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Cross-border Comparative Advertising in the European Union

INTRODUCTION

Comparative advertising is a sales promotion device that compares products or services.¹ It can be a useful source of information to the consumer, as well as an effective promotional tool for the advertiser.² Although a widely accepted practice in the United States, several European Union [EU] Member States consider it in bad taste and unnecessarily violative of the competitor.³ Therefore, they either ban or restrict the practice of comparative advertising.⁴ The European Commission [Commission]⁵ has been trying to change this attitude.⁶

A primary reason for creating the EU was to develop a Single Market. As the EU succeeds in eliminating most other non-tariff barriers to intra-EU trade, national differences in non-harmonized areas come into the foreground as potential and significant obstacles to pan-European marketing and, thus, to the achievement of a Single Market.⁷ Likewise, the differences in Member States's advertising laws could emerge as obstacles to pan-European marketing.⁸ If some Member

¹ Opinion on the Amended Proposal for a Council Directive concerning Comparative Advertising and Amending Directive 84/450 concerning Misleading Advertising, 1992 O.J. (C 49) 35, 35 [hereinafter Opinion on Amended Proposal].

² See *id.*

³ See Diane Summers, *Light Touch in Battle for Brands*, FIN. TIMES, Mar. 31, 1994 at 17 [hereinafter Summers, *Light Touch in Battle for Brands*].

⁴ See *id.*; see also Amended Commission Proposal for a European Parliament and Council Directive concerning Comparative Advertising and Amending Directive 84/450 concerning Misleading Advertising, 1994 O.J. (C 136) 4, 5 [hereinafter Amended Proposal]. See discussion *infra* Part II for examples of restrictive national policies.

⁵ The Commission is the supranational governing body of the EU and represents all the Member States. See D. LASOK & J.W. BRIDGE, AN INTRODUCTION TO THE LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES 105-09 (1973). The Commission is made up of 17 members appointed by the governments of the Member States. See *id.* It is the executive body of the EU government and chief policy maker. See *id.*

⁶ See Opinion on Amended Proposal, *supra* note 1, at 35.

⁷ See *Commission to Issue Green Paper on Cross-Border Promotion Methods*, Eurowatch, Vol. 6, No. 2, Apr. 18, 1994, available in LEXIS, Int'l Library, Europe File [hereinafter *Commission to Issue Green Paper*].

⁸ See *Awaiting Commission's Green Paper in European Community*, Economist Intelligence Unit,

States allow comparative advertising and others do not, the effect is a restriction upon advertising and upon the free movement of goods.⁹ A company with a comparative advertisement may choose not to run it at all in a Member State that prohibits comparative advertising, thereby reducing the product's marketability and the level of imports and trade into that nation.¹⁰ Such restrictive laws amount to trade barriers.¹¹ Meanwhile, "the increased supply and demand triggered by the opening of borders will mean greater use of advertising for product promotion" and should ultimately lead to the increased influx of goods into other Member States.¹²

The Commission has recently launched steps to lift remaining and potential trade barriers in hopes of achieving a legal situation that respects the sovereignty of Member States, while maintaining the EU goal of the free movement of goods across national borders.¹³ One such effort is the Amended Commission Proposal for a European Parliament and Council Directive concerning Comparative Advertising and Amending Directive 84/450 concerning Misleading Advertising [Amended Proposal].¹⁴ If the Commission adopts the Amended Proposal as a directive, Member States will have to change their existing laws with respect to cross-border comparative advertising.¹⁵

This Note considers the status of EU law on comparative advertising in light of European Court of Justice [ECJ] decisions and further addresses the need for a directive as an embodiment of a cohesive policy on comparative advertising. Part I evaluates the background

Bus. Eur., Mar. 28, 1994, available in LEXIS, World Library, Allnws File [hereinafter *Awaiting Green Paper*]; see also, *Commission to Issue Green Paper*, *supra* note 7.

⁹ See Case C-362/88, GB-INNO-BM v. Confédération du commerce luxembourgeois, 1990 E.C.R. 667, 676, 61 C.M.L.R. 801 (1991-92); see also, *Germany—Advertising Regulations*, 1993 National Trade Data Bank, Market Reports, Nov. 16, 1993, available in LEXIS, Int'l Library, Europe File [hereinafter *Germany—Advertising Regulations*].

¹⁰ See *INNO*, 1990 E.C.R. at 676; *Germany—Advertising Regulations*, *supra* note 9. Often, differing national standards for comparative advertising make advertising campaigns across borders near impossible. For example, the US media welcomed a Pepsi-Cola advertisement which compared itself to Coca-Cola, but Pepsi had to modify the advertisement several times to eliminate the word "Coca-Cola" in several EU Member States. *Coke Lawsuit Forces Pepsi Ad Off the Air in Italy*, Euromarketing, vol. 6, no. 41, Jun. 29, 1993, available in LEXIS, News Library, Zwd1d File [hereinafter *Coke Lawsuit Forces Pepsi Off the Air*]. Italy banned the advertisement altogether. *Id.*

¹¹ See *INNO*, 1990 E.C.R. at 677.

¹² See Opinion on Amended Proposal, *supra* note 1, at 35.

¹³ See Amended Proposal, *supra* note 4; *Commission to Issue Green Paper*, *supra* note 7; *Awaiting Green Paper*, *supra* note 8.

¹⁴ Amended Proposal, *supra* note 4.

¹⁵ Winfried Tilmann, *Cross-Border Comparative Advertising*, 25 INT'L REV. INDUS. PROP. & COPYRIGHT LAW 333, 333 (1994).

events leading to the Amended Proposal. Part II discusses the status of the comparative advertising law in various Member States. Part III analyzes the specific provisions of the Amended Proposal. Part IV addresses whether the Amended Proposal, if adopted as a directive will conflict with the idea of subsidiarity espoused by the Maastricht Treaty and concludes that the concept of subsidiarity should be subordinate to the greater EU objective of the achievement of a Single Market. Part IV also addresses the legality of the Amended Proposal with respect to whether restrictions placed by Member States on comparative advertising conflict with article 30 of the Maastricht Treaty in light of recent ECJ decisions. It concludes that the ECJ's rulings demonstrate a slant towards the harmonization of Member States's laws on comparative advertising and that the rulings will have an effect equivalent to that of the Amended Proposal once parties bring their disputes before the ECJ.

I. BACKGROUND OF THE AMENDED PROPOSAL TO THE DIRECTIVE ON COMPARATIVE ADVERTISING

EU advertising legislation began in 1978 with the Misleading Advertising Directive that merely ensured that advertising does not mislead consumers.¹⁶ Initially, article IV of the Directive on Misleading Advertising authorized comparative advertising.¹⁷ Although the European Parliament supported that directive, one Member State opposed the provision on comparative advertising and the Commission dropped it from the directive.¹⁸ The Commission instead adopted Directive 84/450/EEC on misleading advertising, leaving out provisions regarding comparative advertising.¹⁹ In 1991, the Commission published a new draft directive on comparative advertising²⁰, and on April 21, 1994, the Commission published the Amended Proposal which included provisions allowing comparative advertising.²¹ Due to the tension cre-

¹⁶ See Commission Draft Directive on Misleading and Unfair Advertising, 1978 O.J. (C 70) 4; see also, *EC Reviewing Policy on Advertising*, Bus. Eur., Apr. 12, 1993, available in LEXIS, Int'l Library, Europe File [hereinafter *EC Reviewing Policy on Advertising*].

¹⁷ Opinion on Amended Proposal, *supra* note 1, at 35.

¹⁸ See *id.*

¹⁹ Council Directive Relating to the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Misleading Advertising, 84/450, 1984 O.J. (L250) 20 [hereinafter *Misleading Advertising Directive*].

²⁰ Proposal for a Council Directive Concerning Comparative Advertising and Amending Directive 84/450 Concerning Misleading Advertising, COM(91)147 final at 343.

²¹ See Amended Proposal, *supra* note 4, at 5. See discussion *infra* Part III. Article 189 of the Treaty Establishing the European Community explains that a directive requires each Member

ated by conflicting national laws, the Commission had trouble obtaining consensus among the Member States and therefore, the Commission has not yet passed the Amended Proposal as a directive.²²

II. DIFFERING COMPARATIVE ADVERTISING LAWS OF EU MEMBER STATES

The Preamble of the Amended Proposal stresses the importance of the achievement of a cohesive internal market. It also presents, however, the difficulties in achieving a unified European Market, with respect to comparative advertising.²³ The Preamble states, in pertinent part:

Whereas the laws, regulations and administrative provisions of the Member States concerning comparative advertising differ widely; whereas advertising reaches beyond the frontiers and is received on the territory of other Member States; whereas the acceptance or non-acceptance of comparative advertising according to the various national laws may constitute an obstacle to the free movement of goods and services and create distortions of competition. . . .²⁴

Two thirds of EU countries restrict or ban comparative advertising.²⁵ The disparity in treatment of comparative advertising results from the different rules and traditions each country espouses regarding unfair competition in general.²⁶ Some Member States oppose comparative advertising because of the adverse press it gives competitors and because it creates an opportunity to reap a benefit at a competitor's expense.²⁷ Furthermore, opponents of comparative advertising not only believe it encourages misrepresentation, but also that it takes away

State to enact legislation that will produce the desired results. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY art. 189 [hereinafter EEC TREATY].

²² See generally, Tilmann, *supra* note 15, at 333; see also *Commission to Issue Green Paper*, *supra* note 7.

²³ See Amended Proposal, *supra* note 4, at 5.

²⁴ See *id.*

²⁵ See *Coke Lawsuit Forces Pepsi Ad Off the Air*, *supra* note 10.

²⁶ Theo Bodewig, *The Regulation of Comparative Advertising in the European Union*, 9 TUL. EUR. & CIV. L. F. 179, 190 (1994).

²⁷ See Opinion on Amended Proposal, *supra* note 1, at 35-36; UK: *Government Comparative Ad Plans Run into Tory Rebel Troubles*, Reuter Textline Campaign, Feb. 25, 1994, available in LEXIS, Int'l Library, Europe File [hereinafter UK: *Government Comparative Ad Plans Run into Tory Rebel Troubles*].

from the quality of the products advertised because the marketing is not done on the product's merits but rather on highlighting the faults of another.²⁸

On January 18, 1992, the French amended their civil code to allow comparative advertising as long as it is "fair, true, objective and not misleading to consumers."²⁹ In the United Kingdom (UK), the New Trademark Act of 1994 covers comparative advertising in that it allows the use of trademarks in comparative advertising as long as the advertisement complies with "honest practices in industrial or commercial matters."³⁰ The law limits comparative advertising in that it allows mention of a rival product in advertisements only when the competitor has given its permission.³¹

The Benelux³² countries view comparative advertising as an infringement upon trademark rights and therefore forbid it.³³ The Benelux Uniform Trademark Act considers comparative advertising an infringement of the exclusive trademark rights of the owner of the trademark.³⁴ Belgium prohibits advertising that is misleading and disparaging.³⁵ In Belgium, a 1991 law prohibits comparative advertising where the other vendor is identifiable.³⁶ In the Netherlands, no outright prohibition of comparative advertising exists; the law only prohibits disparaging and misleading advertising.³⁷ The Netherlands, however, complies with the Benelux Uniform Trademark Act which forbids the use of another's trademark in advertising.³⁸

Italy does not prohibit comparative advertising, as long as it is not misleading.³⁹ Spain adopted a more lenient position. Article 10 of its 1991 Law on Unfair Competition allows some comparative advertising but "forbids comparisons that relate to factors that are not similar,

²⁸ See UK: *Government Comparative Ad Plans Run into Tory Rebel Troubles*, *supra* note 27.

²⁹ *France—Advertising Services*, 1994 National Trade Data Bank, Market Reports, Jan. 14, 1994, available in LEXIS, Int'l Library, Europe File [hereinafter *France—Advertising Services*].

³⁰ See Bodewig, *supra* note 26, at 198.

³¹ See *id.*

³² Benelux is the common name for the three countries of Belgium, the Netherlands, and Luxembourg.

³³ See Tilmann, *supra* note 15, at 334.

³⁴ Benelux Uniform Trademark Act, art. 31 (a) (1), (2).

³⁵ Art. 32 no. 2 Law on Commercial Practices (1991).

³⁶ *Id.* If the Commission adopts the Amended Proposal as a directive, Belgium necessarily would have to change its law. See Bodewig, *supra* note 26, at 192.

³⁷ Art. 6: 163 j Burgerlijk Wetboek.

³⁸ Bodewig, *supra* note 26, at 194.

³⁹ See Art. 2598 no. 2 Codice Civile.

relevant or comparable."⁴⁰ In contrast, Portugal allows, but strictly limits, the practice of comparative advertising.⁴¹ In 1991, Greece similarly adopted a Consumer Protection Law that allows the limited use of comparative advertising.⁴² Denmark generally allows comparative advertising provided that it is not misleading or disparaging.⁴³

German law espouses one of the most restrictive national policies against comparative advertising, and provides an illustrative example of the conflicts that can arise due to the divergent laws on comparative advertising.⁴⁴ Under §§ 1 and 3 of the Law Against Unfair Competition, Germany limits comparative advertising to cases where the advertiser can invoke a "sufficient" or legitimate reason for using it and the advertisement is restricted to true and objective information and does not go beyond what is necessary.⁴⁵ Such a strict law produces conflict when companies from other Member States try to advertise in Germany. For example, price comparisons in print advertisements were illegal in Germany.⁴⁶ Due to a recent ECJ ruling, however, Germany must now allow such price comparisons for other EU companies advertising within its borders.⁴⁷ Due to the conflict between Germany's desire to keep its restrictive law, and the EU's inclination towards relaxing its laws regarding comparative advertising, German national companies suffer while other EU member companies benefit.⁴⁸

Part III. THE AMENDED PROPOSAL TO THE DRAFT DIRECTIVE ON COMPARATIVE ADVERTISING

The text of the Amended Proposal attempts to harmonize the differing laws of the Member States by allowing comparative advertising under certain conditions.⁴⁹ The Commission broadly defines comparative advertising, as "any advertising which explicitly or by implication identifies a competitor or goods or services of the same kind offered

⁴⁰ See Art. 10 no. 1,2, Art. 7 and Art. 9 Law no. 3/1991 of Jan. 10, 1991 on Unfair Competition, B.O.E. No. 10, Jan. 11, 1991; Art. 6 (c) Law No. 341988 of Nov. 11, 1988, B.O.E. no. 274 Nov. 15, 1988.

⁴¹ Bodewig, *supra* note 26, at 197.

⁴² See *id.*

⁴³ See *id.* at 195.

⁴⁴ See generally, *Germany—Advertising Regulations*, *supra* note 9; Tilmann, *supra* note 15, at 335.

⁴⁵ Bodewig, *supra* note 26, at 193.

⁴⁶ See *Germany—Advertising Regulations*, *supra* note 9.

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ See Amended Proposal, *supra* note 4, at 5–8.

by the competitor.”⁵⁰ The preamble states the Commission’s objectives. First, the Commission emphasizes the value of better information for consumers.⁵¹ Second, the Commission values strengthening competition, which would benefit both the consumer and the advertiser.⁵² Finally, the Commission seeks to harmonize the laws of the Member States in order to achieve the development of a Single Market.⁵³ The Commission balances these goals with the need for the protection of consumers against deception and competitors against disparagement.⁵⁴ Member States must permit comparative advertising and not regulate it more stringently than would the Amended Proposal.

Under the Amended Proposal, comparative advertising shall be allowed “only provided that it objectively compares the material, relevant, always verifiable, fairly chosen and representative features of competing goods and services.”⁵⁵ The advertisement must not create the risk of confusion between the advertiser and a competitor or between the advertiser’s trade marks, trade names, other distinguishing marks, goods or services of those of a competitor.⁵⁶ It must not refer to the personality or personal situation of a competitor.⁵⁷ The Commission, through the Amended Proposal, seeks to preserve the dissemination of information to consumers, yet seeks to diminish the risk of misrepresentation by eradicating its negative characteristics, such as the comparison of dissimilar goods.⁵⁸

The provisions of the Amended Proposal are rather vague, however, and thus, if passed as a directive, will allow the Member States to continue with their national laws until they are tested in the courts.⁵⁹ Further litigation in the ECJ will bring more definition to the law. Thus far, the ECJ has demonstrated its tendency to emphasize harmonization and the goal of creating a Single Market by consistently allowing comparative advertising.⁶⁰

⁵⁰ See *id.* at 5.

⁵¹ See *id.*

⁵² See *id.*

⁵³ See *id.*

⁵⁴ See Amended Proposal, *supra* note 4, at 5.

⁵⁵ *Id.* at 7.

⁵⁶ See *id.* at 8.

⁵⁷ *Id.*

⁵⁸ See Opinion on Amended Proposal, *supra* note 1, at 35–36.

⁵⁹ See Bodewig, *supra* note 26, at 208.

⁶⁰ See Case C-362/88, GB-INNO-BM v. Confederation du commerce luxembourgeois, 1990 E.C.R. 667, 676, 61 C.M.L.R. 801 (1991–92); see also Case C-126/91, Schutzverband gegen Unwesen in der Wirtschaft eV v. Yves Rocher GmbH, 1993 O.J. (C 172) 6.

IV. DISCUSSION

A. WOULD THE ADOPTION OF THE PROPOSED AMENDMENT TO THE DIRECTIVE ON COMPARATIVE ADVERTISING CONFLICT WITH THE EU CONCEPT OF SUBSIDIARITY?

Subsidiarity is a central tenet of The Maastricht Treaty on European Union.⁶¹ The Maastricht Treaty provides that

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.⁶²

According to this principle of subsidiarity, EU institutions should not act, even when permitted, if they could serve their objectives at or below the Member State level.⁶³ Subsidiarity is designed to ensure that the Commission does not needlessly trample upon the sovereignty of each Member State.⁶⁴ The values placed on sovereignty and self-determination of the Member States are not without costs inherent in the principle of subsidiarity. Such costs include the possible impairment of a common internal market and, more generally, its interference with the efficient attainment of the Community's substantive policy goals.⁶⁵

To determine if a Commission action complies with the idea of subsidiarity, the Commission weighs the objectives of the differing national laws against the desired EU objective.⁶⁶ Member States seek to limit comparative advertising due to a belief that it is "more likely to add to the sum of disinformation being showered on consumers than the sum of worthwhile information that the consumer needs for forming a judgment and a choice."⁶⁷ In contrast, the Commission seeks to

⁶¹ Treaty of the European Union & Final Act, 7 Feb. 1992, 31 I.L.M. 247 [hereinafter Maastricht Treaty]; see also, George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 332, 334 (1994).

⁶² Maastricht Treaty, *supra* note 61, art. 3b.

⁶³ See Bermann, *supra* note 61, at 334.

⁶⁴ See *id.*

⁶⁵ See *id.* at 336.

⁶⁶ See UK: *Government Comparative Ad Plans Run into Tory Rebel Troubles*, *supra* note 27.

⁶⁷ See *id.*

encourage comparative advertising, claiming that the right to consumer protection and information includes, “. . .the right to information [as] among the basic rights of consumers. . .”⁶⁸ Furthermore, the Commission states that, “. . .comparative advertising, when it compares details that are relevant, always verifiable and neither misleading nor unfair, may be a legitimate means of informing consumers to their advantage. . .”⁶⁹

Article 129 (a) of the Maastricht Treaty expressly limits the EU's ability to promote consumer protection unless the EU action “supports and supplements the policy pursued by the Member States.”⁷⁰ In *Verband Sozialer Wettbewerb eV v. Clinique Laboratories SNC and Estee Lauder Cosmetics GmbH*, the ECJ focused on the interpretation of articles 30⁷¹ and 36 of the Maastricht Treaty with regard to the prohibited use of a cosmetic product name liable to mislead consumers.⁷² In this case, the German government accused Estee Lauder Cosmetics of misleading advertising.⁷³ The German government felt that the name of the company and its products, “Clinique,” was too similar to the word for “clinic” in German and therefore connoted medical qualities.⁷⁴

The ECJ ruled that prohibiting the use of the name “Clinique” was not necessary for consumer protection.⁷⁵ The ECJ interpreted article 30 as precluding national measures that prohibit the importation and marketing of products classified and packaged as cosmetics on the ground that the product bears the name “Clinique.”⁷⁶ In dicta, however, the Court stated that individual Member States are charged with deciding the degree of protection necessary, even though the rules adopted may create trade barriers.⁷⁷ The case noted one of the main

⁶⁸ See Amended Proposal, *supra* note 4, at 5.

⁶⁹ See *id.*

⁷⁰ See Bermann, *supra* note 61, at 346 n.46.

⁷¹ Article 30 of the Maastricht Treaty provides, in pertinent part, that “quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice . . . be prohibited between the Member States.” Maastricht Treaty, *supra* note 61, art. 30.

⁷² See Case 315/92, *Verband Sozialer Wettbewerb eV v. Clinique Laboratories SNC and Estee Lauder Cosmetics GmbH*, 1994, available in LEXIS, Int'l Library, Eccase File, at 3.

⁷³ See *id.* at 3-4.

⁷⁴ See *id.* at 3. The plaintiff, a German association that had standing to bring legal proceedings with a view to securing the enforcement of the German law against unfair competition, claimed that a proportion of the sector of the market concerned might attribute prophylactic or curative medical effects to the “Clinique” range of cosmetics. See *id.*

⁷⁵ See *id.* at 14.

⁷⁶ See Case 315/92, *Verband Sozialer Wettbewerb eV v. Clinique Laboratories SNC and Estee Lauder Cosmetics GmbH*, 1994, available in LEXIS, Int'l Library, Eccase File, at 14.

⁷⁷ See *id.* at 5-7.

tenets behind the principle of subsidiarity: that although there may be specific differences in linguistic, social and cultural conditions that mislead consumers in one country but not in another, it remains primarily a matter for national legislatures to determine the level of protection desired in each country.⁷⁸ The Commission may impose rules and standards on the Member States, but only in a very general manner.⁷⁹

On the other hand, “[u]nder article 100A of the Single European Act, the Commission may impose regulations which are necessary to further the EU’s progression toward complete integration.”⁸⁰ The Amended Proposal is a way of harmonizing existing EU law in a manner that will avoid barriers to trade.⁸¹ If the principle of subsidiarity protects the many differing national restrictions, it is doubtful that progression towards a Single Market is possible.⁸² According to a British Advertising Association’s expert on Europe, “. . . subsidiarity could prove to be the fatal catch—all excuse for the maintenance of national trade protection.”⁸³

Subsidiarity alone, however, cannot be the sole justification for not implementing the Amended Proposal.⁸⁴ The objectives of the Amended Proposal are consistent with the main principle behind the concept of a Single Market: reduced barriers to trade.⁸⁵ Subsidiarity itself should be secondary to that prime objective. The EU institutions exist to act in situations where Member States’s legislation acts contrary to the aims of the Single Market.⁸⁶ Some degree of sovereignty must be sacrificed in order to achieve the ultimate goal of the Single Market.⁸⁷

The scope of the Amended Proposal, if adopted as a directive, could be reduced substantially to comply with the concept of subsidiarity.⁸⁸

⁷⁸ See *id.* at 7.

⁷⁹ See *id.*

⁸⁰ Jennifer A. Lesny, *Tobacco Proves Addictive: The European Community’s Stalled Proposal to Ban Tobacco Advertising*, 26 VAND. J. TRANSNAT’L L. 149, 160 (1993–94).

⁸¹ See *id.*

⁸² See Diane Summers, *Breaking Down Euro-Barriers*, FIN. TIMES LTD., Mar. 17, 1994, available in LEXIS, Int’l Library, Europe File [hereinafter Summers, *Breaking Down Euro-Barriers*].

⁸³ See *id.*

⁸⁴ See Case 315/92, *Verband Sozialer Wettbewerb eV v. Clinique Laboratories SNC and Estee Lauder Cosmetics GmbH*, 1994, available in LEXIS, Int’l Library, Eccase File, at 6–7.

⁸⁵ See Opinion on Amended Proposal, *supra* note 1, at 35.

⁸⁶ See Bermann, *supra* note 61, at 346.

⁸⁷ See *id.* at 335.

⁸⁸ *Commission Reports on Application of Subsidiarity*, REUTER EUR. COMM. REPORTS, Dec. 8, 1993, available in LEXIS, World Library, Revec File [hereinafter *Commission Reports on Application of Subsidiarity*].

In December 1992, the Commission stated that several proposals needed to be narrowed due to the principle of subsidiarity.⁸⁹ The Commission categorized the proposals as either rules and regulations to be revised, rules and regulations to be simplified, or rules and regulations to be repealed.⁹⁰ The Amended Proposal is among the rules and regulations to be revised.⁹¹ If a directive contains detailed restrictions and rules, the Member State retains less control. Such a result would make the directive more congruent with the primary goal of a Single Market, but it would conflict with the principle of subsidiarity.⁹² The adoption of a detailed directive would better serve the goals of the achievement of a Single Market and fewer barriers to trade. Without a detailed directive, the Member States would be left to their own devices. They would not be required to change their laws, and the objectives of the directive would not be served.

Where national laws are extremely divergent, the analysis should move outside of the realm of subsidiarity because Member States will not break down restrictive barriers on their own.⁹³ The extensive use, or abuse, of the principle of subsidiarity could defeat the purpose behind any directive.⁹⁴ Therefore, subsidiarity should be trumped by the general need for consensus to achieve the broader goal of a Single Market.

B. *European Court of Justice Favors Dismantling Of Trade Barriers*

In recent decisions, the ECJ has demonstrated a tendency to apply article 30 in order to hold that national restrictions on comparative advertising violate the principle of the free movement of goods and amount to a restriction on trade between Member States.⁹⁵ The Court hesitates to uphold restrictions by Member States on the freedom of movement of goods.⁹⁶ In the landmark case, *GB-INNO-BM v. Confed-*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *See id.* at 10.

⁹³ *See* Tilmann, *supra* note 15, at 335.

⁹⁴ *BEUC Calls on German Presidency to Focus on Consumer Policy*, Reuter Eur. Comm. Reports, Jun. 10, 1994, available in LEXIS, World Library, Revec File.

⁹⁵ *See* Case 315/92, *Verband Sozialer Wettbewerb eV v. Clinique Laboratories SNC and Estee Lauder Cosmetics GmbH*, 1994, available in LEXIS, Int'l Library, Eccase File, at 10; *see also*, Case C-362/88, *GB-INNO-BM v. Confederation du commerce luxembourgeois*, 1990 E.C.R. 667, 674, 686, 61 C.M.L.R. 801 (1991-1992).

⁹⁶ Jerome Huet, *Recent Developments in Consumer Protection in the EC*, 16 HASTINGS INT'L. & COMP. L. REV. 583, 588 (1993).

eration due commerce luxembourgeois, the Court refused to approve the prohibitions on advertising of special sales events and on advertising using crossed-out prices.⁹⁷ The ECJ emphasized the role of consumer information as a factor in consumer protection.⁹⁸

In that case, CCL, a non-profit organization, claimed to represent the interests of Luxembourg traders, while GB-INNO-BM operated supermarkets in Belgian territory, near the Belgian-Luxembourg border.⁹⁹ GB-INNO-BM distributed advertising leaflets on Luxembourg and Belgian territory, and CCL alleged that the advertising violated the law of unfair competition.¹⁰⁰ Under the law of unfair competition, sales offers involving a temporary price reduction may not state the duration of the offer or refer to previous prices.¹⁰¹ The Court reasoned that legislation restricting or prohibiting certain forms of advertising and certain means of sales promotion may operate to restrict the volume of trade because it affects marketing opportunities in violation of articles 30 and 36 of the Maastricht Treaty.¹⁰² It concluded that advertising of sales offers involving a price reduction and stating the duration of the offer and the prices previously charged is prohibited by the Luxembourg legislation but permitted by the provisions in force in Belgium.¹⁰³ The Court ruled that an advertisement that is legal in the state in which it originated cannot be banned by the laws of any Member State that it may reach.¹⁰⁴

Although the setting was not for the free movement of goods *per se*, the Court held that article 30 still applied.¹⁰⁵ It reasoned that EU policy establishes a close link between protecting the consumer and providing the consumer with information.¹⁰⁶ The Court decided that article 30 should apply because the effect of restrictive measures on comparative advertising resembled that of quantitative restrictions on imports within the meaning of article 30.¹⁰⁷

⁹⁷ See Case C-362/88, GB-INNO-BM v. Confederation du commerce luxembourgeois, 1990 E.C.R. at 674.

⁹⁸ See *id.* at 672.

⁹⁹ See *id.* at 669.

¹⁰⁰ See *id.*

¹⁰¹ See *id.*

¹⁰² See Case C-362/88, GB-INNO-BM v. Confederation du commerce luxembourgeois, 1990 E.C.R. 667, 676, 61 C.M.L.R. 801 (1991-92).

¹⁰³ See *id.* at 672.

¹⁰⁴ See *id.* at 674.

¹⁰⁵ See *id.* at 676.

¹⁰⁶ See *id.* at 679.

¹⁰⁷ See Case C-362/88, GB-INNO-BM v. Confederation du commerce luxembourgeois, 1990 E.C.R. 667, 678, 61 C.M.L.R. 801 (1991-92).

In *Procureur de roi v. Benoit and Gustave Dassonville*, the Court reasoned that all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade should be considered measures having an effect equivalent to quantitative restrictions.¹⁰⁸ *Dassonville* defines measures having equivalent effect as “[p]rovisions laid down by law, regulation or administrative action, administrative practices and any practice of a public authority or which can be imputed thereto, precluding imports which might otherwise take place.”¹⁰⁹ A ban on comparative advertising arguably can fall within this definition because it is an example of an action by public authority which could preclude imports which might otherwise take place.¹¹⁰

The Court also applied article 30 to the comparative advertising setting in the case of *Schutzverband gegen Unwesen in der Wirtschaft eV v. Yves Rocher GmbH* [Yves Rocher].¹¹¹ On May 18, 1993, the Court declared that German laws concerning price comparisons in print advertisements are inconsistent with article 30 of the Maastricht Treaty.¹¹² In that case, a German consumer action group brought suit against Yves Rocher claiming that the company’s direct mail catalogs to German consumers used price comparisons.¹¹³ While Yves Rocher lost the case in German court, the ECJ determined that the German decision constituted a barrier to trade.¹¹⁴

The German Unfair Competition Act bans German companies from making price comparisons in their advertisements.¹¹⁵ Due to the recent ruling, however, the EU will allow German lawmakers to enforce the Unfair Competition Act against German companies, but will prohibit its application to other EU Member States’s companies.¹¹⁶ The EU stipulated that companies with head offices in other EU states are not obliged to comply with the German advertising law.¹¹⁷ The court based its ruling on article 30.

¹⁰⁸ See Case 8/74, *Procureur du roi v. benoit and Gustave Dassonville*, 1974 E.C.R. 837, 852; 2 C.M.L.R. 436 (1974).

¹⁰⁹ *Id.* at 841.

¹¹⁰ See *id.*

¹¹¹ See Case C-126/91, *Schutzverband gegen Unwesen in der Wirtschaft eV v. Yves Rocher GmbH*, 1993 O.J. (C 172) 6.

¹¹² See *id.*

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See *id.*

¹¹⁶ See *Germany—Advertising Regulations*, *supra* note 9.

¹¹⁷ See *id.*

The ECJ rulings in the *INNO*, *Dassonville* and *Yves Rocher* cases not only demonstrate the Court's tendency to rule in favor of dismantling barriers to trade but also highlight the need for a cohesive EU comparative advertising policy. The *Yves Rocher* ruling gives other Member States the advantage in Germany, leaving German retail companies and other manufacturers at an unfair disadvantage in their home country.¹¹⁸ Furthermore, Germany loses its competitive edge by insisting that national companies follow this restrictive guideline while allowing EU companies to advertise in a more competitive manner. Thus, even if the Commission does not adopt the Amended Proposal, the Court has shown a slant in its favor. Moreover, even if the Court consistently rules in favor of lifting national restrictions, its rulings may create additional problems absent a cohesive EU policy.

The ECJ balanced its interest in dismantling barriers to trade, however, by holding that under article 30 of the Maastricht Treaty, some national differences in the laws of Member States will survive if they can be justified under article 36 or as a "mandatory requirement" under article 30.¹¹⁹ Article 36 provides that in the realm of unfair competition, a Member State's law will survive the scrutiny of the court, even if it restricts the flow of goods across borders, if the means are the least restrictive possible to achieve the goal of the national law.¹²⁰ Thus, without a detailed directive on comparative advertising, a Member State's law restricting comparative advertising would only be struck down if it did not fall within a "mandatory requirement" justification or was not the least restrictive means necessary to achieve the goal of the law. Therefore, to dismantle of trade barriers, the Commission needs to pass the Amended Proposal since restrictive national laws may nonetheless be upheld under the "mandatory requirements" test, the "rule of reason" exception, or the proportionality test of article 36.

The holdings in the unfair competition cases may facilitate pan-European advertising for companies within Member States with more liberal comparative advertising standards. Unless the countries with strict anti-comparative advertising laws conform to their more liberal

¹¹⁸ *See id.*

¹¹⁹ *See, e.g.*, Case 8/74, *Procureur du Roi v. Dassonville*, 1974 E.C.R. 837, 2 C.M.L.R. 436 (1974); *see also*, Case 120/78, *Cassis de Dijon, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649, 3 C.M.L.R. 494 (1979).

¹²⁰ Maastricht Treaty, *supra* note 61, art. 36. This is the principle of proportionality which imposes a "least restrictive means" test on a national law that restricts the flow of goods across Member State borders. Case 261/81, *Walter Rau Lebensmittelwerke v. De Smedt PvbA*, 1982 E.C.R. 3961, 2 C.M.L.R. 496 (1983).

neighbors, companies based there will remain at a competitive disadvantage. Even with decisions such as the *INNO* case, the need for a directive to harmonize the comparative advertising practices in the EU remains.

CONCLUSION

The European Commission has taken steps, such as the Amended Proposal, toward the harmonization of Member States's laws on comparative advertising. In recent decisions, the ECJ ruled in favor of rejecting restrictive national laws which prohibit the free movement of goods. Thus, if parties continue to bring cases regarding comparative advertising to the ECJ, the result could be the harmonization of laws since the Court has shown a tendency to value the free movement of goods across national borders over the restrictive national laws of the Member States.

Subsidiarity may prove to be a barrier to the Commission's efforts at harmonization. Because the principle falls within the larger umbrella of the EU goal of the establishment of a Single Market, subsidiarity should not trump EU harmonization efforts. In any case, it is clear that the Member States's laws on comparative advertising differ enough to warrant Commission action, and the discussion is already outside of the subsidiarity realm.

The impact of the Amended Proposal, if passed as a directive, in its current form, nonetheless may be minimal. Its vague terms still allow Member States to justify their restrictive national laws while ostensibly remaining within the terms of the Amended Proposal. Such a vague directive would require the ECJ to define the law in a more specific manner, if and when those seeking to use comparative advertising and those seeking to thwart it, bring their cases to the Court.

The need for a cohesive EU comparative advertising policy remains. Even if the Amended Proposal is not adopted, the Court has shown itself to be in favor of liberalizing comparative advertising restrictions. Moreover, even if the Court consistently rules in favor of lifting national restrictions, its rulings may create additional problems absent a cohesive EU policy.

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