property has been met. For example, a relevant authority could come to the conclusion that a measure is somewhat loosely linked to the objective, has no counterproductive effect and is relatively efficient. As regards the "level of restriction" part of the proportionality evaluation, the "efficiency" assessment criterion (E) will be crucial in determining whether the level of restriction is really necessary for achieving the intended aim. Finally, as regards the "alter-

native measures test<sup>36</sup> the application of the five assessment criteria to competing measures will allow for the identification of the least restrictive measure.

*In relation to Community regulatory actions*, the characterisation of the measure with the five assessment criteria would also assist in avoiding incoherence, in particular counter productivity vis-à-vis other Community objectives. This should be achieved, when choosing between two measures, by actively seeking and giving preference to that measure which avoids counter productive effects on other Community objectives. Concerning proportionality, the choice should be made in favour of the measure with the lesser restrictive effect on the targeted economic group. In some cases, of course, it may be impossible to avoid using a measure which is incoherent with other objectives or measures. In such cases, the methodology proposed will provide the Commission with a tool assisting it in justifying the proposal.

#### IMPROVED CO-ORDINATION AND INFORMATION AT THE EUROPEAN LEVEL

The survey respondents have called for improved information exchange and communication between themselves, the Commission and national regulatory bodies. The analysis of regulations has also shown the differences in approaches between Member States which could give rise to a growing number of European level regulatory problems as commercial communications increasingly cross borders. It follows that improved co-ordination and information exchange at the European level is required if Commercial Communications are to achieve the beneficial roles in the Internal Market and the Information Society that have been set out earlier in this Green Paper. To meet this objective the Commission would propose the following:

The Commission proposes to establish a committee to consider commercial communications issues in particular to safeguard an effective dialogue with and between the Member States. This committee would not, obviously, limit the powers of initiative of the Commission, but would assist the Commission in making its actions more transparent through discussing commercial communication issues on the basis of the proposed assessment methodology developed above. In this manner the Committee could help safeguard the coherence of

policy initiatives and avoid, where possible, the need to act through the infringement procedure of the Treaty. It would also act as the forum for administrative co-operation in the field of commercial communications in particular allowing for an exchange of information on issues relating to new developments in this field. Given the global nature of the Information Society it would also consider how the Community approach for commercial communications in the European Community could be promoted at the international level.<sup>87</sup>

The Committee would be chaired by a representative of the Commission and would consist of representatives from the Member States' authorities, where necessary, accompanied by representatives of self-regulatory bodies. The Commission would periodically report to this committee on relevant information. At the Commission's request the committee would convene meetings on specific issues. The first series of meetings of the Committee would consist of an exchange of views on sales promotions and sponsorship that were identified in the surveys as those forms of cross border commercial communication services facing the greatest difficulties. More generally, the Committee would begin to consider how existing commercial communications regulations may impact on the development of electronic commerce.

The Commission also recognises that although market data are easily found for certain commercial communication services (e.g. national advertising statistics) other information (for example on cross-border commercial communications in general, direct marketing, sales promotion and sponsorship services) required for efficient policy appraisal are at times not collected or difficult to have speedy access to. Given that certain commercial (notably in the field of media buying and market research), academic and consumer interests collate and work with the relevant market information and that these would have an interest in regulatory data, they should be encouraged to participate in the European commercial communications policy process in so far as their inside knowledge would enhance the effectiveness of this policy. The Commission will therefore seek to improve exchange of data between these various organisations and the national and European regulatory authorities.

Interested parties are also calling for a single contact point able to provide help in identifying which Directorate General is responsible in the Commission for particular enquiries regarding its Commercial Communication policies. A co-ordination/contact point

is needed to maintain a general overview of activities and developments in this area.

In order to meet these objectives the contact/co-ordination point could rely on an on-line commercial communications contact network. This would complement the existing commercial communications newsletter.<sup>88</sup> The network would encourage the development of two-way contacts between interested parties and the Commission. In this manner the Commission's work could have a direct source of information when required. The management and resources required for such an on-line communications network will be the subject of a feasibility study which the Commission has launched.

#### NOTES

<sup>1</sup> "Making the most of the Internal Market": Strategic Programme. Communication from the Commission to the Council 22.12.93 COM(93) 632 final.

<sup>2</sup> Europe's way to the Information Society. An Action Plan. Communication from the Commission; 9.8.94 COM(94) 347 final.

<sup>3</sup> This definition covers all forms of remunerated commercial communication services irrespective of the nature of the paying company or organisation. Thus, for example, a political advertising campaign would be included whereas party TV political broadcasts imposed by law and for which political parties or organisations do not pay would be excluded.

<sup>4</sup> This is because (i) packaging and labelling regulations should be kept separate from non-pack commercial communication regulations and (ii) the pack is typically part of the in-house manufacturing process rather than a part of that element of the marketing mix which is sub-contracted to a specialist service provider as is the case for the commercial communication activities covered by this Green Paper. In the same manner, sales representatives have also been excluded from the scope of this review.

<sup>5</sup> EAAA: European Advertising Agencies' Association.

<sup>6</sup> CERP: Comité européen des relations publiques.

<sup>7</sup> For 1991, the EAAA estimated 155,000 were employed in the European Community. Other sources mention a figure of 266,088 employed in advertising and direct marketing in the same year in only eight of the Member States (B, DK, D, E(1990), F, Eir(1988), Lux, NL) (Eurostat, Mercure). For Belgium and Germany this figure includes only the number of employees. A Eurostat study of 1994 on the advertising sector reports that in 1993 the 15 largest European agency networks together employed around 40,000 people in the whole of Europe. CERP estimates 6,282 employees and 13,670 freelance consultants were active in the public relations sector in 1993.

<sup>8</sup> See Part I of the accompanying Working Document.

<sup>9</sup> The Max Planck Institute was commissioned to provide the Commission with detailed country reports for all fifteen Member States. These examined the source and nature of national restrictive measures. They were then summarised in a comparative study by the consultants. This comparative report (in German) is available from the Commission's services. (The national regulatory tables provided in Part II of the Working Document are based on this study. These tables classify and compare

existing national measures according to their national policy objectives and the Community general interest objectives that they seek to safeguard.)

<sup>10</sup> This was undertaken by the Commission's services and is reproduced in Part 1 of the Working Document.

<sup>11</sup> The results of these are summarised in a publication available from the Commission's services.

<sup>12</sup> This was an open postal "call for comment" sent out by the services of the Commission.

<sup>13</sup> Five questionnaires were sent out to the five groups of interested parties, viz.: "users" of commercial communications, "suppliers" of commercial communications, "carriers" (media and other carriers of such services), consumer associations and relevant self-regulatory bodies. A detailed analysis of the breakdown of these responses has been provided in the first issue of a Journal sponsored by the Commission entitled "Commercial Communications" which is available on request from the Commission's services. Some 2,785 questionnaires were issued directly by the Commission: in addition numerous Trade Associations duplicated copies to send to their members.

<sup>14</sup> The detailed results of these surveys (in English) are available on request from the Commission.

<sup>15</sup> 5,200 users, 530 suppliers, 47 carriers, 15 national self-regulatory bodies and 27 consumer associations were contacted. Of these 532 users, 132 suppliers, 20 carriers, 10 self-regulatory bodies and 10 consumer associations responded.

<sup>16</sup> C-286/81 *Re Oosthoek's Uitgeversmaatschappij* 1982 (4) ECR 4575 of 15.12.82.

<sup>17</sup> C-362/88 *GB-INNO-BM v Confederation du commerce Luxembourgeois* 1990 (2) ECR I-667 of 7.3.1990.

<sup>18</sup> C-126/91 *Schutzverband gegen Unwesen in die Wirtschaft e.V. v Yves Rocher GmbH* 1991 (3) I-2361 of 18.5.93.

<sup>19</sup> Case C-267 and C-268/91 *Re Bernard Keck and Daniel Mithouard* 1993 (7) ECR I-6097 of 24.11.93.

<sup>20</sup> C-267 and C-268/91 of 24.11.93, Paragraph 16 cited above.

<sup>21</sup> For example: C-292/92 *Ruth Hünermunde e.a. v Landesapothekerkammer Baden-Württemberg* 1993 (8) ECR I-6787 of 15.12.93; *Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité S.A. and M6 Publicité* 1995 ECR I-179 of 9.02.95.

<sup>22</sup> C-352/85 *Bond van Adverteerders (vereigning) v The Netherlands* 1988 (2) ECR 2085 of 26.04.1988. In this case the Court explained that for the application of free movement of services it is necessary first to identify the services in question, secondly to consider whether the services are transfrontier in nature for the purposes of Article 59 of the Treaty and lastly, to establish whether the services in question are services normally provided for remuneration within the meaning of Article 60 of the Treaty (Paragraph 12).

<sup>23</sup> See, for example; C-155/73 *Re Guiseppe Sacchi* 1974 (1) ECR 409 of 30.04.1974, C-52/79 *Procureur du Roi v. Marc JVC Debaue and Others* 1980 ECR 833 of 18.03.1980.

<sup>24</sup> C-384/93 *Alpine Investments BV v. Minister van Financiën* ECR 833 of 10.05.95.

<sup>25</sup> *Op cit*, Paragraph 28.

<sup>26</sup> See "Commission interpretative Communication concerning the free movement of services across frontiers" OJ C 334, 9.12.93.

<sup>27</sup> C-288/89 *Stichting Collectieve Antennevoorziening Gouda and Others v Commissariat voor de Media. "Mediawet Case"* 1991 (1) ECR 4007, paragraph 13.

<sup>28</sup> C-279/80 *Re Alfred John Webb* 1981 ECR 3305, paragraph 19; *Joined Cases 62/81, 63/81 Seco SA and Desquenne and Giral SA v Etablissement d'Assurance contre la Vieillesse et l'Invalidité* 1982 (1) ECR 223, paragraph 14; C-133/89 *Rush Portuguesa Lda v Office National d'Immigration* 1990 (2) ECR I-1417, paragraph 18.

- <sup>29</sup> C-220/83 *Commission v France* 1986 (4) ECR 3663, paragraph 20.
- <sup>30</sup> C-62/79 *S.A. Compagnie Generale pour la Diffusion de la Television Goditel and Others* (1980) ECR 881, paragraph 15.
- <sup>31</sup> Case C-180/89 *Commission v Italy* 1991 (2) ECR I-709, paragraph 20; Case C-154/89 *Commission v France* 1991 (2) ECR I-659, paragraph 17; Case C-198/89 *Commission v Greece* 1991 (2) ECR I-727, paragraph 21.
- <sup>32</sup> *Joined Cases 110, 111/78 Ministere Public and Chambre Syndicale des Agents Artistiques et Impresarii de Belgique, A.S.B.L. v Willy van Wesemael and Others "Van Wesemael Case"* 1979 (1) ECR 35, paragraph 28.
- <sup>33</sup> C-288/89, cited above, in note 27 paragraph 23.
- <sup>34</sup> C-379/87 *Anita Groener v Minister for Education and City of Dublin Vocational Committee* 1989 (4) ECR 3967 (28.11.1989).
- <sup>35</sup> C-384/93 *Alpine Investments BV*, paragraph 45, cited above in note 24.
- <sup>36</sup> C-288/89 cited above in note 27, paragraph 15.
- <sup>37</sup> *Communications Nos 359/1989 and 385/1989 Ballantyne Davidson McIntyre*, decision of 31.3.93 CCPR/C/47/D/359/1989 and 385/1989/Rev.1.
- <sup>38</sup> See cases *markt intern Verlag GmbH and Klaus Beerman*, Series A No165, 20.11.89 and *Groppera Radio AG and others v. Switzerland – Series A no. 173* of 28.03.90. In recent case law, it appears that the European Commission of Human Rights considers that there is no doubt that advertising is protected by Article 10. In two recent decisions on the admissibility of Applications to the European Court of Human Rights, under the ECHR, the Commission took the view that a restriction on advertising would fall under Article 10 ECHR (Decision of September 5 1991 re Application no.16632/90 (*Colman v. UK*) and Decision of December 2 1991 re Application no.15450/89 (*Cosado Coca v. Spain*)).
- <sup>39</sup> C-260/89 *Elleniki Radiophonia Tilcorassi AE v Dimotiki Etaireia Piroforissis and Sotiros Kouvelas* 1991 ECR I-2925 of 18.06.91, Paragraphs 41-44.
- <sup>40</sup> In the light of C 4/73 *J. Nold, Kohlen v Baustoffgroßhandlung v Commission "The Nold Case"* 1974 (1) ECR 491 paragraph 13.
- <sup>41</sup> Council directive 84/450/EEC of 10.9.84 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising.
- <sup>42</sup> Council directive 79/112/EEC, of 18.12.78, on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, OJ No L 33, 1979.
- <sup>43</sup> Council directive 92/96/EEC of 10.11.92, on the co-ordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance Directive), OJ No L 360, 1992. Council Directive 92/49/EEC of 18.6.1992, on the co-ordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive), OJ No L 228, 1992. Council directive 85/611/EEC of 20.12.85 on the co-ordination of laws, regulations and administrative provisions relating to the undertakings for collective investment in transferable securities, OJ No L 375, 1985. Second Council Directive of 15.12.89, on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC. OJ No L 386, 1989.
- <sup>44</sup> Council directive 92/28/EEC, of 31.3.92, on the advertising of medicinal products for human use, OJ No L 113, 1992.
- <sup>45</sup> Directive of the European Parliament and the Council 95/46/EEC of 24.10.95 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.



<sup>46</sup> Council directive 89/552/EEC of 3.10.89, on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. OJ No L 298, 1989.

<sup>47</sup> MRB International were asked to approach a representative sample of each of the five audiences that were mailed the "call for comment." All the "users" covered by this survey were offices of companies who traded across borders and who had control over a significant proportion of marketing budgets for commercial communications in their non-domestic markets.

<sup>48</sup> This and following summaries are drawn from the results of both surveys described in the introduction; more extensive summaries of the results are provided in a separate document available from the Commission.

<sup>49</sup> "Below the line" refers to commercial communication services that do not involve the purchase of media space. Thus, the term covers all forms of commercial communications except for advertising.

<sup>50</sup> As an example Forrester Research expects purchases over the Internet to grow from \$240 million in 1994 to \$6.9 billion by 2000.

<sup>51</sup> See Part I of the Working Document.

<sup>52</sup> For further information, see COM(94) 319 final.

<sup>53</sup> Other Directives are complementary and pursue the same basic aims, such as the "cable and satellite" copyright Directive adopted in 1993 and the transmission standards Directive adopted in 1985.

<sup>54</sup> "New prospects for Community cultural action" Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, COM(92) 149 final of 29.4.92.

<sup>55</sup> European Committee on business, the arts and culture (CEREC) (operational since March 1991).

<sup>56</sup> This is shown in the commissioned regulatory review. Copies, in German, of this comparative study will be made available on request. The report was undertaken by Professor Schriker of the Max Planck Institute (Munich) for the Commission. In addition to the comparative report (Vergleichende Analyse der gesetzlichen und Selbstkontrollregelungen im Bereich der "Commercial Communication" in den Mitgliedstaaten der EWG sowie in Finnland, Norwegen, Österreich, der Schweiz und Schweden) seventeen more detailed country reports were prepared for the Commission covering each of the Member States as well as Norway and Switzerland.

<sup>57</sup> In Anglo-Saxon law the term unfair competition is rarely found but these objectives are pursued within the context of the law of "Tort."

<sup>58</sup> This branch of law dates back to the middle of the nineteenth century. Following the industrial revolution rules relating to trades were replaced with laws that would prevent abuses of the newly established commercial and industrial freedom to compete.

<sup>59</sup> It dates back to the 1960's and 1970's in most Member States.

<sup>60</sup> ECHR: signed in Rome on 4 November 1950 and ratified by all the Member States.

<sup>61</sup> See Country Tables provided in the accompanying Working Document.

<sup>62</sup> This has been indicated by the survey results summarised in Part I.

<sup>63</sup> Council Directive 84/450/EEC of 10.9.84 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising OJ No L 250, 1984. Although in recitals this directive proposed that at a later stage both unfair advertising and comparative advertising should be considered by the Community, the Commission is of the belief that the very wide span and lack of agreement on the term "unfair" would prevent any useful horizontal action being accomplished in this domain. This does not exclude specific initiatives on certain more narrowly defined forms of commercial communications that certain



national regulations might encompass in their interpretation of "unfair." Meanwhile, comparative advertising has been addressed as explained in the text.

<sup>64</sup> Solicitors are now permitted to advertise in the United Kingdom.

<sup>65</sup> Article 3 bis. Proposed revision of Directive 84/450/EEC on misleading advertising to account for comparative advertising.

<sup>66</sup> Common Position (EC) No 19/95 of 29.6.95 with a view to adopting the Directive on the protection of consumers in respect of distance contracts. OJ No C 288, 30.10.95.

<sup>67</sup> Directives of the European Parliament and the Council 95/46/EEC of 24.10.95 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

<sup>68</sup> Obviously, such practices, if used in a manner to restrict competition, could fall foul of Article 86 of the Treaty.

<sup>69</sup> This was recognised as a justified restriction by the ECJ in the *Oosthoek* judgement (see footnote 16 above).

<sup>70</sup> In its *Schindler* Judgement (Case C-275/92, (1994) ECR I-1039) the ECJ ruled that bans on the cross-border promotion of "major" (in this case State or regional State) lotteries could be justified because of the need to protect social order and to prevent fraud.

<sup>71</sup> Council Directive 89/552/EEC of 3.10.89, on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. OJ No L 298, 1989.

<sup>72</sup> The Television Without Frontier directive (89/552/EEC) harmonised the ban on TV tobacco advertising and TV sponsorship which already existed across the Member States at the time of its adoption.

<sup>73</sup> Modified Proposal for a Council Directive on the Advertising of Tobacco Products (COM (91) final-SYN 194).

<sup>74</sup> This refers to beer with an alcohol content of above 1.8 and up to 2.8% and fermented apple juice (cider).

<sup>75</sup> Resolution 86/C184/02 of the Council of Health Ministers of the European Community on Alcohol Abuse.

<sup>76</sup> An association of 14 of Europe's major companies in the alcoholic drinks sector.

<sup>77</sup> Directive 79/112/EEC, of 18.12.78, on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, OJ No L 33, 1979.

<sup>78</sup> Directive 91/321/EEC of 14.5.91.

<sup>79</sup> Directive 92/28/EEC, of 31.3.92, on the advertising of medicinal products for human use, OJ No L 113, 1992.

<sup>80</sup> Council Directive 92/96/EEC of 10.11.92, on the co-ordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance Directive), OJ No L 360, 1992.

<sup>81</sup> Council Directive 92/49/EEC of 18.6.92, on the co-ordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive), OJ No L 228, 1992.

<sup>82</sup> Council Directive 85/611/EEC of 20.12.85, OJ No L 375, 1985.

<sup>83</sup> Second Council Directive of 15 December 1989, on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC. OJ No L 386, 1989.

<sup>84</sup> See Part I.

<sup>85</sup> See definitions in the Introduction.

<sup>86</sup> This final assessment is similar to the previous one. It differs only in so far as the measure used for evaluation is not the specific restrictive measure under assessment as such but another alternative measure which could result in a less restrictive effect: The objective of this step is therefore not to analyse the restrictive measure but to identify other appropriate measures that could meet the objective whilst being less restrictive.

<sup>87</sup> In this respect, when proposing initiatives, the Commission and the Member States should always give due regard to the trade liberalisation commitments taken in the GATT Treaty and their application by the WTO.

<sup>88</sup> The Commission has already launched the newsletter on commercial communications to begin to develop these contacts. By relying on an independent editor and giving equal weight to information and views from the Commission's services and interested parties, this newsletter encourages participants to draw to the attention of the Commission, the problems arising within the Internal Market for commercial communications. The newsletter was launched before this Green Paper so that interested parties could learn of the proposed new policy approach. "Commercial Communications" is a bi-monthly publication. Enquiries on this newsletter should be made to the Editor (Fax (00 44) 1 273 772727).

#### PERSONS TO CONTACT

Further information should be requested from and/or responses should be sent to Ms Margot Fröhlinger, Head of Unit E/5 (The Media, Commercial Communication and Unfair Competition) in Directorate General DGXV (Internal Market and Financial Services) or Mr Jean Bergevin. The postal address is: European Commission, DGXV E-5, C-107 8/59, 200 rue de la Loi, B-1049 Brussels, Belgium. The Green Paper is also available in other languages.