

IS SELF-REGULATION THE BEST OPTION FOR
THE ADVERTISING INDUSTRY IN THE EUROPEAN
UNION? AN ARGUMENT FOR THE
HARMONIZATION OF ADVERTISING LAWS
THROUGH THE CONTINUED USE OF DIRECTIVES

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1. INTRODUCTION

Advertising law in the European Union ("EU")¹ varies greatly among Member States. Although advertising was not addressed specifically in the Treaty on European Union,² the EU traditionally has regulated the advertising industry through the use of directives.³ These directives, however, do not provide sufficient guidance for companies seeking to advertise on a pan-European basis.⁴ The advertising

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¹ There are four governmental bodies in the EU: 1) the Council of the European Communities ("Council"), which acts primarily as an intergovernmental legislative body; 2) the Commission of the European Communities ("Commission"), which functions as an executive organ; 3) the European Parliament, which represents the people of the Member States; and 4) the Court of Justice of the European Communities ("ECJ"), which serves as a judicial body. Supporting these bodies in an advisory capacity is the Economic and Social Committee ("Committee"). The legislative procedure within the EU consists generally of the Commission making a proposal to the Council, which then decides whether to act upon it. If the Council accepts the proposal, it may be required to seek the opinion of Parliament or of the Economic and Social Committee. *See generally* Mark Brealey & Conor Quigley, *COMPLETING THE INTERNAL MARKET OF THE EUROPEAN COMMUNITY: 1992 HANDBOOK* xxi-xxix (1989) (describing generally the legislative process in the EU).

² Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 224) 1. The Treaty, which was signed at Maastricht, the Netherlands, is commonly known throughout the EU as the "Maastricht Treaty." This Comment will refer to the Treaty as either the "TEU" or the "Maastricht Treaty."

³ *See Single Market: Promised Land or Waste Land?*, MEDIA WK., July 6, 1990, at 28, 28-29 [hereinafter *Single Market*]. For a list of these directives, see *infra* notes 16-24 and accompanying text.

⁴ The EU has attempted to harmonize some aspects of advertising law (e.g., misleading advertising) but has not harmonized the crucial area of sales promotion techniques. *See Understanding the Laws of the Lands, Marketing*, June 3, 1993, available in LEXIS, News Library, ASAPII File.

Advertising can be broken into above-the-line and below-the-line

industry,⁵ which is opposed to the continued use of directives, has been lobbying for self-regulation as a means of avoiding the strict rules that would result from anticipated directives requiring EU interference with industry activities.

Self-regulation, however, is not the best way to police the advertising industry. Self-regulation has provided few clear rules for the industry and it lacks adequate enforcement mechanisms. The absence of strong, fair rules hurts the advertising industry, as well as the businesses that rely upon it. For instance, the industry's perceived abuses alienate consumers and conflict with the goal of consumer protection. Consumer disaffection resulting from the absence of enforceable standards for the advertising industry may lead consumer protection organizations to request stricter government regulation than would have resulted through the initial use of directives.

The advertising industry thus should welcome the continued use of directives to harmonize advertising law throughout the EU. Industry self-regulation should remain available as an additional consumer protection device; EU directives, however, should preempt self-regulation when these two enforcement mechanisms conflict.

One of the primary reasons for creating the EU was to unify the individual Member States in a single economic market. In order to achieve the EU's goal of a unified European market, Member States must eliminate differences in their advertising laws so that companies may more easily conduct advertising campaigns on a pan-European basis. Pan-European advertising campaigns will lead to an increased flow of goods across borders, facilitating the creation of a common EU market.

The EU can look to many sources for inspiration as it

activities. Above-the-line activities include the use of television, radio, and print advertising, as well as most sales promotion techniques, such as the use of coupons and free prize draws. Below-the-line advertising, or direct marketing, includes the use of telemarketing, "junk mail," and electronic methods of advertising. See, e.g., Sid Bernstein, *Old Terms Gain New Importance*, ADVERTISING AGE, Aug. 6, 1990, available in LEXIS, Fedcom Library, ADAGE File.

⁵ For the purposes of this Comment, references to the "advertising industry" implicitly include those companies that employ the services of the advertising industry.

drafts future advertising directives. For example, the EU can draw upon the EU-wide self-regulatory system set up by the advertising industry, as well as the International Chamber of Commerce's ("ICC") code of practice. Additionally, the EU can look at Member States' advertising laws and can incorporate the suggestions of the advertising industry when drafting its advertising directives. With regard to dispute resolution, the Commission should issue specific directives requiring each Member State to utilize its existing government structures to hear and police complaints about industry abuses. Furthermore, the Commission should issue a directive that would continue to permit consumers and competitors trying to combat industry abuses to file private lawsuits in the courts of individual Member States.

The advertising industry should shift its considerable lobbying efforts from promoting self-regulation towards ensuring that future EU directives reflect industry priorities. The EU already has demonstrated its willingness to work with the advertising industry. When the EU and the advertising industry have cooperated in the past, the industry generally has found the resulting directives to be acceptable.

This Comment surveys the structure of advertising regulation in the EU and examines the issues now faced by the advertising industry. Section 2 summarizes the EU's advertising policy and briefly discusses the EU's two most important advertising directives. Section 3 reviews the content and progress of three proposed advertising directives and considers their likely impact on the advertising industry. Section 4 analyzes the present system of advertising regulation in the EU as well as the alternative system of self-regulation proposed by the advertising industry. Section 5 briefly outlines a system of EU regulation that may resolve some of the problems posed by existing regulatory mechanisms. Section 6 concludes that the advertising industry should view EU regulation as beneficial to its interests and that the industry should cooperate with the EU in the drafting of future advertising directives.

2. CURRENT EU LAW RELATING TO ADVERTISING

It is important to note that there is no existing EU law that regulates advertising directly. EU directives merely

require each Member State to adjust its laws to conform to the requirements of the directive;⁶ therefore, the national law of each Member State must be consulted to determine the precise law to apply in a given situation.⁷ Despite the occasional variation in Member States' laws that results from this methodology, directives are the preferred manner of harmonizing laws across Member States. When precisely written, directives can have the practical effect of achieving complete harmonization.⁸

As there is no universally applicable EU law regulating advertising, it follows that there is no legal mechanism for redress of complaints at the EU level. Parties seeking redress must resort to national courts, which typically lack jurisdiction over foreign countries or other non-national entities.⁹

⁶ Article 189 of the Treaty of Rome, which established the European Economic Community ("EEC"), describes the difference between a directive and a regulation. A directive requires each Member State to enact laws that will achieve the results desired by the directive, while a regulation automatically binds each Member State and supersedes national law. Article 189 provides: "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY art. 189 [hereinafter EEC TREATY].

⁷ See Peter Schotthöfer, *European Community, in ADVERTISING LAW IN EUROPE AND NORTH AMERICA* 85 (James R. Maxeiner & Peter Schotthöfer eds., 1992).

⁸ See GEORGE A. BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW* 79 (1993). For example, products liability law was harmonized by requiring Member States to amend their existing laws in order to comply with an EU directive. *Id.* Additionally, television broadcasting was harmonized simply by announcing the rules of law that the Member States were required to implement directly. *Id.*

⁹ This problem illuminates a potential flaw in the current system, but a detailed discussion of the issue is beyond the scope of this Comment. Disputes regarding advertising campaigns are adjudicated under national law and it usually is necessary for separate complaints to be brought in each country. This does not present a problem when the advertising campaign is confined to one Member State, but it may be a problem for campaigns that cross state borders. It is a waste of resources to require that a complainant bring more than one suit related to a single advertising campaign. Moreover, it is possible that an advertisement found to be illegal in one country will be permitted in another simply because no adjudicatory action is undertaken in the latter country. For a discussion of these issues, see generally Peter Busl, *Advertising Law Disputes and Conflict of Laws, in ADVERTISING LAW IN EUROPE AND NORTH AMERICA, supra* note 7, at 350, 352-54 (discussing conflicts of laws issues in advertising disputes);

2.1. Council Resolutions on Consumer Protection Policy and Advertising

The Council has issued several resolutions¹⁰ regarding consumer protection policy, most recently in 1992.¹¹ Generally, the EU's approach to consumer protection is to balance the sometimes conflicting objectives of protecting the health, safety, and economic interests of consumers with

Alexander Reuter, *International Marketing and Advertising and Conflict of Laws: Germany as an Example*, 79 TRADEMARK REP. 698, 703-05 (1989) (discussing how German conflict of laws rules govern the activities of foreign business interests operating in Germany).

Harmonizing Member States' advertising laws will minimize this problem because harmonization will create substantially the same body of advertising law in all Member States. In order to remedy potential conflict of laws problems, the EU also could create an international agency with the authority to make binding decisions on the legality of pan-European advertising campaigns. Such an agency could be modeled after the U.S. Federal Trade Commission ("FTC"). The FTC is a federal agency that oversees competition and has the authority to issue industry guidelines and trade regulation rules. For a detailed discussion of the FTC, see James R. Maxeiner, *United States, in ADVERTISING LAW IN EUROPE AND NORTH AMERICA*, *supra* note 7, at 317, 319. Although some commentators have recognized the need for a European equivalent of the FTC, the creation of such an agency would be very expensive. The European Advertising Lawyers Association supports the idea, but the EU has not indicated that it actually will create such an agency. See *Lawyers to Unite Ad World*, CAMPAIGN, June 7, 1991, at 2.

¹⁰ Resolutions are intended merely to provide a general statement of the Council's views with regard to a particular subject. Such resolutions do not identify a particular method for achieving the Council's objectives, however.

¹¹ The last three resolutions are: 1) Council Resolution of 13 July 1992 on Future Priorities for the Development of Consumer Protection Policy, 1992 O.J. (C 186) 1 [hereinafter Resolution on Priorities for Consumer Protection Policy]; 2) Council Resolution of 9 November 1989 on Future Priorities for Relaunching Consumer Protection Policy, 1989 O.J. (C 294) 1; and 3) Council Resolution of 25 June 1987 on Consumer Redress, 1987 O.J. (C 176) 2.

The Commission adopted a second three-year action plan on July 28, 1993 in favor of consumers at the initiative of Christiane Scrivener, Commissioner with Special Responsibility for Taxation, Customs and Consumer Policy. At the time, Scrivener noted: "It is essential that the advent and deepening of the large European market should have a tangible impact on the life of European citizen-consumers and secure them a high level of protection. This is the only way the internal market will gain their confidence and be a success." *The Commission Approves the Second Three-Year Action Plan in Favour of Consumers (1993-1995)*, RAPID, July 28, 1993,

available in LEXIS, News Library, TRAPID File.

providing adequate product information.¹² The 1992 Resolution recognizes both the importance of securing consumer confidence in the operation of a single market and the significance of providing a means of redress for consumer grievances.¹³ Finally, the 1992 Resolution specifically addresses advertising by inviting "the Commission to look further into the question of unfair advertising with a view to submitting a relevant proposal to it."¹⁴

2.2. Current EU Advertising Directives

The Commission issues a legislative program annually that serves both as a planning tool as well as an overview of the EU's legislative business.¹⁵ The 1993 Programme lists 100 items of proposed legislation, which include directives relating to time-share contracts,¹⁶ unfair terms in contracts,¹⁷ data protection,¹⁸ and distance selling.¹⁹

The EU already has several advertising directives in place, the two most important being the Council Directive of 1984

¹² This conflict becomes evident when laws on the content and form of advertising, promulgated in the name of increased consumer protection, are so restrictive as to limit the informational and educational value of the advertising.

¹³ See Resolution on Priorities for Consumer Protection Policy, *supra* note 11, at 1. At the present time, an aggrieved consumer must file a suit in each jurisdiction in which a misleading or otherwise actionable advertisement appears in order to stop the campaign in its entirety. See *supra* note 9 and accompanying text.

¹⁴ Resolution on Priorities for Consumer Protection Policy, *supra* note 11, at 2.

¹⁵ The Commission's Legislative Programme for 1993, 1993 O.J. (C 125) 9. The Commission has used an annual program since 1988. See *id.*

¹⁶ Proposal for a Council Directive Concerning the Protection of Purchasers in Contracts Relating to the Utilization of Immovable Property on a Timeshare Basis, 1993 O.J. (C 176) 95.

¹⁷ Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 29.

¹⁸ Opinion on the Proposal for a Council Directive on the Legal Protection of Data Bases, 1993 O.J. (C 19) 3 [hereinafter Opinion on the Proposed Data Base Directive].

¹⁹ Opinion on the Proposal for a Council Directive on the Protection of Consumers in Respect of Contracts Negotiated at a Distance (Distance Selling), 1993 O.J. (C 19) 111 [hereinafter Opinion on the Proposal for a Distance Selling Directive].

concerning misleading advertising²⁰ and the Council Directive of 1989 concerning television broadcasting activities.²¹ Other advertising directives, pending or achieved, include topics such as the advertising of medicinal products,²² the advertising of tobacco products,²³ and comparative advertising.²⁴

2.2.1. *Misleading Advertising Directive*

The Misleading Advertising Directive was the EU's first major foray into advertising regulation.²⁵ This directive was

²⁰ Council Directive of 10 September 1984 Relating to the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Misleading Advertising, 1984 O.J. (L 250) 17 [hereinafter *Misleading Advertising Directive*].

²¹ Council Directive of 3 October 1989 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1989 O.J. (L 298) 23 [hereinafter *Television Broadcasting Directive*].

²² Council Directive 92/27/EEC of 31 March 1992 on the Labelling of Medicinal Products for Human Use and on Package Leaflets, 1992 O.J. (L 113) 8.

²³ Opinion on the Modified Proposal for a Council Directive on Advertising for Tobacco Products, 1992 O.J. (C 313) 27.

²⁴ Opinion on the Proposal for a Council Directive Concerning Comparative Advertising and Amending Directive 84/450/EEC Concerning Misleading Advertising, 1992 O.J. (C 49) 35 [hereinafter *Opinion on the Proposal for a Directive to Modify the Misleading Advertising Directive Regarding Comparative Advertising*].

²⁵ For an extensive analysis of the Misleading Advertising Directive, see REIN RIJKENS & GORDON E. MIRACLE, *EUROPEAN REGULATION OF ADVERTISING* 101-22 (1986). Initially, this directive was to include unfair advertising, but the language regarding unfair advertising was deleted due to criticism that it was phrased too broadly. See Maurice Moore, *The EEC Directive on Misleading Advertising*, 1986 J. BUS. L. 72, 73. "Unfair advertising" is defined as any advertising that:

- a) casts discredit on another person by improper reference to his nationality, origin, private life or good name, or
- b) injures or is likely to injure the commercial reputation of another person by false statements or defamatory comments concerning his firm, goods or services, or
- c) appeals to sentiments of fear, or promotes social or religious discrimination, or
- d) clearly infringes the principle of the social, economic and cultural equality of the sexes, or
- e) exploits the trust, credulity or lack of experience of a consumer, or influences or is likely to influence a consumer or the public in general in any other improper manner.

intended both to harmonize Member States' laws and to increase consumer protection. The Commission believed that the differences in Member States' laws regarding misleading advertising led not only to "inadequate levels of consumer protection, but also hinder[ed] the execution of advertising campaigns beyond national boundaries and thus affect[ed] the free circulation of goods and provision of services."²⁶ The directive establishes only a minimum level of protection, though it does permit Member States to impose stricter standards.²⁷

The directive defines "misleading advertising" broadly: [A]ny advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behavior or which, for those reasons, injures or is likely to injure a competitor.²⁸

Article 4 of the directive requires that aggrieved persons be permitted to seek redress through either national courts or an administrative authority, although it also encourages the imposition and use of self-regulatory bodies.²⁹ Article 6 gives courts the discretion to place the burden of proof on advertisers to show the validity of their factual claims when it is "appropriate on the basis of the circumstances of the particular case."³⁰

Regulations and Administrative Provisions of the Member States Concerning Misleading and Unfair Advertising, 1978 O.J. (C 70) 5.

²⁶ Misleading Advertising Directive, *supra* note 20, at 17.

²⁷ *See id.* art. 7.

²⁸ *Id.* art. 2(2).

²⁹ An example of a self-regulatory body is the U.K.'s Advertising Standards Authority ("ASA"). The ASA deals with consumer complaints about advertising and is an organization independent of the advertising industry. *See* Stephen Groom et al., *United Kingdom*, in *ADVERTISING LAW IN EUROPE AND NORTH AMERICA*, *supra* note 7, at 287, 313.

³⁰ Misleading Advertising Directive, *supra* note 20, art. 6(a). The directive refers only to factual claims and thus excludes puffery. *See* Moore, *supra* note 25, at 75. "Puffery" is understood generally to be a statement that is merely the seller's opinion of the value of the goods. *BLACK'S LAW DICTIONARY* 1233 (6th ed. 1990).

2.2.2. Directive on Television Broadcasting

The Television Broadcasting Directive governs television transmissions made across national boundaries. Articles 10 through 21 of the directive relate specifically to advertising.³¹ Television advertising must be readily recognizable as such and must not prejudice respect for human dignity or be offensive to religious or political beliefs.³² The directive bans completely all television advertising of tobacco products and prescription pharmaceuticals and it severely limits television advertising for alcohol.³³

Article 16 requires that television advertisements not directly exhort minors to buy a product by exploiting their inexperience and further requires that television advertisements not unreasonably show minors in dangerous situations.³⁴ Article 17 requires that program sponsors be clearly identified as such and requires that sponsors not influence the content of a program.³⁵ The placement and

³¹ See Television Broadcasting Directive, *supra* note 21, arts. 10-21. The EU currently is planning an amendment to the Television Broadcasting Directive that will enact relatively liberal rules regarding teleshopping services, but it is not yet clear what effects the amendment will have on advertising. See *New Look TV Without Frontiers Directive Makes Fur Fly*, TECH EUR., Dec. 1, 1994, available in LEXIS, World Library, ALLWLD File.

³² Article 12 provides that television "advertising shall not:

- (a) prejudice respect for human dignity;
- (b) include any discrimination on grounds of race, sex or nationality;
- (c) be offensive to religious or political beliefs;
- (d) encourage behavior prejudicial to health or to safety;
- (e) encourage behavior prejudicial to the protection of the environment."

Television Broadcasting Directive, *supra* note 21, art. 12.

³³ For example, advertising for alcoholic beverages must not be aimed specifically at minors, must not be linked with social or sexual success, and must not place emphasis on high alcoholic content. *Id.* art. 15. Some commentators argue that the restriction of advertising in one medium may have a "domino effect" on other media. See *Single Market*, *supra* note 3, at 37 (explaining that the "domino effect" occurs when advertising restrictions spread from one medium to another and from one product category to another); *EC Reviewing Policy on Advertising*, BUS. EUR., Apr. 12, 1993, at 1.

³⁴ See Television Broadcasting Directive, *supra* note 21, art. 16.

³⁵ *Id.* art. 17. The Television Broadcasting Directive specifically disallows the sponsorship of news and current affairs programs. See *id.* The EU may legislate on sponsorship soon, possibly including it in a revised

frequency of advertising are subject to the regulations set out in Articles 11 and 18. These articles generally require that advertising not exceed fifteen percent of daily transmission time and that there be at least twenty minutes of programming between advertising breaks.³⁶ Finally, Article 19 permits Member States to enact stricter guidelines for television broadcasting within their jurisdiction.³⁷

3. PROPOSED EU ADVERTISING DIRECTIVES

Current EU draft directives affecting the advertising industry serve as concrete examples of the different modes of cooperation between the EU and the industry. For example, the draft directive on distance selling has been lauded as an example of how directives should be drafted. The proposed directive on comparative advertising is ambiguous and is an example of what can happen if clear rules are not enacted on a pan-European basis. Finally, the proposed directive on tobacco advertising reveals the potential scope of influence of the advertising industry over EU policymaking.

3.1. *Proposed Directive on Distance Selling*

The EU has drafted a directive regarding contracts negotiated at a distance ("distance selling").³⁸ The proposed

draft directive on comparative advertising. See *EC Update: Comparative Price Advertising*, MARKETING, July 1, 1993, at 12.

³⁶ See Television Broadcasting Directive, *supra* note 21, arts. 11, 18. Article 11 requires that advertisements be inserted between programs but in some cases allows them to be inserted between the parts of a program. Advertisements are not permitted to interrupt news broadcasts, documentaries, religious programs, and children's programs, any of which last less than 30 minutes. *Id.* art. 11.

The use of infomercials likely would be prohibited under a combination of both Article 11 and Article 10(2). See Peter Schotthöfer, *European Community, in ADVERTISING LAW IN EUROPE AND NORTH AMERICA, supra* note 7, at 88. Infomercials are "30-minute ads . . . often masquerading as talk shows . . . usually run during the wee hours [of the morning]." *This Time, Only One Resolution, DRUG & COSMETIC INDUS.*, Dec. 1991, available in LEXIS, News Library, ASAPII File.

³⁷ See Television Broadcasting Directive, *supra* note 21, art. 19.

³⁸ See Proposal for a Council Directive on the Protection of Consumers in Respect of Contracts Negotiated at a Distance (Distance Selling), 1992 O.J. (C 156) 14 [hereinafter Proposal for a Distance Selling Directive]; see also Opinion on the Proposal for a Distance Selling Directive, *supra* note 19,

directive is especially important to the direct marketing industry because it concerns electronic selling techniques, outbound telemarketing, and "junk mail." The Commission has identified a number of reasons why the draft directive is warranted. The Commission notes that sales promotion techniques used in conjunction with distance selling give rise to special problems and thus it is necessary to increase consumer protection.³⁹ The Commission also notes that a single EU market requires elimination of the discrepancies in Member States' laws that are likely to have adverse effects on competition within the industry.⁴⁰ The Commission's Economic and Social Committee argues that making distance sellers more accountable will benefit the consumer as well as the seller because it will enhance the seller's credibility.⁴¹ The Committee also opines that EU "harmonization of protection measures is particularly welcome, since national rules cannot cover all the problems faced by consumers in transnational negotiations."⁴²

The draft directive seeks to avoid fragmentation of national laws through a code of practice that puts the burden of enforcement on the suppliers' trade associations, instead of requiring each Member State to enact legislation.⁴³ The directive, however, does contain an "annex" identifying issues that should be addressed by these trade associations. These issues include: sales promotion techniques (e.g., the use of rebates, gifts, lotteries, and competitions); presentation of solicitations (i.e., making sure all presentations are ethical); financial security (i.e., ensuring the reimbursement of payments); and dissemination of solicitations (i.e., providing a

at 111; Commission Recommendation of 7 April 1992 on Codes of Practice for the Protection of Consumers in Respect of Contracts Negotiated at a Distance (Distance Selling), 1992 O.J. (L 156) 21 [hereinafter Recommendation on Codes of Practice for Distance Selling].

³⁹ See Recommendation on Codes of Practice for Distance Selling, *supra* note 38, at 21.

⁴⁰ See *id.* ("[O]ne of the reasons for this initiative is concern to avoid fragmentation of the national legislation.").

⁴¹ See Opinion on the Proposal for a Distance Selling Directive, *supra* note 19, at 112.

⁴² *Id.*

⁴³ See Recommendation on Codes of Practice for Distance Selling, *supra* note 38, at 21-22.

means for consumers to opt out of further solicitations).⁴⁴ The Committee explained that it sought to take "a middle path, leaving as a voluntary matter the regulation of sensitive points" (e.g., solicitation to buy, sales promotion methods, right of withdrawal), while still establishing a minimum floor of harmonization and consumer protection.⁴⁵

This draft directive is illustrative of the benefits of mutual cooperation between the advertising industry and the EU. The direct marketing industry had extensive input into the proposal and generally was satisfied with the resulting product. The industry, however, became outraged at some modifications proposed by the European Parliament.⁴⁶ In May 1993, the EC added Article 4, which provides that distance selling by means of fax, electronic mail, telephone, or automatic calling units may only be accomplished with the prior consent of the consumer.⁴⁷ The controversy over "opting in," which requires consumers to indicate positively that they are willing to receive solicitations, versus "opting out," which requires consumers to indicate that they do not wish to receive solicitations, also was encountered in the debate over data protection.⁴⁸ The direct marketing industry earlier had been assured that consumers would be protected through "opting out" provisions, which are acceptable to the industry. The EC's May 1993 proposal, however, seemed to require prior

⁴⁴ See *id.* at 22.

⁴⁵ Opinion on the Proposal for a Distance Selling Directive, *supra* note 19, at 111.

⁴⁶ Before the amendments, the direct marketing industry felt that the proposed distance selling directive was not controversial because the industry had been consulted. The direct marketing industry was much more concerned with the EU's proposed data protection directive. See *Direct Marketers in EC Face Tough New Regulations*, BUS. INT'L, June 1, 1992, available in LEXIS, World Library, ALLWLD File. See also Jerrold Ballinger, *Nasty Surprise for Telemarketers in Europe: Prior Consent Revived; Possibility Causes Clash at Forum*, DM NEWS, June 14, 1993, at 1 (stating that the prior consent provision was slipped in without consulting the industry).

⁴⁷ See Amended Proposal for a Council Directive on the Protection of Consumers in Respect of Contracts Negotiated at a Distance (Distance Selling), art. 4, 1993 O.J. (C 308) 18, 24.

⁴⁸ See Kate Trollope, *EC: Marketing Services Reports on Effects of British Presidency for Direct Marketers*, MARKETING, May 21, 1992, available in LEXIS, World Library, ALLWLD File. For a discussion of the draft directive on data protection, see *infra* note 128 and accompanying text.

written consent on the part of the consumer, an "opting in" provision.⁴⁹ For example, it is unclear whether a company including a negative-option tick-box on its order form will satisfy the requirement, or whether each consumer must affirmatively "opt in."⁵⁰ The fate of this provision is uncertain because the final directive has not yet been issued. The direct marketing industry, however, has substantial power and has been lobbying for removal of this amendment.

The direct marketing industry also objected to a subsequent proposal that would have made companies mailing material from outside of the EU liable for violating laws within the EU.⁵¹ It appears that this proposal will be defeated. In January 1994, the advertising industry was successful in defeating a proposal that required consumers to receive their goods before they were obliged to send payment to the seller.⁵² The advertising industry won further concessions in a meeting held on May 17, 1994 by the Consumer Affairs Council of the European Communities.⁵³ It was agreed that financial services, including insurance, would be excluded from the scope of this directive and instead would be addressed in the future by specific directives.⁵⁴ The Council also agreed that it was not necessary for direct marketers to provide consumers with information that has

⁴⁹ Ray Schultz & Jerrold Ballinger, *New Regulatory Threat in Europe: U.S. Firms Could Be Held Liable*, DM NEWS, Sept. 13, 1993, available in LEXIS, World Library, ALLWLD File.

⁵⁰ *Id.* (explaining that a "negative option tick-box" is simply a box on the written order which, if not checked off by the consumer, would permit the marketer to send the solicitations).

⁵¹ The proposal was denounced as being harmful to U.S. companies. *Id.* A company may nevertheless conduct direct marketing in the EU from outside the EU to avoid the draft directive. See *European Community Marketing: Lessons from the National Geographic*, BUS. EUR., May, 9 1994, at 7.

⁵² See *UK: DMA Rallies Against Draft Directive*, MARKETING WK., Jan. 28, 1994, available in LEXIS, World Library, ALLWLD File.

⁵³ See *Consumer Affairs Council: EU Ministers Water Down Distance Selling Directive*, EUR. ENV'T., May 31, 1994, available in LEXIS, World Library, ALLWLD File.

⁵⁴ *Id.* This decision recognizes the inherent differences between the selling of goods and the selling of services and envisions that future directives will be better suited to address the unique issues raised by the

already been provided in writing elsewhere.⁵⁵ The advertising industry also made gains regarding the use of deposits and the canceling of credit card payments.⁵⁶

Despite continuing disagreement over Article 4, the proposed directive on distance selling should serve as a model for future legislation relating to advertising. First, the draft directive responds to the advertising industry's interests without sacrificing consumer protection. Furthermore, the draft directive illustrates the benefits that the advertising industry can derive by working with the EU. The Commission notes that the proposal "is the result of lengthy consultations with consumer associations and sectoral organizations."⁵⁷ As the European Direct Marketing Association's spokesman commented, "[w]ith the distance selling directive we have developed a model. We were given the opportunity to comment before the directive reached an advanced stage."⁵⁸ The one remaining point of contention, the prior consent requirement of Article 4, exists precisely because the direct marketing industry was not consulted before this article was added.⁵⁹

3.2. Proposed Directive on Comparative Advertising

The Misleading Advertising Directive nearly included comparative advertising, but ultimately left it to be addressed "at a second stage."⁶⁰ Currently, only seven out of twelve Member States allow comparative advertising.⁶¹ The

⁵⁵ For instance, once an order has been placed, there will be no need to provide the consumer with information already printed in a catalogue. *Id.*

⁵⁶ *Id.* The Commission originally wanted to ban the use of deposits, but it was agreed that sellers could take deposits as long as they are reimbursed in the event of withdrawal. *Id.* In the same vein, the consumer's right to cancel payment on a credit card sale originally extended to all sales, but booking services have since been excluded. *Id.*

⁵⁷ Opinion on the Proposal for a Distance Selling Directive, *supra* note 19, at 111.

⁵⁸ Trollope, *supra* note 48, at 22. This view is shared by others in the advertising industry as well. See *Direct Marketers in EC Face Tough New Regulations*, *supra* note 46, at 20 (stating that consultation with the industry resulted in a relatively benign directive).

⁵⁹ See Ballinger, *supra* note 46, at 1 (arguing that the prior consent provision was not arrived at democratically and that "[t]hey can't say anymore that this came about after discussions with the industry").

⁶⁰ Misleading Advertising Directive, *supra* note 20, at 17.

⁶¹ *Advertisers Outline Concerns About Sweeping EC Measures*, EXTERNAL <https://scholarship.law.upenn.edu/jil/vol16/iss1/5>

Council, in its draft directive on comparative advertising, recognized this disparity as a problem and sought to harmonize the Member States' laws by permitting the use of such advertising.⁶²

The Council defines comparative advertising as "any advertising which explicitly or by implication identifies a competitor or goods or services of the same kind offered by a competitor."⁶³ The proposed directive permits comparative advertising, provided that it objectively compares the "material, relevant [and] verifiable" features of the goods or services being advertised.⁶⁴ Such comparisons must not mislead the public or denigrate the competitor.⁶⁵ Furthermore, such comparisons should not confuse the marketplace or capitalize on the reputation of a competitor's trademarks.⁶⁶ Finally, the draft directive on comparative

IMPACT OF EUR. UNIFICATION, Dec. 13, 1991, available in LEXIS, World Library, ARCNWS File. Some commentators view this fact in a different light. See Stephen Groom, *EC Proposal Opens the Door to Comparative Advertising, But Could Pepsi Hammer Coke with its Rap Commercial?*, EUROMARKETING, Feb. 18, 1992, available in LEXIS, News Library, ZWLD1 File [hereinafter Groom, *EC Proposal Opens the Door to Comparative Advertising*] ("In no less than 9 out[] of the 12 European Community member states comparative advertising is at best highly restricted and at worst completely banned.").

⁶² See Commission Proposal for a Council Directive Concerning Comparative Advertising and Amending Directive 84/450/EEC Concerning Misleading Advertising, 1991 O.J. (C 180) 14 [hereinafter Proposal for a Directive to Modify the Misleading Advertising Directive Regarding Comparative Advertising]; Opinion on the Proposal for a Directive to Modify the Misleading Advertising Directive Regarding Comparative Advertising, *supra* note 24, at 35.

⁶³ See Proposal for a Directive to Modify the Misleading Advertising Directive Regarding Comparative Advertising, *supra* note 62, at 15.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* The EU has a directive governing trademarks, but the Commission acknowledges the need to use a competitor's trademark in order to identify the competitor in a product comparison. The Commission permits this type of comparison so long as it meets certain requirements. For a discussion of trademarks, see First Council Directive of 21 December 1988 to Approximate the Laws of the Member States Relating to Trade Marks, 1989 O.J. (L 40) 1. See also Stephen Groom, *Will You Own the Rights to Your Brand Name After 1992? Marketers Should Act Now to Protect Their Trademarks*, EUROMARKETING, Mar. 10, 1992, available in LEXIS, News Library, ZWLD1 File (noting that marketers should act now to protect their brands and trademarks under existing national structures before pending changes to the European trademark system, 2014 affected).

advertising amends the Misleading Advertising Directive so that consumer rights of redress are not changed or expanded.⁶⁷

The advertising industry could interpret the EU's decision not to eliminate comparative advertising entirely as a victory. Some members of the advertising industry, however, do not interpret this fact as an unqualified victory. For instance, critics refer to a recent Pepsi-Cola commercial featuring MC Hammer, a popular rap star, who sings off-key when he mistakenly drinks Coca-Cola but sings on-key when he drinks Pepsi-Cola.⁶⁸ The language of the proposed directive on comparative advertising suggests that Pepsi-Cola might be required to "verify" the effect of different colas on MC Hammer's singing and further show that any such effect is "material" or "relevant." As Pepsi is unlikely to meet this high burden, the comparative advertising directive would ban this advertisement throughout the EU.⁶⁹ On the other hand, some commentators mistakenly believe that the proposed directive would require all comparative advertisements to include a comprehensive list of all relevant characteristics in order to compare even one. The draft directive, however, contains no language to support this interpretation.⁷⁰

After several years of inactivity, the EU recently passed an amendment to the Misleading Advertising Directive.⁷¹ This amendment makes few substantive changes but does require that the same rules govern comparative advertising as govern the advertising of certain specified products (e.g., foodstuffs).⁷² Although the draft directive on comparative

⁶⁷ See Misleading Advertising Directive, *supra* note 20, at 19.

⁶⁸ Groom, *EC Proposal Opens the Door to Comparative Advertising*, *supra* note 61. Although the advertisement was played in 14 countries, Coca-Cola persuaded five Member States to ban the advertisement. *Id.* Coca-Cola won another battle against Pepsi regarding a comparative advertisement in which a motorcyclist refuses to drink Coca-Cola but will drink Pepsi. *Coke Lawsuit Forces Pepsi Ad Off the Air in Italy*, EUROMARKETING, June 29, 1993, available in LEXIS, News Library, ZWLD1 File.

⁶⁹ See Groom, *EC Proposal Opens the Door to Comparative Advertising*, *supra* note 61.

⁷⁰ *Id.*

⁷¹ Amended Proposal for a European Parliament and Council Directive Concerning Comparative Advertising and Amending Directive 84/450/EEC Concerning Misleading Advertising, 1994 O.J. (C 136) 4.

⁷² See *Comparative Advertising Text*, AGRA EUR., June 1994, available in <https://scholarship.law.upenn.edu/jil/vol16/iss1/5>

advertising was slated for discussion at the meeting of the Consumer Affairs Council on May 18, 1994, the discussion was postponed due to time limitations and because agreement on the draft directive was highly unlikely. The status of the proposed directive remains undetermined. As the Commission is willing to permit the use of comparative advertising,⁷³ however, it is unlikely that the Commission will enact draconian restrictions on its use throughout the EU.

There was some doubt that the draft directive on comparative advertising would survive at all under the principle of "subsidiarity."⁷⁴ In light of subsidiarity, it appears that the draft directive will not be abandoned altogether, though its scope will be reduced substantially. Such a reduction in scope will leave more areas of the proposed directive to national discretion.⁷⁵ Given the wide

LEXIS, World Library, CURNWS File.

⁷³ It appears that the Commission was attempting to follow the more liberal laws of the U.K. and Ireland, which freely permit comparative advertising, as opposed to Germany, which forbids comparative advertising. See Groom, *EC Proposal Opens the Door to Comparative Advertising*, *supra* note 61. A recent judgment by the ECJ, which overruled a German prohibition of comparative price advertising on the grounds that it violated Article 30 of the Treaty of Rome, supports this conclusion. See Judgment of the Court in Case C-126/91; *Schutzverband gegen Unwesen in der Wirtschaft eV v. Yves Rocher GmbH*, 1993 O.J. (C 172) 6. For a discussion of the case, see *German Advertising Ban Overruled by Court*, FIN. TIMES, June 8, 1993, at 14. For a discussion of the impact of Article 30 on advertising, see *infra* section 4.1.1.

⁷⁴ *Eight Items for Repeal in Commission Subsidiarity List*, REUTER EUR. COMMUNITY REP., Nov. 26, 1993, available in LEXIS, World Library, REVEC File. "Subsidiarity," a system of legislative deregulation, allows for the withdrawal of EU legislation so that Member States may legislate on the matter at issue on a national level. See *EP Disagrees With Commission Subsidiarity Issues*, AGENCE EUR., Sept. 18, 1993, available in LEXIS, World Library, ALLWLD File.

⁷⁵ *Commission Reports on Application of Subsidiarity*, REUTER EUR. COMMUNITY REP., Dec. 8, 1993, available in LEXIS, World Library, REVEC File. At the Edinburgh European Council in December 1992, the Commission indicated that 18 proposals may need to be modified under the principle of subsidiarity. In the latter part of 1993, the Commission placed each proposal in one of three categories: 1) rules and regulations to be revised; 2) rules and regulations to be simplified; and 3) rules and regulations to be repealed. *Id.*

The European Parliament does not agree with the Commission's proposals and has stated that "the Liberals are the only ones who really plan to implement subsidiarity." *EP Disagrees with Commission on Subsidiarity Issues*, *supra* note 74 (noting that the European Parliament

variation in the Member States' laws on comparative advertising, it might be better for the advertising industry if the EU does not simplify the proposed directive. If the proposed directive is not simplified, more complete harmonization of comparative advertising laws among Member States would result.⁷⁶ For example, a number of Member States currently disallow, or substantially restrict, comparative advertising.⁷⁷ These Member States would be required to permit comparative advertising under the proposed directive as drafted. A simplified directive, however, while requiring these states to permit comparative advertising, would nevertheless also permit these states to restrict severely the use of comparative advertising. The better approach for the advertising industry is to lobby for a comprehensive, detailed directive that requires each Member State to permit comparative advertising on terms that are made uniform across state borders.

3.3. Proposed Directive on Tobacco Advertising

A number of countries have restricted substantially and even banned advertisements for harmful products such as alcohol and tobacco.⁷⁸ Additionally, the Television Broadcasting Directive bans television advertisements for tobacco and severely limits alcohol advertisements.⁷⁹ The

wants to withdraw only one of the 18 proposals and substantially amend another).

⁷⁶ The excessive use of the subsidiarity principle and its reliance on the law of individual Member States, rather than the use of directives and their applicability to all Member States, may undermine the goal of creating a level playing field for businesses. *BEUC Calls on German Presidency to Focus on Consumer Policy*, REUTER EUR. COMMUNITY REP., June 10, 1994, available in LEXIS, World Library, REVEC File.

⁷⁷ See *supra* note 61 and accompanying text.

⁷⁸ For instance, Italy and Iceland ban tobacco advertising, but the ban seems to have had little effect on the consumption of tobacco products. See *Tobacco Industry to Assault TV Ad Ban*, BUS. REV. WKLY., Jan. 16, 1987, at 26-27 (discussing a proposed ban in Australia). The United States also restricts some advertising of tobacco products and employs other disincentives to advertise such products. See 15 U.S.C. § 1331-41 (1988) (The Federal Cigarette Labeling and Advertising Act); H.R. REP. NO. 1230, 103d Cong., 1st Sess. (1993) (disallowing the deduction from gross income of expenses for advertising tobacco products or alcoholic beverages).

⁷⁹ Television Broadcasting Directive, *supra* note 21, art. 15.

tobacco industry feared that this directive would create a "domino effect" that would lead to a complete, EU-wide ban on tobacco advertising in almost all media.⁸⁰ The EU has signaled its willingness to legislate against tobacco products through a Council Directive that required all tobacco products to be labeled to inform the consumer that tobacco seriously damages health.⁸¹ The Commission's initial proposal would have targeted only advertising of tobacco products in the press and by means of bills and posters. The Commission, however, later amended the proposal to include all forms of advertising except newspapers and magazines.⁸²

The Commission believes that advertising of tobacco products increases their consumption and justifies the regulation of tobacco advertising as a means of improving the health and quality of life of citizens in the EU.⁸³ The

⁸⁰ The EU's efforts on a draft directive confirm the industry's fears. See Opinion on the Modified Proposal for a Council Directive on Advertising for Tobacco Products, *supra* note 23, at 13; Amended Proposal for a Council Directive on the Approximation of Member States' Laws, Regulations and Administrative Provisions on Advertising for Tobacco Products, 1992 O.J. (C 167) 3, 4 [hereinafter Amended Proposal for a Directive on Advertising of Tobacco Products] (noting the differences between the laws, regulations, and administrative provisions of the Member States on advertising for tobacco products and noting that such differences could create a "domino effect" that would inhibit the free flow of goods across state borders). For a discussion of the "domino effect," see *supra* note 33.

⁸¹ See Council Directive 89/622 of 13 November 1989 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning the Labelling of Tobacco Products, 1989 O.J. (L 359) 1.

⁸² See Proposal for a Council Directive on the Advertising of Tobacco Products in the Press and by Means of Bills and Posters, 1989 O.J. (C 124) 5.

⁸³ See Amended Proposal for a Directive on Advertising of Tobacco Products, *supra* note 80, at 6. Many commentators have written on the effect of advertising regulation on consumer behavior, although a detailed analysis of this material is beyond the scope of this Comment. For a discussion of the effectiveness of advertising, see RIJKENS & MIRACLE, *supra* note 25, at 22-24; *Commission Microscope Still Trained on Tobacco Advertising*, EUR. ENV'T, Oct. 25, 1994, available in LEXIS, World Library, EURENV File. For an insightful analysis of the effects of tobacco advertising at a society-wide level, see *Africa: Ashtray of the World*, SUNDAY TIMES, May 13, 1990, at A12. The tobacco industry defends itself by arguing that advertising does not increase the consumption of tobacco products by attracting new consumers, but instead only encourages established users to switch brands. *Tobacco Industry To Assault TV Ad*

proposed directive defines tobacco advertising broadly to include indirect advertising, such as the use of brand names, trademarks, or other distinctive features of tobacco products.⁸⁴ Furthermore, the proposed directive bans all forms of advertising for tobacco products, though it does permit advertising "within tobacco sales outlets, provided that it is not visible from outside the premises."⁸⁵

Critics of the proposed directive have advanced several arguments against it. First, they note the irony that the EU heavily subsidizes the tobacco industry, yet at the same time claims that its advertising ban is motivated by health and safety considerations.⁸⁶ Second, critics note that the Member States that strongly support a tobacco advertising ban operate state tobacco monopolies⁸⁷ and that an EU-wide tobacco advertising ban would benefit home-produced tobacco products.⁸⁸ Finally, some opponents argue that the advertising of products that are themselves legal, such as tobacco, should not be made illegal.⁸⁹ Even if the Council enacts the proposed directive, however, the directive probably would not apply to direct marketing. Therefore, many tobacco companies may resort to the use of "junk mail"⁹⁰ to circumvent the advertising ban.⁹¹ The use of direct

⁸⁴ See Amended Proposal for a Directive on Advertising of Tobacco Products, *supra* note 80, arts. 1-2.

⁸⁵ *Id.* art. 3. The rationale for this exception is that such advertising only affects existing users of tobacco products. *Id.* at 4.

⁸⁶ Maria Harding, *Dodging the EC Directive*, *MARKETING WK.*, Sept. 20, 1991, at 37.

⁸⁷ For instance, France, Spain, Italy, and Portugal have state-owned monopolies and support the ban. See *Advertisers Outline Concerns About Sweeping EC Measures*, *supra* note 61.

⁸⁸ *Id.*

⁸⁹ See *Single Market*, *supra* note 3, at 28 ("Advertisers rightly take the view that if a product is on sale legally, advertisements for it must be legal too.")

⁹⁰ Wendy Moore, *Smoking Them Out; Tobacco Companies, Anticipating a Europe-wide Advertising Ban, Are Planning to Launch a Junk Mail Blitz*, *GUARDIAN*, July 16, 1992, available in LEXIS, World Library, GUARDN File (defining "junk mail" as the blitz of advertisements that tobacco companies send to people whose names appear on purchased mailing lists).

⁹¹ See *id.* (describing the novel methods used by tobacco companies to escape the proposed ban). Many tobacco companies have attempted to increase their sales to less developed nations in order to minimize the anticipated losses from the proposed ban. See Ariane Genillard, *Advertising*

marketing, as opposed to above-the-line spending,⁹² would allow the tobacco industry to maintain a low profile and thus prevent more restrictive legislation in the future.⁹³

Tobacco companies and other opponents of the ban have not yet lost the war. There are signs that critics of the ban may be able to reach a compromise with the EU. The proposed directive was considered by the Health Council on May 27, 1993 and again on June 2, 1994. For the eighth consecutive time, however, the Health Council made little progress.⁹⁴ The United Kingdom, the Netherlands, Germany, Greece, and Denmark all oppose the ban.⁹⁵ Moreover, the United Kingdom has prepared a strategy paper, as an alternative to the proposed directive, suggesting instead that the EU set a target level for the reduction of tobacco consumption and let each Member State determine how to reach that goal.⁹⁶ Given the intense opposition of these countries to the proposed directive on tobacco advertising, it now appears that the directive may not pass.⁹⁷

4. A CRITIQUE OF THE OPTIONS FOR REGULATION

4.1. *The Present System*

Despite the existence of several current and proposed directives, advertising laws vary greatly among the Member States. For example, no directives currently govern the use of

in Czechoslovakia: Freedom Brings a Free-for-all, FIN. TIMES, Sept. 5, 1991, at 10 (noting that Eastern Europe has relatively few restrictions on advertising and that tobacco companies regard the region as a growth area). See also *Eastern European Potential Realised?*, MARKETING, June 3, 1993, at 29 (arguing that mass deregulation and low-cost media in Eastern Europe create a marketer's dream).

⁹² For a discussion of the distinction between above- and below-the-line spending, see *supra* note 4.

⁹³ See Harding, *supra* note 86, at 40 ("Direct marketing is the only way for drinks and tobacco manufactures to avoid the 'double negative' effect.").

⁹⁴ See *Consumer Policy*, COOPERS & LYBRAND EC COMMENTARIES, Dec. 1, 1994, available in LEXIS, World Library, ALLWLD File.

⁹⁵ See *Advertisers Outline Concerns About Sweeping EC Measures*, *supra* note 61 (quoting Lionel Stanbrook, European Affairs Director of the U.K. Advertising Association).

⁹⁶ *Consumer Policy*, *supra* note 94.

⁹⁷ See Laurel Wentz, *EC Readies More Liberal Ad Stance*, ADVERTISING

many marketing techniques, such as prize competitions, promotional gifts, and clearance sales,⁹⁸ and the laws in these areas vary considerably among Member States.⁹⁹ The inconsistency of advertising laws among Member States creates confusion and added cost for companies that seek to advertise on a pan-European basis. For instance, because companies cannot utilize the same techniques within every country, standardization of advertising campaigns across national borders is nearly impossible. In this manner, the differences in Member States' advertising laws creates an additional burden beyond the varied languages, cultures, and economies that must already be accommodated by a pan-European advertising campaign.¹⁰⁰

Member States' advertising laws vary for many cultural, social, and legal reasons. Although the EU correctly views these differences as restraints on trade,¹⁰¹ the EU has not aggressively pursued harmonization.¹⁰² Current EU

⁹⁸ Peter Schotthöfer, *European Community, in ADVERTISING LAW IN EUROPE AND NORTH AMERICA*, *supra* note 7, at 89, 91. In the draft directive on distance selling, the EU indicated that it may require the industry to harmonize these laws through self-regulation. For a critique of this position, see *infra* section 4.2.

⁹⁹ For example, the use of a sweepstakes or lottery as a means to promote a product is not allowed in Luxembourg, Norway, Sweden, Switzerland, and Denmark. Louella Miles, *Marketing Services Sales Promotion Premiums: Destination Europe*, *MARKETING*, June 11, 1992, at 24, 26 [hereinafter, Miles, *Marketing Services Sales Promotion Premiums*]. A sweepstakes is possibly permitted in the United Kingdom, Ireland, Spain, Germany, France, Belgium, Netherlands, Portugal, Italy, Greece, and Austria. *Id.* It clearly is permitted in Finland. *Id.*

In fact, there are only two promotional methods that can be used with impunity across the EU—on-pack price cuts and in-store demonstrations. *Id.* at 24.

¹⁰⁰ See Peter L. Tracey, Comment, *International Advertising: Regulatory Pitfalls for the Unwary Marketer*, 7 *DICK. J. INT'L L.* 229, 238-39 (1989) (noting that international advertisers, at a minimum, face translation problems, which include taking into account whether a message appearing in a foreign language takes up more space in an advertisement than is required by the translation and also whether the translation truly captures the original meaning of the message). For example, Pepsi's "Come Alive" campaign was translated as "Come out of the grave" in some advertisements. *Id.* at 239 n.59 (citation omitted).

¹⁰¹ See *supra* note 26 and accompanying text.

¹⁰² There appear to be wide differences in what motivates people in different countries to purchase products. One advertiser commented that "the Dutch are heavily into Green issues, the French are very image-

directives regarding advertising harmonize the Member States' advertising laws only superficially; thus, the benefits of complete harmonization are not realized.¹⁰³ In other areas of the law, the EU has made its directives the exclusive standard and does not permit the Member States to impose stricter standards.¹⁰⁴ In contrast, the draft directive on distance selling allows the direct marketing industry to harmonize sales promotion laws through self-regulation.¹⁰⁵ This methodology does not adequately protect the interests of either consumers or the advertising industry.¹⁰⁶

In response to questions about the differences in advertising in France vis-à-vis Belgium, the Commission declared that it has no further plans to harmonize Member States' advertising laws.¹⁰⁷ The Commission indicated that France and Belgium, not the EU, were responsible for reconciling differences in their sales advertising laws.¹⁰⁸

4.1.1. *The GB-INNO-BM Case*

In 1990, the ECJ issued a decision that has affected advertising regulation in the EU significantly.¹⁰⁹ In *GB-INNO-BM*, a Belgian supermarket advertised one of its sales in Luxembourg. Leaflets advertising the sale identified the regular retail price of the sale items, a practice forbidden under Luxembourg's unfair competition law.¹¹⁰ In a

conscious, while the Italians will do anything to compete for a bright red Ferrari." Tom Lester, *Preparing for 1992: Borderline Branding*, *MARKETING*, May 4, 1989, at 27. For examples of how cultural differences impact on business, see Roy Terry, *Manners Mean a Good Deal*, *FIN. TIMES*, Nov. 17, 1992, at 5.

¹⁰³ See *supra* note 26 and accompanying text.

¹⁰⁴ See BERMANN ET AL., *supra* note 8, at 430.

¹⁰⁵ See *supra* section 3.1.

¹⁰⁶ See *infra* section 4.2.

¹⁰⁷ See *A European Law of Advertising*, *BUS. L. BRIEF*, Oct. 1992, available in *LEXIS*, News Library, BLB File.

¹⁰⁸ See *id.*

¹⁰⁹ Case 362/88, *GB-INNO-BM v. Confederation du Commerce Luxembourgeois*, 1990 E.C.R. 667, 61 C.M.L.R. 801 (1991-92).

¹¹⁰ Section 8 of Luxembourg's Grand-Ducal Regulation of 23 December 1974 on unfair competition prohibits retail sales offers involving a temporary price reduction, outside the context of a special sale or clearance sale when those offers state their duration or refer to previous prices. *Id.*

landmark decision, the ECJ held that restrictions on advertising could impede the movement of customers, thus violating Articles 30 and 36 of the Treaty of Rome.¹¹¹

The effect of this holding is that an advertising campaign that is legal in the Member State in which it originates cannot be restricted by the laws of any other Member State that the campaign might reach.¹¹² The ECJ, however, did limit this potentially broad holding. Under the ECJ's "rule of reason" exception, the advertising law of a Member State prevails over a "foreign" advertising campaign if: 1) the Member State's law applies equally to both domestic and imported products; and 2) the Member State's law is necessary to satisfy mandatory requirements regarding consumer protection or the fairness of commercial transactions.¹¹³ In *GB-INNO-BM*, the ECJ found, however, that because information dissemination is an essential requirement of consumer protection, the rule of reason exception cannot be invoked to justify any restrictions on information dissemination through advertising.¹¹⁴

This holding may make it easier for companies located within Member States that have liberal advertising laws to conduct pan-European advertising campaigns. This phenomenon, in turn, may encourage Member States with stricter advertising laws to conform their laws to those of Member States with more liberal advertising laws, so that companies within their borders are not disadvantaged in competition with companies from Member States with more lenient advertising regulations.

There is only a remote chance, however, that a Member State with strict advertising laws will conform its laws to the lowest common denominator. First, most Member States will decline to change their advertising laws voluntarily, on the grounds of national sovereignty. The wholesale movement of companies among Member States, based solely upon existing differences in those countries' advertising laws, simply will not

at 804.

¹¹¹ *Id.* at 812. Article 30 of the Treaty of Rome states: "Quantitative restrictions on imports and all measures having equivalent effect shall . . . be prohibited between Member States." EEC TREATY art. 30.

¹¹² *GB-INNO-BM*, 61 C.M.L.R., at 817.

¹¹³ *See id.* at 816.

¹¹⁴ *See id.*

occur because many companies, especially small, family-run businesses, find it difficult to move their operations easily. Relocating is an expensive undertaking and involves a complex decision-making process that will not be driven merely by the appeal of liberal advertising laws. Empirically, the fact that there has not been a mass exodus of companies relocating their operations to Member States, such as the United Kingdom, that have liberal advertising laws, support these arguments. If Member States will not voluntarily harmonize their advertising laws, significant differences in advertising laws will persist throughout the EU. Thus, the ECJ's ruling in *GB-INNO-BM* does not eliminate the need to harmonize advertising laws among Member States.¹¹⁵

4.2. Self-Regulation

The advertising industry has lobbied extensively for self-regulation as a means of protecting the consumer and avoiding intervention by the EU.¹¹⁶ Although the industry supports harmonization as much as the EU, it does not approve of the EU's strategy of using directives to achieve harmonization.¹¹⁷ Proponents argue that self-regulation offers the advantages of quickness, cost-effectiveness, and flexibility.¹¹⁸ Moreover, the industry believes that any EU regulation will be draconian because it will harmonize at the level of the most restrictive

¹¹⁵ Some companies will continue to have an unfair advantage due to the liberal advertising laws of the countries within which they advertise. See *supra* notes 108-12 and accompanying text.

¹¹⁶ See *Companies Fear EC Data Protection Laws May Be Too Harsh*, MARKETING WK., July 20, 1990, available in LEXIS, News Library, ASAPII File (noting that self-regulation generally is praised by the industry); *Understanding the Laws of the Lands*, *supra* note 4 (suggesting that by operating a self-regulatory code, the industry is trying to avoid EU interference).

¹¹⁷ See *Companies Fear EC Data Protection Laws May Be Too Harsh*, *supra* note 116, at 42 ("No one in the industry denies the necessity of a uniform set of guidelines across EC member states.").

¹¹⁸ Much has been written on the merits of self-regulation. For an excellent survey of the arguments in favor of self-regulation, see RIJKENS & MIRACLE, *supra* note 25, at 40-46. For a detailed analysis of the relative merits of self-regulation, private litigation, and governmental intervention as systems of regulating false advertising, see Arthur Best, *Controlling False Advertising: A Comparative Study of Public Regulation, Industry Self-*

Member State's advertising laws.¹¹⁹ As an example, proponents of self-regulation cite the draft directive on data protection and its reliance upon the highly restrictive German data protection law.¹²⁰

At least two reasons, however, combine to diminish the force of these arguments. First, the draft directive on data protection has been modified in the advertising industry's favor.¹²¹ Second, the EU has demonstrated that it is willing

¹¹⁹ Many commentators suggest that, where the primary goal of a single European market is to increase trade among Member States, EU regulations regarding trade will tend to be liberal. Many observers in the advertising industry, however, are skeptical of this argument. See Ken Gofton, *Marketing Services Sales Promotion Premiums: In Danger of Missing the Vote*, *MARKETING*, Jan. 16, 1992, at 20. The more common view within the industry is that EU advertising legislation will harmonize advertising laws at the level of the Member State with the most stringent regulations. See UNITED STATES INTERNATIONAL TRADE COMMISSION, *INDUSTRY & TRADE SUMMARY (ADVERTISING)* Oct. 1992, 1992 ITC LEXIS 644, available in LEXIS, Itrade Library, ALLITC File.

¹²⁰ See Gary Mead, *Rules Posted for the Junk Mail Merchants*, *FIN. TIMES*, Jan. 9, 1992, at 14 (noting that the original draft directive on data protection was based on restrictive German law). Germany is considered to have the strictest advertising laws within the EU. For an overview of Germany's regulatory framework, see Georg Jennes, *Germany, in ADVERTISING LAW IN EUROPE AND NORTH AMERICA*, *supra* note 7, at 151-175.

¹²¹ In reaction to the advertising industry's criticism of the draft directive on data protection as draconian, the European Parliament has recommended, and the Commission has accepted, changes to the draft directive that are favorable to the industry. See *EC Announces New Direct Marketing Proposals*, *MARKETING WK.*, Mar. 27, 1992, at 7 (correctly predicting that the Commission would accept the pro-business amendments); *Marketers Prefer EC's New Data Protection Draft*, *EUROMARKETING*, Nov. 3, 1992, available in LEXIS, News Library, ZAM1 File (commenting that the new draft directive "demonstrates what can be done through an intelligent dialogue with legislators to meet common concerns"); Louella Miles, *Feeling the Draft*, *MARKETING*, May 30, 1991, at 16 (arguing that if the draft directive was not changed, it would cripple the direct marketing industry). For an extended analysis of the draft directive, see *Opinion on the Proposed Data Base Directive*, *supra* note 18, at 3 (providing the full text of the draft directive).

Finally, the draft directive on data protection, although it relates to advertising, is not a good analogy for the proponents of self-regulation in advertising because data protection raises many issues not raised by advertising. The main concern of the Commission in enacting the draft directive on data protection was not consumer protection but rather protecting the consumers' right to privacy. Direct marketing creates the possibility of illicit use of private consumer information, a concern not typically raised by advertising. See Miles, *Marketing Services Sales*

to work with the advertising industry in the drafting of directives.¹²² The advertising industry's experience with the EU's proposed distance selling directive suggests that when the EU consults the industry, the resulting directives generally are acceptable to all parties.¹²³

The advertising industry has implemented a national self-regulatory system that encompasses the EU, primarily as a means of avoiding further EU regulation. The industry has established the European Advertising Standards Alliance ("EASA"), which incorporates the national self-regulatory

Promotion Premiums, *supra* note 99 at 25. For a discussion of these issues, see generally COLIN J. BENNETT, *REGULATING PRIVACY: DATA PROTECTION AND PUBLIC POLICY IN EUROPE AND THE UNITED STATES* (1992) (discussing data protection and its implications on privacy); DAVID H. FLAHERTY, *PROTECTING PRIVACY IN SURVEILLANCE SOCIETIES* (1989) (discussing the German, Swedish, Canadian, French, and U.S. data protection laws, the objectives of those laws, and the manner in which they were implemented); *Invasion of Privacy: When Is Access to Customer Information Foul—or Fair?*, *HARV. BUS. REV.*, Sept.-Oct. 1993, at 154, 155 (discussing the regulation of personal information).

¹²² John Mogg, Deputy Director-General for the internal market, has attempted to consult the advertising industry about new EU directives. In fact, he issued a comprehensive survey to the industry in September 1993 in an attempt to solicit industry input. See *EC Reviewing Policy on Advertising*, *supra* note 33 (noting that the Commission is reviewing advertising and sponsorship in order to define a coherent approach to EU legislation). Responses to the questionnaire are still being received and the industry believes that the results will have a significant bearing on future directives. See Lionel Stanbrook, *EC Questionnaire May Bore But It Is Fundamental*, *MARKETING*, Sept. 1, 1994, at 10.

The EU also has consulted the advertising industry in order to prepare a Green Paper, or policy statement, on commercial communications that is scheduled for completion in the near future. See Ian Arthur, *Sales Promotion—Speaking in Codes*, *MARKETING WK.*, May 7, 1993, available in LEXIS, News Library, ASAPII File. The EU's new attitude may lead regulators to take a more liberal approach to advertising and to recognize it as commercial free speech. See Drayton Bird, *EC Tunes in to Direct Marketing*, *MARKETING*, May 14, 1992, at 14 (discussing the growing cooperation between the direct marketing industry and the Commission); Wentz, *supra* note 97, at 30.

¹²³ It is interesting to note that the industry initially feared that the proposed directive on distance selling would be too restrictive because the commissioner in charge of implementing advertising directives was the same person who drew up the draft directive on data protection. See Miles, *Marketing Services Sales Promotion Premiums*, *supra* note 99, at 24. For a discussion of the reasons that the draft directive on distance selling should serve as a model for future directives, see *supra* notes 57-59 and

bodies of the Member States, to handle complaints about cross-border advertisements.¹²⁴ The EU has praised the industry's action, although the true import of the EASA is unclear.¹²⁵

Presently, a number of lobbying groups represent the advertising industry's interests.¹²⁶ The industry and its lobbyists argue that if the industry can successfully self-regulate at the national level, it can self-regulate on an international scale as well.¹²⁷ Many commentators point to the United Kingdom's system of self-regulation as a paradigm for the entire EU.¹²⁸ The advertising industry in the EU, however, cannot easily replicate the U.K. model on an international level. The United Kingdom's unique, and relatively liberal, regulatory framework operates best given the "well developed sense of fair play" that prevails in the United Kingdom.¹²⁹ In contrast, most marketers outside the United Kingdom "find it perfectly baffling that [a] U.K. sales promoter should choose voluntarily to abide by anything that

¹²⁴ See Mat Toor, *New Watchdog Puts Guard on Euro Ads*, *MARKETING*, June 4, 1992, at 12 (describing how the new system operates); *Advertising: Publicity Men Take Themselves in Hand*, *EUR. ENV'T*, June 2, 1992, available in LEXIS, World Library, ALLWLD File (noting that those supporting the EASA are promoting self-regulation over EU intervention). The EASA has members in all Member States except Denmark and Luxembourg. See *Advertisers To Check On Cross-Border Complaints*, *REUTER LIBR. REP.*, May 19, 1992, available in LEXIS, World Library, ALLWLD File.

¹²⁵ See *EC Reviewing Policy on Advertising*, *supra* note 33, at 3.

¹²⁶ See *UK: Sales Promotion Consultancies Form Lobby Group*, *MARKETING WK.*, Mar. 17, 1989, available in LEXIS, World Library, ALLWLD File (noting the formation of a new lobbying group that has the support of the Institute of Sales Promotion and the European Federation of Sales Promotion); Miles, *Marketing Services Sales Promotion Premiums*, *supra* note 99, at 24 (stating that the various lobbying groups have agreed to speak with one voice).

¹²⁷ See *EC Reviewing Policy on Advertising*, *supra* note 33, at 2.

¹²⁸ See *Companies Fear EC Data Protection Laws May Be Too Harsh*, *supra* note 116 (commenting that the English system is the most favored for use in the EU). For an overview of the English system, see Stephen Groom et al., *United Kingdom*, in *ADVERTISING LAW IN EUROPE AND NORTH AMERICA*, *supra* note 7, at 287-315. The English framework has been described as "one of patchy legal controls alongside and in some cases overlapping with a not-so-seamless web of advertising regulations and Codes emanating from a wide range of statutory, quasi-statutory and voluntary bodies." *Id.* at 287.

¹²⁹ Faith Legh, *Will the Great British Freebie Bite the Dust?*, *TIMES*, May 10, 1993, available in LEXIS, World Library, ALLWLD File.

does not have the force of law.”¹³⁰ Implementing rules that carry the force of law on an EU-wide basis will more effectively protect honest advertisers from competitors who either are unaccustomed to self-regulation or do not adhere to the spirit of fair play that makes self-regulation possible.

The advertising industry’s promotion of self-regulation as an alternative to EU regulation is shortsighted for other reasons as well. Because self-regulation does not carry the force of law, many parties perceive self-regulation as too lax.¹³¹ For instance, consumers may believe that a code of practice drafted and policed by the advertising industry itself would sacrifice consumer protection for the sake of the industry.¹³² This perception would be detrimental to the advertising industry, as it would foster consumer distrust of advertising companies and detract from the overall effectiveness of advertising campaigns.¹³³ In fact, increased

¹³⁰ *Id.* For example, a French promotions consultant commenting on the United Kingdom stated: “It’s much easier here if it is not specifically forbidden, you can do anything you like!” *Id.* It will be nearly impossible to overcome this attitude in the vast majority of Member States that are unaccustomed to a self-regulatory system. Furthermore, the forced imposition of such a system could be damaging to the advertising industry as a whole because many advertisers might not truly respect a self-regulatory code. Even a few “bad apples” might damage the entire industry’s reputation. This may, in turn, cause consumer groups to seek strict government regulation of the advertising industry. *See infra* notes 126-29 and accompanying text.

¹³¹ *See* RIJKENS & MIRACLE, *supra* note 25, at 42. A survey of U.S. consumer attitudes about advertising regulation revealed that 59% of those polled thought that the government did not regulate advertising enough. *See Best, supra* note 118, at 9. This figure may be even higher in the EU because the United States already has much more government regulation (although it is not necessarily more restrictive) than most of the Member States of the EU. *See id.*

¹³² An advertising executive commented: “We must be responsible. There is no benefit in winning a war that the ordinary consumer doesn’t think we deserve to win.” Gofton, *supra* note 119, at 20 (quoting Ian Arthur, deputy chairman of Tim Arnold and Associates, which represents the U.K.’s Institute of Sales Promotion on the European Federation of Sales Promotion).

¹³³ Evaluating the effectiveness of advertising campaigns generally is beyond the scope of this Comment. It is logical, however, to think that a consumer who has a negative opinion of the advertising industry will be less likely to lend credence to advertisements created by the industry and also will be less likely to purchase products based solely upon advertising claims. For a general discussion of the impact of advertising on the consumer, see

consumer dissatisfaction with the advertising industry may translate into increased consumer protection activity and stricter government regulation of the industry.¹³⁴ These negative effects would impact both the advertising industry itself as well as businesses that employ advertising companies.

Self-regulation will not ensure a high degree of consumer protection unless it adequately polices the advertising industry and imposes substantial penalties on wrongdoers. Even if self-regulation eventually succeeds in increasing consumer protection, however, consumer disaffection with the advertising industry will not disappear quickly, especially if consumer groups react to the lack of substantive government regulation before the advertising industry has had time to increase consumer confidence. The EU believes self-regulation by the advertising industry is not as effective as external regulation because self-regulation lacks deterrent effect and the requisite public transparency.¹³⁵

Additionally, self-regulation is problematic because it is an inefficient way to harmonize the laws of the Member States. Such inefficiency would prevent the advertising industry from realizing the full benefits of harmonization.¹³⁶ Also, as self-regulation lacks the force of law, nothing prevents a Member State from ignoring the wishes of the advertising industry. For example, if the industry approved the use of comparative advertising, it is unlikely that Germany voluntarily would repeal its long-standing ban on comparative advertising.

Self-regulation can effectively control certain industries.¹³⁷ Advertising, however, is unique, as it permeates everyday existence in a more visible and thorough

¹³⁴ See *Companies Fear EC Data Protection Laws May Be Too Harsh*, *supra* note 116 ("If the public is assured of adequate protection, it can only become better disposed towards an industry that has received its fair share of bad publicity.").

¹³⁵ Written Question No. 2808/92 by Mrs. Mary Banotti (PPE) to the Commission of the European Communities, 1993 O.J. (C 137) 10-11 ("The Commission has repeatedly stated that self-regulatory measures are not as effective as statutory measures.").

¹³⁶ For a discussion of the benefits of harmonization, see *supra* notes 105-10 and accompanying text.

¹³⁷ This Comment does not argue that all industries are incapable of self-regulation. Rather, this Comment analyzes the effectiveness of self-regulation as practiced in the advertising industry only.

way than almost any other industry.¹³⁸ Due to the sheer volume of advertisements to which the consumer is exposed and the acknowledged impact of advertising on the consumer, the advertising industry may require more stringent control than self-regulation can provide.

5. A PROPOSED MODEL FOR ADVERTISING REGULATION IN THE EU

A comprehensive advertising plan for the EU should address the following concerns: 1) ensuring consumer protection; 2) not unduly inhibiting the advertising industry; 3) maintaining cost-effectiveness; and 4) harmonizing advertising laws among Member States. A comprehensive advertising plan, however, also should tolerate minor differences in Member States' laws that exist due to overriding cultural factors.

These objectives can best be met through a system that employs the continued use of EU directives, drafted with assistance from the advertising industry. As long as self-regulation does not conflict with EU directives, self-regulation can be viewed simply as another layer of consumer protection and can act as a model for subsequent EU directives.¹³⁹ As demonstrated by the proposed directive on distance selling, if the advertising industry works with the EU, the resulting directives will acknowledge the industry's interests as well as protect consumers.¹⁴⁰

Much of the groundwork for a series of comprehensive EU directives on advertising already has been completed. The

¹³⁸ Individuals are inundated with advertisements on a daily basis. For instance, the average U.S. adult is exposed to 3,000 marketing messages a day. See *What Happened to Advertising?*, BUS. WK., Sept. 23, 1991, at 66, 68. Although this figure applies to U.S. consumers only, the volume of advertising in the EU has been growing at a faster rate than in the United States; thus, statistics regarding advertising exposure in the EU may be comparable to those in the United States. See *id.* at 72.

¹³⁹ It is common for a country to employ both self- and government regulation to monitor an industry. For instance, the United States combines self- and government regulation to monitor its advertising industry. See generally Maxeiner, *supra* note 9, at 317-49 (giving an overview of advertising regulation in the United States).

¹⁴⁰ For a discussion of the proposed distance selling directive, see *supra*

advertising industry itself has established a code of practice¹⁴¹ and the ICC also has an influential code of practice.¹⁴² The Commission can draw upon these two sources for future directives, thereby reducing the costs associated with drafting wholly new directives. The Commission also can draw from the advertising laws of individual Member States and can consult the advertising industry for regulatory suggestions. In fact, the Commission already has requested that the advertising industry draft a uniform code on direct marketing techniques, which may be a prelude to future EU regulation in this area.¹⁴³ If this code proves suitable to both the EU and the advertising industry, then all the EU must do to legitimize it is to issue a directive giving the draft code the force of law.

By legislating through the use of directives, as opposed to regulations,¹⁴⁴ the EU can accommodate minor differences in the advertising laws of each Member State where maintaining such differences is necessary to preserve a Member State's cultural integrity. For example, in controversial areas like the advertising of contraceptives and the use of nudity on television, the EU should permit each Member State to regulate as it sees fit. Minor differences in an otherwise uniform body of advertising law need not create new problems for the advertising industry, particularly when the industry

¹⁴¹ See *supra* note 128 and accompanying text.

¹⁴² See Peter Schotthöfer, *International Treaties and Advertising*, in *ADVERTISING LAW IN EUROPE AND NORTH AMERICA*, *supra* note 7, at 365-72 (providing the text of the ICC International Code of Advertising Practice). The ICC also has developed codes relating specifically to marketing research, sales promotion, direct mail, and direct sales. See *id.* at 365.

¹⁴³ See Arthur, *supra* note 122.

¹⁴⁴ Article 100 of the original EEC Treaty permits the harmonization of laws through the use of directives only. See EEC TREATY art. 100. Article 100a of the Maastricht Treaty modified Article 100 by permitting the use of regulations as well, but the EU has not yet attempted to harmonize Member States' laws through the use of regulations. See Maastricht Treaty, *supra* note 2, at 32; see also BERMANN ET AL., *supra* note 8, at 117-18 (noting that Article 184 of the EEC Treaty allows an indirect challenge to a regulation even after the time for bringing a direct challenge has expired). For a discussion of the difference between regulations and directives, see *supra* note 6. See also David Anderson, *Inadequate Implementation of EEC Directives: A Roadblock on the Way to 1992?*, 11 B.C. INT'L & COMP. L. REV. 91, 92 (1988) (noting that directives are a "more flexible and less controversial means of legislative change").

already must account for such differences in order to advertise on a pan-European basis.

Finally, future advertising directives should require Member States to use their existing courts or administrative agencies to resolve disputes, as the Misleading Advertising Directive currently provides.¹⁴⁵ Such private enforcement action will help protect consumers.¹⁴⁶ Further, the use of existing adjudicatory structures will minimize the costs of implementing new EU directives. The combination of self-regulation, government regulation through EU directives, and private adjudication will protect both consumers and industry competitors from the effects of unfair and misleading advertising.

Several advantages make this proposed regulatory framework preferable to either industry self-regulation or to the current regulatory system. First, EU directives carry the force of law. Adhering to these directives will lend credibility to the advertising industry, helping it to maintain good consumer relations. Second, a series of comprehensive EU directives will harmonize almost completely advertising laws among Member States.¹⁴⁷ Increased harmonization will eliminate confusion about the applicable law within each Member State, which will more easily permit pan-European advertising campaigns.¹⁴⁸ Finally, an increase in pan-

¹⁴⁵ See *supra* notes 25-30 and accompanying text.

¹⁴⁶ The United States grants a cause of action to an injured consumer. See Lanham Trademark Act of 1946, § 43(a), 15 U.S.C. § 1125(a) (1988). Germany goes so far as to allow the recovery of legal costs to the complainant even where no proceedings result. See Jenness, *supra* note 120, at 151.

¹⁴⁷ Directives will more effectively harmonize advertising law within the EU than would industry self-regulation. See *supra* note 130 and accompanying text.

¹⁴⁸ See *supra* notes 108-12 and accompanying text. Pan-European advertising campaigns are not yet widespread, in part due to the inconsistencies in Member States' advertising laws. See, e.g., Ali Qassim, *Marketing Week Report on Direct Marketing—A New Direction To European Relations*, *MARKETING WK.*, Apr. 6, 1990, at 55, available in, LEXIS, World Library, ALLWLD File (describing pan-European marketing as a concept touted by U.S.-owned agencies that think Europe is one big country); Philip Rawstorne, *International Direct Marketing; Entering a New Era*, *FIN. TIMES*, Apr. 27, 1989, at 41 (noting that pan-European direct marketing campaigns are still relatively rare); cf. *Single Market*, *supra* note 3 (noting that Nestle S.A. has been using pan-European campaigns for years).

European advertising resulting from harmonization will help advance the goal of creating a common European market. Harmonization will promote the use of pan-European advertising campaigns by making them easier to conduct, which will increase the flow of goods across borders and make the EU a true union rather than a loosely-organized federation of Member States.¹⁴⁹

6. CONCLUSION

Both the EU and the advertising industry recognize the value of harmonizing advertising laws among Member States as a means of promoting the international flow of goods and creating a common European market. The use of EU directives to achieve this result is preferable to either self-regulation by the advertising industry or the current regulatory system. First, many companies may not consent to self-regulation, which may lead to flagrant abuses of the system. Also, consumers tend to view self-regulation as lax and to believe that the advertising industry, if left to its own devices, will not sufficiently protect consumer interests. If the

Once Member States' advertising laws have been harmonized, the use of pan-European advertising campaigns is likely to increase as they are quite cost-effective. For the prospects of the increasing use of pan-European campaigns, see *Will the Single Market Open the Door for Euro Direct Marketing?*, *MARKETING*, Apr. 24, 1989, available in LEXIS, World Library, ALLWLD File (commenting that many clients are interested in building pan-European data bases in order to conduct Europe-wide campaigns); cf. *Single Market*, *supra* note 3 (noting that it is essential for an international advertiser to avoid becoming "Euro-bland" by trying to appeal to too wide a market).

¹⁴⁹ Some marketing executives have indicated that they see the dawning of a "Euroconsumer" among people who travel regularly (e.g., business travelers) and who want to find the same sorts of products at home that they enjoy abroad. See *Targeting the International Consumer*, *MARKETING*, June 3, 1993, at 30 (noting that theater, music, and sports cross borders and link groups of consumers together under one culture). But see William Dullforce, *International Direct Marketing: Largely Unchartered Territory Ahead*, *FIN. TIMES*, Apr. 18, 1990, at 15 (arguing that the "Euroconsumer," who travels regularly and desires "foreign" amenities at home, is still "a fringe development"). Some commentators have proposed a theory of "global homogenization," whereby advances in communication and travel drive consumers toward identical consumption preferences. See generally, Theodore Levitt, *The Pluralization of Consumption*, *HARV. BUS. REV.*, May-June 1988, at 7 (discussing how consumption patterns are driven simultaneously to both standardization and pluralization).

advertising industry fails to protect consumers adequately through self-regulation, the EU may respond by drafting more stringent provisions to govern the industry than would result if the industry initially had cooperated with the EU in drafting directives. The advertising industry has substantial lobbying power and this fact, combined with a more enlightened approach to advertising by the EU, has resulted, and will continue to result, in fairer and more liberal advertising laws. In drafting its three proposed advertising directives, the EU has demonstrated its sensitivity to the advertising industry's interests.

Future EU directives should attempt to harmonize Member States' advertising laws as completely as possible. The EU can rely upon several sources when drafting advertising directives, including existing codes of practice, current advertising laws within the Member States, and consultations with the advertising industry itself. The EU should permit the advertising industry to self-regulate so long as self-regulation does not conflict with existing or prospective EU directives. The EU should require Member States to use their existing administrative and legal structures to adjudicate disputes regarding unfair or misleading advertising. This interlocking framework of EU directives, industry self-regulation, and private enforcement action will most effectively protect consumers.