

COMMERCIAL COMMUNICATIONS

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A market-driven or consumer-friendly approach?

Heinz Zourek, Deputy Director General, DG XV

As the Parliamentary debates on the proposals made in the Green Paper progress, the responses to the text continue to arrive. This issue of the newsletter gives a flavour of the debates with summaries of the preliminary report emanating from the lead (Economic and Monetary Affairs and Industrial Policy) Committee and of one of the opinions from the associated (in this case that for Culture, Youth, Education and Media) Committees. Both of these are supportive to the thrust of the Green Paper although raising a number of questions and emphasising the need to take account of specific concerns. In addition to the Culture, Youth, Education and Media Committee, two others have given opinions on the Green Paper to be transmitted to the lead Committee. These are from the Legal Affairs and Citizens' rights and the Environment, Public Health and Consumer Protection committees. Although the former was generally supportive, amendments voted on its report which were strengthened and developed in amendments voted in the latter committee are worrying in that they demonstrate that there are misunderstandings that have led to serious concerns in Consumer associations causing them to lobby against the proposals made in the Green Paper.

The concerns expressed by the consumer associations warrant greater focus on their specific points and the next issue will therefore explain their views in more detail. In this issue the International Consumer Policy Bureau provides some indication of these doubts. It should be of interest to those (and they are numerous) who have responded that the Green Paper's proposals do not go far enough!

Without wishing to pre-empt the debate that will ensue, it may be helpful to mention a few points in response to some of these worries:

1. The Green Paper's proposals seek to establish a more effective regulatory framework for cross-border commercial communications. Cross-border commercial communications are increasing and will do so at an accelerating rate thanks to new borderless 'carriers' notably the Internet. An Internal Market regulatory approach to regulating these cross-border communications implies that consumers must have effective redress in the country where the guilty-party is established. Calling for country of destination control, as certain consumer associations do, when new electronic media do not respect borders is neither a feasible nor a fair option for consumers. Given that a Court in a host Member State will have little, if any, power to rule against and sanction an economic operator established in the home Member State, country of destination control implies that national consumers will always receive more effective redress than those in host Member States.

2. The Green Paper is not a manifesto calling for consumers to welcome more commercial communications but a policy document seeking to ensure that their rights are effectively protected. It shows that in an uncertain world commercial communication is a means by which businesses seek to influence

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consumers choices. Of-course abuses can arise and regulatory policy must be vigilantly applied in this field as in any other. At the cross-border level we believe that effective protection of consumer rights will be ensured by the effective application of the proportionality assessment methodology. Such services do have benefit in that they instil consumer confidence in many products and services that are backed by strong international brand reputations. Without the associated promotional commercial communications services such brand confidence (and loyalty which the brand owners seek) could not be built and new products and services offering greater consumer choice could not be introduced in the Internal Market in a viable manner. Furthermore, we do not believe that the market for commercial communications is more imperfect vis à vis the consumer than that for any of the other elements of a business activity. Consumers are not aware of the level of communications costs that they pay for in the final price but this is true for every other element of the product's final price (production, packaging, material inputs, other marketing costs, distribution costs and of-course profit margin) so the lack of cost breakdown cannot be used as a specific criticism for this particular form of business activity. Abusive levels of communication costs will of-course arise when the communications services are used in an anti-competitive manner but as for all such behaviour, this can and should be eliminated by effective application of national and Community competition policy.

3. There are concerns of consumers being forced to receive advertising. Nobody denies that the 'commercial break' can at times be irritating but most recognise that without it, or without the print advertisement etc. the cost of the media would be much higher and its very viability and availability could thus be threatened. That is why all the media operators who have responded to the Green Paper are supportive. Indeed certain consumer associations who recognise that their own communications channels (consumer journals) rely on the 'underwriting' offered by advertising have not raised this concern.

4. Finally, and probably most fundamentally, the Green Paper's approach has been viewed by certain interested parties as being market driven and not providing sufficient consideration to the fourth element in the 'chain reaction' viz.; the reactions of the consumers. This seems to represent a serious misunderstanding of the role of the chain reaction proposed as one of the assessment criteria in the proportionality assessment methodology. The whole point of explaining the chain reaction was to show how the 'active' commercial communication users, suppliers and carriers used these services to influence their passive receivers (i.e. the consumers) and responded to restrictions in that chain. In other words, the *raison d'être* of the *chain reaction* is to see how differing regulatory restrictions alter market behaviour so that policy-makers can assess the form of restrictions that can most effectively meet the aim of protecting consumers. This is a key point and one which needs to be stressed. Our policy aim must be to ensure that receivers of cross-border communications benefit from high levels of qualitative protection. It is only through an understanding of how the market operates that this aim can be achieved. It is far too simplistic and yet also commonplace to falsely believe that restrictive regulation is effective regulation. We seek to achieve the latter which is not a necessary condition for the former.

Thus to conclude, the market drives commercial communications strategies which affect consumers. The Internal Market policy objective is to ensure that the latter can benefit from cross-border services and be effectively protected. When cross-border services are of an illegal nature, the most effective means for a consumer to seek redress is for him or her to have the possibility via easy-to-use channels to take action in the country of origin where his/her rights must be treated as equal to that of a national resident. Country of destination control may seem an easier option but in fact is a non-option both in practical and legal terms. The Green Paper's proposals are the basis on which this Internal Market regulatory framework can

be established in this field. There is much work to do and the consumer associations will be included in the process but we must begin by agreeing that one can only understand the effectiveness of *market restrictions* by analysing how the *relevant market* in fact operates. That is what the chain reaction criterion in the proposed proportionality assessment methodology seeks to do.

Editorial

In this issue we continue to provide an account of responses to the Green Paper, publishing edited versions of the submissions of the World Federation of Advertisers (W.F.A.) and of one of Europe's largest advertisers, Procter & Gamble. We also carry reports on the documents presented to the European Parliament by two of the Committees with responsibilities in this area.

What all of these have in common is a belief that the approach outlined in the Green Paper provides an opportunity for real progress to be made towards the establishment of an Internal Market in commercial communications, but only if the proposals are strengthened. Important ways in which this might be affected are detailed in these accounts and it is clear that the commercial communications sector faces some formidable challenges in the near future.

An immediate challenge, touched upon in these pages in the last issue, is in the establishment of a 'shadow' or advisory committee. Jessica Larive, rapporteur to the Parliament's lead Committee on the Green Paper (Committee on Economic and Monetary Affairs and Industrial Policy) is in favour of setting up such a Committee. However, as she points out, 'this means that industry must organise itself in order to find someone who can represent the interests of the whole commercial communications industry of the Member State concerned.' Equally, in the area of self-regulation, the industry needs to work extremely hard to ensure that the principle of mutual recognition is universally accepted and that adequate consumer safeguards are in place.

However, elsewhere there are serious concerns about the implications of the Green Paper's proposals. Consumer groups in particular are, in the main, unhappy and some of their concerns are covered in this issue. We shall be highlighting others in the next issue of *Commercial Communications* and will no doubt be returning to them regularly. Adequate consumer protection is essential to any proper functioning of the Internal Market for commercial communications.

Now that the debate is underway in earnest, we hope you will continue to use the pages of this newsletter to help resolve such difficulties as persist or underline problems which in your view, need to be given greater attention.

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How the Green Paper fails the consumer



Jeremy Mitchell

The market is necessarily not transparent, in that the cost of commercial communications is concealed from the recipient consumer.

Our understanding of the main argument of the Green Paper is as follows:

- Cross-border commercial communications within the EU are growing and the need for them is likely to grow in future, especially in relation to the development of new information and communication technologies;
- Brandowners who want to mount EU-wide marketing campaigns currently find themselves faced with obstacles arising from differing national regulations governing commercial communications. Their profitability is therefore less than it would otherwise be if unnecessary differences in national regulations could be eliminated;
- A preliminary review of existing national regulations shows that '...there is a growing divergence between certain Member States in the way in which they develop their national regulatory frameworks' (p 29);
- There needs to be a further review of the three types of national regulations that have been identified, namely regulatory bans, limitations on some forms of commercial communications, and limitations on specific products or services;
- There should be an early notification system, whereby Member States would be required to notify relevant draft legislation to each other and to the Commission, to allow for an examination of its compatibility with Community law;
- There should be an agreed methodology (outlined in the Working Document) designed to help the Commission assess the proportionality of regulations proposed both by Member States

and by itself;

- To improve co-ordination and information at EU level, a Committee should be set up, chaired by the Commission and with representatives from Member States.

Inherent imperfections in the commercial communications market

The main thrust of the argument in the Green Paper is fundamentally flawed. While (especially in the Working Document) considerable weight is given to analysis of brandowners' actual and potential strategies in relation to EU-wide markets for their products, little attention is paid to the nature of the actual market for commercial communications.

The market for commercial communications is highly imperfect. This arises not just from any regulatory or cultural barriers, but intrinsically from the very nature of the market. The market is necessarily not transparent, in that the cost of commercial communications is concealed from the recipient consumer. The consumer rarely if ever pays directly for the commercial communications targeted at her or him. There is, of course, a cost, but the consumer does not know how much this is. The amount is concealed within the retail price of the product or service which is the subject of the commercial communication. It has been calculated by Barwise and Ehrenburg that advertising costs '...in total can be as much as 5 or 10 per cent of the retail price of some advertised goods or services'.¹ Also, the consumer cannot choose whether or not to pay this hidden cost, as it is not separately identified as a component of the retail price.

It is argued by advertising and marketing industry interests that advertising pays for itself by increasing the volume of sales, with consequent economies of

¹ Patrick Barwise and Andrew Ehrenburg 'Television and its audience'. Sage, London, 1988 (p111).

Jeremy Mitchell
Director
International Consumer
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scale leading to lower retail prices. However, the authorities cited above conclude in relation to television advertising that '...there is no evidence that this is what happens... We believe instead that television supported by advertising is paid for at least in part by consumers paying extra for the advertised brands'.

Moreover, there are extensive and concealed cross-subsidies at work. Only those consumers who choose to buy the product or service in question pay for these costs as part of the purchase price, even though a much wider group of consumers may have been at the receiving end of the relevant commercial communications. Those arguments in the Green Paper which seek to derive authority from the theory of markets or the imperatives of competition should therefore be treated with considerable scepticism. The market for commercial communications does not - and cannot - ever begin to approximate to something which can be subject to the normal processes of perfect competition.

Furthermore, consumers are frequently involuntary participants in the commercial communications market. The consumer often has no choice but to 'receive' a particular commercial communication. It is impossible, when turning over the pages of a newspaper, to avoid seeing the display ads. Increasingly sophisticated direct mail shots, designed to look like ordinary correspondence, can only be detected once the envelope has been opened. The 'off' knob on the radio cannot be reached in time to make sure that one doesn't hear the ad. A particular television programme necessarily involves watching and listening to the sponsor's 'messages'. Similarly, a child in school using sponsored teaching materials cannot avoid references to the sponsoring company.

There is substantive evidence that many consumers, given the choice, would prefer

not to receive commercial communications. For example, social and market research shows that where technology provides consumers with a means of avoiding commercial communications, as it does with television remote control 'zappers', they take this path in large numbers and with enthusiasm.² UK advertisers' anxiety about television audiences that 'get lost' by using the remote control zapper during advertising breaks is manifest in their repeated pressure on television companies to reduce advertising rates, on the grounds that the real size of the audience for television commercials is appreciably smaller than that for the surrounding programmes.

The consumer is often therefore an unwilling participant in the market for commercial communications. There is a pronounced element of forced consumption, with the consumer paying indirectly through the price of goods and services which are the subject of commercial communications - and without any knowledge of the size of the hidden charges.

The conclusion is that the market for commercial communications is highly - and intrinsically - imperfect. As the recipients of commercial communications, consumers are very vulnerable and open to exploitation, including economic exploitation through hidden charges. A situation of this kind surely warrants consumer protection issues being given priority in the formulation of Commission policy. One of the Commission's main goals should be to ensure a high level of consumer protection in relation to commercial communication throughout the EU.

The legal basis for a high level of consumer protection

There is already a firm basis for this in the foundation instruments of the European Community. Article 3(s) of the Treaty of Maastricht defines 'a contribution to the strengthening of consumer protection' as

² See for example Preben Sepstrup 'The electronic dilemma of TV advertising'. *European Journal of Communication*, 1, 1986, pp 383-406

A situation of this kind surely warrants consumer protection issues being given priority in the formulation of Commission policy.

The Working Document examines in detail the role of suppliers, users and carriers, but is virtually silent about individual consumers.

one of the designated activities of the Community in achieving its task. Further, Article 129 states that 'The Community shall contribute to the attainment of a high level of consumer protection through... measures adopted pursuant to Article 100a in the context of the completion of the internal market..... Reference to Article 100a of the Treaty of Rome shows that where internal market measures are proposed which concern consumer protection, health and safety 'The Commission will take as a base a high level of protection.'

While there is a reference to the consumer protection implications of Article 129 on p 12 of the Green Paper, no mention is made of the obligation to establish a high level of consumer protection. Also, the significance of the individual consumer in the whole of nexus of relationships in the market for commercial communications is almost absent, both from the Green Paper itself and from the analysis in the Working Document. For example, the Working Document examines in detail the role of suppliers, users and carriers, but is virtually silent about individual consumers. Tables 1, 2 and 3 omit any mention of consumers. In Table 4, consumer protection issues receive a wholly inadequate treatment in the 'Potential objective impact checklist', as they are viewed solely from the supply side.

National regulatory barriers - less serious than stated

The Green Paper appears to place a distorted emphasis on the importance of national regulatory barriers. Although we have not had the benefit of seeing the detailed survey results cited on pp 7-9, even the figures quoted can be interpreted in a wholly different way. The Green Paper argues the importance of national regulatory barriers as an impediment to service suppliers operating across the Internal Market. However, from the figures given in

the last paragraph on p 7, it seems that 77% of service suppliers, a substantial majority, did not spontaneously put national regulatory problems high on their list of very serious barriers. Moreover, 60% did not spontaneously say that it was necessary to undertake totally different campaigns in each country. From the figures on p. 9, it can be inferred that as many as 81% of users of commercial communications services did not consider regulatory problems were the most significant impediment to their development of strategies for non-domestic markets, while the comparable figure for carriers was 70%. (It should be noted that the replies to prompted questions should not be taken very seriously. Replies to prompted questions are invariably misleading in establishing the true knowledge or attitudes of respondents)

Contrary to what is implied in the Green Paper, these survey results seem to suggest that differing national regulatory regimes are not, in fact, considered to be a primary obstacle to the development of trans-national marketing strategies. Indeed, the figures show clearly that cultural differences between countries are considered to be significantly more important. This is hardly surprising. Commercial communications are, after all, only a part, and a relatively small part, of the whole field of human communications, which is pervaded by cultural differences. Even in the field of mass communications, the media vary widely among Member States in their pattern of ownership, structure, content, audience reach and political context, not to mention their orientation towards international, national, regional or local issues. The cultural diversity of the European Union is happily reflected in the diversity of the media which carry mass communications, whether commercial or non-commercial. It is a diversity which is rightly prized in the EU's- cultural policies.

The distinction between regulatory

and cultural barriers is itself somewhat artificial, in that many regulatory variations between Member States themselves spring from cultural differences. To take one of the areas highlighted in the Green Paper (pp 25-26), varying restrictions on commercial communications for alcoholic drinks reflect not only differing patterns of consumption but also divergent public and social attitudes towards different kinds of alcoholic drinks. A similar point can be made in relation to commercial communications for food products (p 27). Cultural diversity as reflected in varied national regulatory structures needs to be taken into account in any review of potential regulatory barriers.

The dangers of sponsorship

In the context of the Green Paper's comments on audiovisual policy, a question mark must be placed against the uncritical approach to sponsorship on pp 14-15, especially the explicit endorsement of the maximisation of the resources broadcasters earn through sponsorship revenues. It must be emphasised that sponsorship in broadcast media is a major distortion of the market in which broadcasters supply programmes to viewers and listeners. It means that only those programmes will be sponsored which sponsoring companies think will help them market their brands or companies to the viewing and listening audience. The broader implication of this is that, instead of being motivated to make and broadcast programmes which their audiences want, the financial incentive of sponsorship pushes broadcasters towards making and broadcasting programmes which sponsors think will help them sell goods and services which have nothing at all to do with broadcasting. The broadcasting market is distorted by sponsorship, as is the nexus of relationships between broadcasters on the one hand and viewers and listeners on

the other. Instead of being an important market in its own right, with strong cultural significance, it becomes merely an adjunct to markets for other goods and services. Sponsorship therefore needs to be regulated extremely tightly to safeguard the integrity of broadcasting media.

Conclusions

The inherent gross imperfections in the market for commercial communications mean that consumers' interests are highly vulnerable. In particular, consumers suffer concealed economic loss through higher retail prices for goods and services which are the subject of commercial communications. The Commission should therefore put a high level of consumer protection in the forefront of its priorities on commercial communication, in accordance with the intention and provisions and of Articles 3(s), 100 (a) and 129.

In any review of existing or new national regulations, the interests of consumers should rank at least equally with those of users, suppliers and carriers.

The inherent gross imperfections in the market for commercial communications mean that consumers' interests are highly vulnerable.

Consumer interests should be fully and effectively represented in any relevant consultative machinery that is established by the Commission. This is not taken into account in the Green Paper proposals for a new committee. If the membership of the new committee is limited to representatives of Member States, then the Commission should consider also setting up a more broadly based consultative group representing the interests of all parties, including consumers, along the lines of the Payment Systems Users' Liaison Group, convened by DG XV to advise on payment systems issues.

The Green Paper - the view of the World Federation of Advertisers

WFA submitted its response to the Commission by the end of October 1996. In parallel, WFA's membership, affected by EU legislation, pledged to submit individual responses in support of the official WFA Position, the key points of which are contained in the following resumé:

WFA welcomes the Green Paper on Commercial Communication (hereafter Green Paper) and congratulates the Commission on its careful analysis of the current situation. WFA believes the Commission's proposals could offer a practical means of achieving a true Single Market in commercial communications, provided they are substantially strengthened.

In order to achieve this objective as quickly as possible all Member States should be obliged to recognise the principle of freedom of commercial communication. Although guaranteed, in principle, by Articles 30 and 59 of the EU Treaty, the practical application of these principles is not so obvious. In order to overcome the disparities between national regulations which give rise to barriers to trade, WFA feels that there should be a clear re-affirmation of how these principles apply to commercial communications.

Industry would like assurance that any restriction to the application of the principle of Mutual Recognition by Member States be justified solely in terms of fulfilling a legitimate public policy objective and that such restriction is indeed proportionate to these objectives. It is also essential that effective procedures exist to ensure Member States comply with the principles of freedom of commercial communication and mutual recognition. WFA feels that the Green Paper does not adequately explain how the proposed committee (which presumably would apply the proposed proportionality methodology) would in practice eliminate barriers to commercial communication within a realistic timetable.

WFA believes that a few practical matters need to be sorted out and urges the Commission to issue a Communication to the Council and the European Parliament that:

- re-states how Articles 30 and 59 of the EU Treaty and relevant ECJ jurisprudence guarantee freedom of commercial communication within the EU;
- confirms that the principle of mutual recognition applies to all forms of commercial communication;
- states that the principle task of the proposed assessment Committee would be to consider the proportionality of national measures that constitute alleged barriers to the Single Market in commercial communication and to use the proposed proportionality methodology as the basis for all discussions;
- undertakes that the Committee's work will be entirely transparent and, in particular, that agendas will be published well in advance of discussions on a given topic, all interested parties will have the right to make appropriate submissions to the Committee, the Committee will be obliged to take expert advice from industry and other interested parties, information about Member State measures under discussion and their proportionality assessment by the Committee would be made public through an on-line commercial communications contact network, the Committee would be obliged to publish all minutes and opinions reached with regard to Member State measures;

- specifies the time limits to be respected by the Committee in pronouncing its assessment verdict and confirms the Commission's undertaking to take account of the Committee's findings (without precluding itself from taking account of representations by the complainant);
- undertakes to consult the Committee on all complaints received by the Commission relating to national measures affecting commercial communication and specifying at what point, in the course of the procedure under Article 169 of the EU Treaty, the Commission will seek consultation;
- specifies strict time limits (not exceeding three months) within which the Commission undertakes to act, under Article 169, when it receives a complaint relating to national measures concerning commercial communication;
- explains how the Commission envisages the proportionality methodology and how the Committee's services can be used either by national courts in relation to national proceedings concerning alleged barriers to commercial communication, or by the European Court of Justice when it has been referred to by a national court, under Article 177 of the EU Treaty in relation to such a barrier.

WFA believes that all measures relating to commercial communication that are proposed for adoption by Member States should be subject to a mandatory prior notification system. In this connection, the scope of the current proposal to

amend Directive 83/189 to cover information society services needs to be considerably extended if a true Single Market for commercial communication, in its broadest sense, is to be achieved. At present the proposal relates only to services provided at a distance by electronic means and at the request of the service receiver.

To date the Single Market in commercial communication remains theoretical and advertisers have waited long enough for its completion. WFA is determined to see that what is explicit in the Treaty become a reality as soon as possible.

Furthermore, the amended proposal should provide that, where a Member State notifies a commercial communication measure to the Commission in accordance with the (amended) Directive, the Commission will be obliged to consult the Committee on commercial communication (during the initial standstill period imposed by the Directive) as to the proportionality of the measure and, again, the work of the Committee should be transparent and subject to strict time limits, as explained above.

To date the Single Market in commercial communication remains theoretical and advertisers have waited long enough for its completion. WFA is determined to see that what is explicit in the Treaty become a reality as soon as possible. Practical, effective measures must be introduced by the Commission for this to happen. WFA would lend its full support to such a move provided the proposed measures, outlined in the Green Paper, are strengthened as suggested above. Time will tell.

Procter & Gamble - commercial communications in Europe

Procter&Gamble is an international company with European headquarters in Brussels, Belgium. It is one of the leading manufacturers of consumer goods, selling its products in more than 140 countries. In Europe, P&G has built a sizeable business by satisfying consumer needs through the development of superior products tailored to the European market. This strategy and the joint efforts of more than 27,000 employees in P&Gs European operations, make P&G one of the leading companies on the European market.

Procter&Gamble manufactures well-known brands in the categories of laundry and cleaning, cleaners, paper hygiene, health and beauty care, cosmetics, perfumes, beverages and pharmaceuticals. Some of the well-known European brands are Ariel, Lenor, Mr. Proper, Tempo, Pampers, Always, Clearasil, Vidal Sassoon, Pantene and Oil of Olaz.

We have established a European business organisation, but still can't execute our brand marketing strategies cross-border because of national restrictions.

Overall, P&G appreciates that the European Commission has published the Green Paper and has clearly recognised the issue that there is yet no single market in the field of commercial communications. P&G's ability to meet the needs of European consumers is affected by this issue, as we have established a European business organisation, but still can't execute our brand marketing strategies cross-border because of national restrictions. These restrictions must be abolished so that the consumers in Europe can fully benefit from the values attainable through the economies of scale in the single market.

We believe that it would be in the best interest of the consumers in Europe if the

member states would recognise the principle of 'freedom of communication' and apply the principle of 'mutual recognition' to all commercial communication. This would mean that all commercial communication lawfully created, published or broadcast in one member state would be permitted in all other member states. The Single Market for products and services is a reality within the EU, however, at present, when it comes to important communication tools, particularly advertising, direct marketing and sales promotion, we face a multitude of different national regulations.

The Green Paper proposes 'proportionality' as the method to assess what regulations are really needed. This approach finds our full support and we wish that the Commission will be able to ensure that the assessment process will be implemented in an effective and efficient way.

Furthermore, we encourage the Commission to address in the context of commercial communication also the non-mandatory information on packs and labels, which is of strong importance for us as a marketer of branded products. The package is a carrier of information to the consumer. The fact that there are different national labelling laws increases the cost of products, the cost of communication and may lead to confusion of the consumers. National restrictions, new and established ones, in the fields of packaging as well as commercial communications, are a threat to the Internal Market.

We support the call of the EC for an improved information exchange on commercial communication issues in the Internal Market. We are willing to actively contribute facts and data supporting the need to accomplish the single market also in the field of commercial communications.

Report to the European Parliament

Jessica Larive
Rapporteur
The Committee on
Economic and Monetary
Affairs and
Industrial Policy
The European Parliament

Shortly before Christmas, Jessica Larive, the rapporteur for the lead committee of the European Parliament on the commercial communications Green Paper (The Committee on Economic and Monetary Affairs and Industrial Policy), produced an initial report for the Parliament's consideration. As a 'Working Document', the response seeks to generate further discussion before the Parliament adopts its formal position, probably in June of this year. It is important, therefore, to give due consideration to the key elements of the 'Working Document'.

The submission takes as its starting point 'the need to promote the development of cross-border commercial communication services' and stresses the importance of this objective for the generation of employment and for the increasingly important contribution they will have to make in the development of electronic commerce. Larive acknowledges that this objective must not fail to recognise the need for adequate consumer protection to be provided in cross-border commercial communications. She suggests that on this issue the Green Paper was 'particularly vague' and that additional measures may need to be introduced to provide adequate consumer representation. Overall, however, the report is supportive of the Commission's proposals, although she feels 'they have to be reinforced in order to reach the intended goal'.

Larive considers initially the proposed methodology for assessing proportionality, stressing the utmost importance in arriving at an agreed evaluation of the principle. Whilst recognising that the five criteria suggested in the Green Paper 'seem to be appropriate', the rapporteur feels the Commission needs to set out the general interest objectives it believes to have been recognised by the ECJ and which would be applied by the methodology proposed.

It is considered vital that the meth-

odology is applied both to existing and future legislation at both national and Community level (and self-regulatory codes). Larive has six additional suggestions which would help to make the use of the methodology 'efficient, independent and transparent'.

- The use of the methodology should be made mandatory for existing legislation (including self-regulatory codes) upon a complaint. The time limit for the complaint to be transferred from the Commission to the proposed Committee should be set at two months.

- The use of the methodology should also be mandatory before the introduction of all new legislative proposals. Member States should be required to notify each other and the Commission of draft legislation in this area.

- There should be a time limit of six months for the implementation of the assessment procedure following a complaint.

- The assessment procedure arguments and the results of the proportionality tests should be made public within one month.

- A Council decision should be taken to enable possible infringement proceedings to be heard in the Court of First Instance.

- The Commission services in charge of implementation should be accorded adequate resources in terms of funding and manpower.

The Committee

The rapporteur supports the establishment of the proposed Committee, but feels its composition needs to be more clearly defined. Larive believes the Committee should consist of permanent representatives from the Member States and suggests a preference for officials from economic or trade ministries. Possibly to also include a representative from the European Parliament, the Committee's transparency should be ensured by publication of findings and minutes within



Jessica Larive, MEP

Larive acknowledges that this objective must not fail to recognise the need for adequate consumer protection to be provided in cross-border commercial communications.

one month of each meeting.

The establishment of an advisory or 'shadow' committee consisting of one permanent representative of every Member State to represent the commercial communications sector is also urged. Other particular interest groups would form specialist committees which would provide input to the advisory committee and full use, of course, should be made of those committees which already exist. Larive sees an important task of the advisory committee as establishing 'a control system by which self-regulatory codes could be measured to ensure that self-regulatory systems live up to acceptable standards throughout the European Union'.

The contact/co-ordination point

The proposal to establish a single contact point is accepted by Larive as important. She draws attention to the usefulness of the proposed on-line communications network in providing 'quick information about existing legislation' and such divergences between Member States as exist.

Further Measures

The rapporteur stresses that she is not (in general) in favour of 'imposing new legislation'. She believes that the principles of mutual recognition and country of origin, together with the proportionality assessment and 'the safeguards provided by the Treaty for the protection of public and consumer interests', should be capable of dealing with most existing barriers to commercial communications in the Internal Market. This belief, it is stressed, is conditional on the Commission's proposals being strengthened in the ways outlined in the 'Working Document'. Larive points out, however, that there may be certain 'very precise' cases where restrictions are deemed to be proportional and harmonisation will be required.

The rapporteur insists that the

'strengthened' proposals should be put into effect as quickly as possible. She proposes a time frame for evaluating progress towards an Internal Market for commercial communications and suggests that such an evaluation should take place two years after the first meeting of the Committee and certainly no later than the year 2002. If the evaluation concludes that substantial barriers still exist, then a framework Directive should be considered to establish 'clearly and unequivocally the principles of mutual recognition and country of origin for all forms of commercial communications'.

Larive suggests proposing that the Commission should encourage Member States to agree a Council Declaration to establish a binding definition of proportionality in national and self-regulatory legislation affecting commercial communications.

Further, to improve the effectiveness of the infringement procedure within the Commission, it is suggested that the Commissioner responsible for the completion of the Internal Market should be given by his colleagues a technical mandate. This would allow for cases to be brought quickly and without the need for collegiate agreement, save in exceptional cases.

The new media sector

The 'Working Document' concludes with some comments on the new, interactive, media sector. Recognising that the key dilemma is the establishment of responsibility for 'accessible material', Larive argues that 'home country control must be the norm in this area also'. It is further suggested that for these communications, and indeed others where there is a substantial cross-border element (including traditional print, TV and direct marketing) there could be a simple message indicating that the communication in question 'conforms to the rules/laws/industry code' of x Member State/country.

The rapporteur insists that the 'strengthened' proposals should be put into effect as quickly as possible.

The Culture Committee Report

Aldo Arroni
MEP
Rapporteur
Committee on Culture,
Youth, Education and
the Media
The European
Parliament

Aldo Arroni drafted the response of the Committee on Culture, Youth, Education and the Media to the Commercial Communications Green Paper. The submission concentrated on sponsorship 'in its widest sense' and identified four reasons for this:

- Sponsorship has become one of the main sources of financing, both locally and internationally, for a wide range of activities
- Sponsorship is regarded as an integral part of companies' commercial communications strategies
- Sponsorship enables business to demonstrate its involvement in society
- Whilst the positive benefits of sports sponsorship are well established, the sponsorship of cultural activities is not yet so advanced. At a time of declining public investment, growth in this area needs to be encouraged.

Arroni set out some definitions and distinctions which are essential to understanding the different ways sponsorship is regulated in Member States.

'Patronage' is 'Financial, material or moral assistance provided by an organisation or an individual for an undertaking, principally in the cultural, social or scientific fields. The assistance provided is of no direct benefit to the patron's activities, but adds to his reputation and honour through the fame that follows.' It is noted that the second part of the definition also applies to 'philanthropic' activities. These differ from patronage in that they do not give rise to communications and thus do not fall under the heading of commercial communications.

'Sponsorship' is defined as 'Any communication by virtue of which a sponsor undertakes contractually, to the mutual benefit of himself and the recipient, to give support, financial or otherwise, with a view to his image, identity, brands, products or services being associated in a

favourable light with the event, activity, organisation or individual he assists.'

These definitions, Arroni concludes, are rather academic, since 'the differences between these forms of assistance essentially lie in the sponsor's objectives and motives.' The important distinction is between patronage and sponsorship on the one hand and philanthropy on the other. Companies engage in both patronage and sponsorship with a vested interest and they lend their support 'with a view to gaining some advantage or something in return'.

The report points out that whilst patronage/sponsorship revenues for sports and cultural rights had grown from 2bn ECU in 1990 to 3.3 bn ECU in 1994, the amount directed to cultural activities is only 500m ECU.

Arroni highlights a number of beneficial effects which follow from all forms of sponsorship and patronage, suggesting that at a time when public funding is in decline they are essential sources of funds for a great many activities which would not otherwise be generally available.

The report concludes by proposing a number of amendments which, in the main, support the Commission's position that the establishment of an Internal Market in this area should be an early priority.

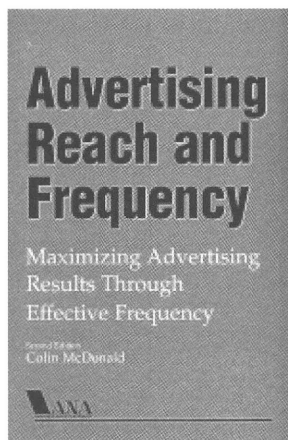
In particular, it points to what it regards as the false distinction between patronage and sponsorship which has detrimental effects on the funding of cultural events. This is because of the different fiscal status of patronage and sponsorship across the European Union, where often 'patronage' is not tax deductible whilst sponsorship is. The report considers 'it essential for a special initiative to be taken at Community level to enable fiscal policies to be harmonised in this sector and to facilitate the various forms of cross-border sponsorship/patronage.



Aldo Arroni

In particular, it points to what it regards as the false distinction between patronage and sponsorship which has detrimental effects on the funding of cultural events.

How many ads are enough?



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If I can't reach all the people all the time, is it better to reach a few of them continually or a lot of them occasionally?

How many times does someone need to see an advertisement before it has an effect on their behaviour? Is there a 'threshold' level, below which nothing will happen, and the advertising money be wasted? Is there, on the other hand, an upper limit where further repetitions become progressively less effective, useless, or even negative in their effects? How long does an 'effect' last? How quickly does it decay so that the advertising needs to be repeated?

From the advertiser's point of view, such questions are not just academic. They translate to very practical choices: Should I spend all my money in one month or spread it thinly across a whole year? If I can't reach all the people all the time, is it better to reach a few of them continually or a lot of them occasionally? Anyone who actually spent their own money on advertising would rapidly decide that these questions were important - at least as important, probably, as the question of creative content. Yet while many hours are spent arguing about niceties of copy or art direction, the media scheduling decisions are still often based on little more than conventional wisdom (bursts or 'flights' at some established level), or driven by a goal of the lowest cost per thousand.

One reason for this is that all the questions above, while reasonable ones to ask, are in practice very difficult to answer. One of the merits of this new book is that explains a highly complex set of issues with admirable clarity, and reviews all the important evidence we have about 'effective frequency' (available up to the time of its writing - despite its current publication date, it was written in 1993). *Advertising Reach and Frequency* is more, however, than a convenient summary of the topic; it significantly revises some of the most commonly held beliefs about it. To explain the nature of these changes it will be helpful to review a little history.

In 1966 Colin McDonald, then working for the British Market Research Bureau in

London, carried out a research project for J Walter Thompson. This was a study of the relationship between advertising exposure and buying behaviour in a number of packaged goods markets, using a single source diary panel. (A 'single source' panel, in this sense, collects detailed information for each individual both on what brands were bought, and what ads were seen, each day.) This study was not intended, at the time, to address the questions of 'effective frequency', but the more fundamental issue of whether short term advertising effects on purchasing behaviour could be proven to exist. The most famous finding of this study (as reported at the time) was that *one* exposure to advertising between two purchase occasions had no positive effect on brand choice; that *two* exposures did have an effect, that *three* had a little more; and that *above three* exposures there were no increased effects.

The McDonald Study, after its brief moment of glory, was unjustly neglected by many advertising agency people; they were not very interested in effects which appeared to be very short term and rather small, and they preferred talking to their clients about the long term effects of advertising on brand image. But the study was leapt on enthusiastically by media planners who had been asking questions about effective frequency. Nothing like the McDonald study had ever been done before. Now the data appeared to show that a 'threshold' of two exposures did exist, and also that the effect of advertising peaked at three exposures. The implication for media planners was that they should maximise the number of people receiving two exposures in a purchase interval, and minimise the number receiving more than three. (This is actually very difficult to put into practise, but in theory, at least, it became an established principle.)

This 'three exposure' principle received apparent confirmation when it was matched to a psychological theory developed independently by Dr Herbert Krugman, then

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head of market research at General Electric in the USA. Krugman argued that consumer response to an ad went through three stages. The first time it was seen, the respondent would just ask 'what is it?'. On the 'second exposure' the viewer was able to evaluate the communication - 'what of it?'. Having made sense of the message, the 'third exposure' would merely be a repetition and after this the subject would begin to 'disengage'. Krugman developed this argument in various papers published during the 1970's.

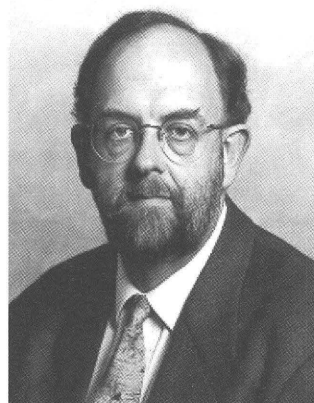
In 1979 the Association of National Advertisers in New York produced a book authored by Mike Naples, called *Effective Frequency*. This reviewed the complex issues involved, and all the relevant experimental findings, starting from Ebbinghaus' research into memory decay in the 1890's. In pride of place was the McDonald Study, and McDonald's own paper about it from the 1970 ESOMAR Congress was included in full as an appendix. The book drew a number of conclusions, and was widely understood to endorse the 'three exposure theory' (Dr Krugman contributed the foreword to the volume). The first conclusion of *Effective Frequency* began, in fact, with the words: 'One exposure of an advertisement to a target group consumer within a purchase cycle has little or no effect in all but a minority of circumstances...'

When Colin McDonald accepted a brief from the ANA in 1993 to update *Effective Frequency* he was already becoming uneasy with this conclusion, which was also being challenged by more recent research. In particular he was aware of work being done by Professor John Philip Jones in the USA (published in 1995 as a book, *When Ads Work*). Using data from the Nielsen single source panel and a similar conceptual approach to the McDonald Study (though not identical), Jones claimed decisive evidence for an advertising effect on behaviour after *one* exposure, with strongly diminishing returns above two.

The result is a substantial rewrite of the

earlier book, with some significantly different conclusions. The new book follows much of the original structure, and like the original it reviews a wide body of published evidence. But at the core of the book is a detailed re-examination by McDonald of his 1966 study, which makes it very clear that the 'two exposure threshold' was, in fact, an illusion - an artefact of one particular type of analysis which was thereafter extensively quoted out of context. The findings of Jones and McDonald are therefore consistent with each other, and with other single source studies which are referred to in the book.

It may seem surprising that a mistaken interpretation of data can lead to a generally held belief which remains uncorrected, even by its original author, for some thirty years. But anyone who reads this book with attention will understand how easily and frequently 'effective frequency' debates can be misunderstood and misrepresented by those who attempt to reduce the complexity of the evidence to simple rules. We constantly need to remind ourselves, for example, that 'one exposure in a purchase interval' is not the same as 'one exposure' taken in isolation, still less 'the first exposure'. And Krugman's own explanation of his theory (he is quoted at length on pages 43-46) makes it clear (to me, at least) that he is talking about something quite different from the findings of McDonald's or Jones' studies. (Krugman is discussing reactions to a repetition of an *execution*; he also explains that the stages of involvement and disengagement do not necessarily take place at *literally* the second and third exposures, but may happen after numerous repetitions. Jones and McDonald, on the other hand, mean exposures to *any* advertising for a brand within a purchase interval, or in Jones' case, within seven days preceding a purchase.) It is all too easy (I have seen it done!) to leap from Jones' or McDonald's findings to careless or mischievous conclusions such as 'all successful advertisements must work on one exposure' (as certain



Paul Feldwick

copytesting providers would love to believe), or, 'all advertisements wear out after three exposures'. Neither of these statements is remotely justified by the evidence.

McDonald is careful in his conclusions not to pretend we know more than we do or to offer simplistic rules. However, some convincing principles do emerge from his review. One is that advertising's effect on short term behaviour becomes much more marked the closer in time the advertising is to the purchase. This suggests more research into which days products are bought on, and careful buying close to these where possible. A second general point is that clustering more than two or three exposures into a purchase interval is likely to be 'overkill'. Taken together, these two conclusions make a strong case for more 'drip' advertising rather than burst. After all, bursts are popular for all the wrong reasons; because they suit the media buyers, they produce dramatic results on tracking studies, they make 'events' that can motivate the sales force, not because they are known to be more sales effective.

But alas! if only it were all so simple. Another theme that emerges clearly from this book is that advertising response is not just driven by absolute numbers of exposures, but by competitive share of voice. If Brands A and B have cleverly scheduled two 'drip' campaigns at similar weights and have similarly effective executions, they will, not surprisingly, cancel each other out. In this context the number of exposures needed to achieve a net behavioural change might be very different from one or two.

And while I regard the McDonald study as being of seminal importance, we must not forget that it and its successors only address the short term behavioural effects of advertising. The relationship of this to longer term effects - whether the short term effects accumulate, or whether there can be long term effects that exist somehow separately - is another issue, and one that is still

obscure and contentious.

In the final chapters McDonald therefore declines to offer generalisable 'rules', but recommends that more empirical research is needed to understand what works for particular brands in particular circumstances. This could be approached through various forms of modelling, or through better use of single source panel data. Having pioneered single source data at a time when data was collected in hand written diaries and analysed with punch cards and slide rules, the author is clearly frustrated by the limited extent to which panels with all the modern advantages of scanning and computing technology have been used to address these questions.

In fact, it is remarkable that most of the major studies quoted here, including the McDonald study itself, are twenty or thirty years old or even more - the Adtel study of 1975, Bogart Tolley and Orenstein's newspaper experiment from 1970, the Ogilvy and Mather daypart study of 1965, back to Zielske's work on magazine recall in 1959. While the technology has advanced, the will on the part of advertisers, research companies, and especially ad agencies to invest money and time in high quality experimental work seems, on the whole, to have declined. There are of course honourable exceptions, and it is unfortunate that some of the most recent work done by Millward Brown since this work went to the press could not be included here.

This is an important book, to be strongly recommended not only to media planners, but to anyone who is interested in how advertising works. Colin McDonald is extremely good at explaining these highly complex issues in simple terms, and no prior knowledge or mathematical skills are needed to follow the argument in all its details. While it does not answer as many questions as advertisers might like, they should value it as a corrective against making errors based on half understood results.

This is an important book, to be strongly recommended not only to media planners, but to anyone who is interested in how advertising works.

Information Services - the need for a Transparency Directive

John Stephens
Chairman
International Communications
Round Table

As communications technology steadily improves, a variety of new information services, from entertainment to education to shopping, is rapidly emerging. The significant innovation is that all these services can be delivered via electronic means, at the request of the individual. Electronic delivery empowers the consumer to choose, request, and receive personalized services without ever leaving home.

The technology that is making electronic services viable is not yet fully developed. Much remains to be done. The challenges ahead include overcoming slow transmission speeds, establishing secure methods of electronic payment, and reaching agreement on global rules permitting strong encryption. It is already clear, however, that there exists a genuine potential to create a worldwide, borderless electronic marketplace.

The question remains whether this potential will be fully realized. The regulatory environment is a critically important factor. Flexible, market-based standards that are consistent from one jurisdiction to the next will do much to encourage investment and innovation. Inconsistent, cumbersome rules that are adapted from other regulatory regimes and poorly suited to the new technologies will have precisely the opposite effect.

The Regulatory Environment

Europe is entering a critical phase in shaping regulatory policy towards the Internet, online services, and other new media comprising the Information Society. Already, a variety of divergent national legislation to regulate the new technologies is beginning to emerge, a trend that almost certainly will gather momentum. There is a growing risk that haphazardly developed national policies will slow the pace of innovation in crossborder services.

Some urge that these new media should be treated as 'broadcasting' and subject to rules that were developed for traditional television. Others urge that the new media should be considered an extension of 'telecommunications' and subject to the stringent requirements that typically have characterised telecommunications licensing regimes.

In fact, neither of these traditional models is well suited to the new media. Traditional broadcasting has been characterised by high barriers to entry, limited spectrum, linear programming and passive consumption. Content controls were designed for an environment in which consumers were captive and had relatively little choice. The new services are characterised by low entry costs, high interactivity, complete consumer choice as to reception timing and content, and virtually unlimited capacity for programming.

Already, a variety of divergent national legislation to regulate the new technologies is beginning to emerge, a trend that almost certainly will gather momentum.

Telecommunications regulation also has been shaped by recognition that market entry costs are exceedingly high due to the huge investment required to develop communications infrastructure. At the same time, telecommunications services have been deemed essential to the public welfare, giving rise to extensive regulatory requirements imposed through elaborate premarket licensing regimes. Yet the premises of telecommunications regulation are no more applicable to the new services than are the premises of broadcasting regulation.

A new model is needed — one that

takes into account the unique characteristics of the new technologies. It will take time and careful deliberation to construct such a model. It is especially important that the new services not be over regulated in their infancy. They must be given time to develop so that industry can experiment with new offerings; consumers can express their preferences through purchasing decisions; and investors can efficiently allocate resources by choosing the most promising among the various opportunities before them.

The proposing member state is not permitted to enact its proposal prior to the expiration of three month period, which may be extended to six months if the Commission or any member state issues a detailed opinion calling for amendments.

In the meantime, there must be a practical way of moderating the impulse to impose rules that, without proper co-ordination, inevitably will differ from one jurisdiction to the next. There must also be a way of identifying the issues that warrant a regulatory approach, as distinct from the issues that are better handled in other ways, such as codes of practice, voluntary cooperation, and industry self regulation. This is essential if the new regulatory model is to be well tailored to the technologies it addresses.

Transparency Directive 83/189/EEC of 1983

The European Commission has proposed a procedural device that will go a long way towards satisfying these objectives. This proposal would require Member States to give advance notice of draft legislation affecting information services

that are provided 'at a distance, by electronic means, and on the individual request of the service receiver'. In effect, it would apply to future proposals to regulate new information services at the national level.

The proposal takes the form of an amendment to Council Directive 83/189/EEC, which establishes a notification procedure for draft national rules applicable to various aspects of goods, such as packaging, advertising, and safety testing, as well as characteristics of the goods themselves. The basic objective is to give the Commission and other Member States an opportunity to consider (1) whether a Member State's proposed legislation should be modified before enactment to ensure that it does not constitute an unjustified barrier to the internal market and (2) whether the EU should adopt harmonisation legislation on the matter that the proposed national legislation seeks to address.

The Directive provides that Member States must notify the Commission of the rationale for their proposals and requires the Commission to forward each such notification to the other Member States. The Directive then gives the Commission and those Member States a three-month 'stand-still' period to consider the measure and submit comments, which the proposing Member State is required to take into account 'as far as possible'.

The proposing Member State is not permitted to enact its proposal prior to the expiration of three month period, which may be extended to six months if the Commission or any Member State issues a detailed opinion calling for amendments. The stand-still period is further extended to twelve months if the Commission gives notice of its intention to propose or adopt legislation on the subject matter, and to eighteen months if the Council reaches a common position on

such a proposal.

Although Directive 83/189 is largely a procedural instrument and does not by its own terms prevent the adoption of any national legislation, the Directive has helped in preventing fragmentation of the internal market. Between 1992 and 1994, for example, Member States notified 1,136 measures. According to official reports, the Commission has presented comments in 548 cases seeking to reduce the potential impediments to trade, and in 63 cases, the Commission has triggered the extended stand-still periods provided by the Directive. The Commission has frequently used the Directive to support the inclusion of mutual recognition clauses in national legislation.

Extending Transparency to Information Services

Extending the Directive to information services is highly desirable for at least two reasons. First, such a mechanism could be an important means of prohibiting or at least reducing fragmentation in the regulation of emerging electronic services — fragmentation that is already taking place and may yet grow worse, as Member States find themselves at differing stages of technological development and often unable to agree on the order of regulatory priorities. Second, such a measure could aid in identifying areas where harmonization is truly needed. This could help target EU legislation and reduce the danger of over-regulation in developing the appropriate model for new services.

As a practical matter, the extension of the Directive could have a positive impact for other reasons. Today, individual companies encounter great difficulty in monitoring emerging legislative developments in all Member States, let alone in marshalling the necessary resources to

shape them. The proposed extension of Directive 83/189 could provide a centralized and expeditious mechanism for members of industry and the general public to obtain information on Member State proposals and to participate more meaningfully and efficiently in their review.

It is good policy for a member state to facilitate its industry's participation in cross-border electronic commerce — even if this comes at the modest cost of having to notify its own legislation.

The proposal is also well balanced and moderate. It enables the Commission and Member States to participate in pre-enactment review legislation but at the same time permits the Member State proposing legislation to go forward after the expiration of the stand-still period. There is a 'real world' experience with the transparency approach. It has worked well in the case of measures covered by existing Directive 83/189.

Most important of all, the authorities within each Member State hopefully will recognize the benefits that their service industries receive from the transparency approach. It is good policy for a Member State to facilitate its service industry's participation in cross-border electronic commerce — even if this comes at the modest cost of having to notify its own legislation. After all, that Member State will also have an opportunity to review legislation from other Member States that could impede its industry's participation in the new electronic market place.

Don't rock the boat

A pan-European view of 'Television without Frontiers'



Rosemary Stock

As a pan-European broadcaster, MTV Europe strongly supports the concept of a coordinated audio-visual policy across Europe. The 'Television without Frontiers' Directive constitutes an important cornerstone of this policy and has certainly contributed to the evolution of a single market in broadcasting since its adoption in 1989. It is the result of a well-balanced (and hard fought) compromise of the varying interests of the Member States, a compromise that has been under serious threat from the fundamental changes proposed in certain quarters. A small amount of fine-tuning was undoubtedly necessary - clarifying existing legislation and agreeing interpretation - but the major review being pushed by 'special interests' was in danger of rocking the boat, or even of swamping it all together!

At the heart of the Directive is the *country of origin* principle, a concept that proved crucial for MTV when establishing its service in Europe. When we launched in 1987 the sceptics predicted that the marketplace was too fragmented for a pan-European niche broadcaster. Yet, in only 9 years, MTVE has become one of the fastest growing and largest cable and satellite channels in Europe - one service simultaneously available to over 55 million households in 37 countries (almost 49 million in the EU alone).

This success would, however, have been difficult to achieve had MTVE had to adapt to the many variations - some slight, some more fundamental - in the conditions that regulate broadcasting in the different Member States. One needs only to consider the differing advertising regulations to see how difficult it could have been - some Member States allow 'natural' breaks while others insist on 'block' advertising; indications of price are required on toy advertising in some places, but not others and indeed some Member States have bans or partial bans on children's advertis-

ing per se; the word 'diet' may not be used in food or drink advertising in one country but is acceptable elsewhere; the ban on 'political' advertising could encompass more than traditional partisan political broadcasts. Need I go on?

Under such varying conditions, MTV Europe would have been an impossibility financially, technically and logistically. Thus, the adoption of the Directive which *'lays down the minimum rules needed to guarantee freedom of transmission in broadcasting'*¹ was, and still is, welcomed - provided the country of origin principle is maintained and Member States, while still being able to tailor regulations for services under their own jurisdiction (in line with the principle of subsidiarity), do not also seek to further regulate incoming broadcasts. This would go against the very grain of the Television without Frontiers Directive and would have grave repercussions - new entrants to the market would be inhibited and the growth, if not the survival, of certain existing channels would be threatened.

What future then for the multichannel (digital) environment? Judging by the tenor of the debate, which has tended to ignore pan-European services, one could be forgiven for thinking that this will be the province of national terrestrial (and possibly national satellite) broadcasters. Yet pan-European services have much to offer the consumer and should not be prevented, by misplaced regulation, from forging ahead.

It is, of course, entirely reasonable that Member States have the right to suspend, provisionally and subject to certain conditions, retransmission of an incoming broadcast that *'manifestly, seriously and gravely infringes Article 22'*² in respect of the protection of minors. As a youth channel, MTV Europe is well aware of its responsibilities in terms of broadcasting to minors and we support the intention to protect young peo-

¹ Recital 13, Council Directive 89/552/EEC of 3 October 1989.

² Article 22 para. 2(a), Council Directive 89/552/EEC of 3 October 1989.

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Government and
Regulatory Affairs Manager
MTV Europe**

ple from gratuitous violence and pornography. We would, however, caution against legislating too broadly on questions of moral judgement under the guise of protecting minors, thereby crossing the fine line into censorship. Some of the suggestions for increasing the means of protection, while reasonable on the surface, need to be carefully investigated prior to any overly hasty Europe-wide legislation. For example, niche broadcasters with very short programming elements (e.g. music videos, cartoons, etc) could find it difficult to comply in any effective manner requirements to label programmes with visual or acoustic warnings. Attempting to find a Europe-wide classification system for this sort of tagging, or for one to fit the 'V-chip' solution, may prove to be a well-nigh impossible challenge. The differences in moral standards and sensibilities across the European Union make it difficult to see how any major harmonisation could occur. Here again we would stress the importance of maintaining the country of origin principle while encouraging greater dialogue between Member States' regulatory authorities.

As indicated earlier, the regulation of advertising is another area where country of origin is important. The provisions in Chapter IV of the existing Directive more than adequately fulfil the obligations of consumer protection, including the protection of minors, and taste and decency requirements. In our experience any problems encountered are more likely to be with Member State implementation, rather than with the Directive itself. Beware then imposing any further over-zealous limitations on advertising and creative freedom which may unnecessarily limit revenues and curtail resources that would otherwise be reinvested in programming. Nor should the relationship between viewer and broadcaster be overlooked or disregarded. Viewers are only too willing to switch to other channels (commercial or noncommercial),

or turn off completely, if annoyed by the style, frequency or content of advertising messages - broadcasters ignore this at their own peril.

Flexibility is essential in allowing for the expansion of Europe's rapidly evolving broadcasting industry and nowhere is that flexibility more important than in the application of Article 4 in respect of European programming quotas. There is no need here to reiterate all the arguments, for and against, the 'majority proportion' we have no desire to add to what has already been an overly politicised debate - but there is no harm in emphasising that the title, and the content, of this Directive is Television without Frontiers. The specific needs of the European film industry should not be confused with the very different requirements of broadcasting, nor should they be used as an excuse to needlessly 'tighten up' the Directive. Article 4, as it stands, allows a Member State to use its discretion in achieving the goal while still taking into account the financial constraints inherent in starting up new channels, allowing for the transition period during which such channels depend to a large extent on catalogue programming.

Looking ahead over the next decade and beyond, it is not difficult to predict fundamental changes in the way television broadcasting is received and perceived. Readjusting the rules of the game to fit all requirements, as well as fostering the growth of Europe's audiovisual industry, will require foresight on the part of regulators. The Television without Frontiers Directive has provided a sound basis for a 'frontiers-free' broadcasting environment but it is a fragile balance at best - too many precipitate changes to the Directive would indeed rock the boat. Let us not lose sight of our moorings as we chart our way forward into the next century.

The provisions in Chapter IV of the existing Directive more than adequately fulfil the obligations of consumer protection, including the protection of minors, and taste and decency requirements.

Advertising and the professions

The European Commission's Green Paper entitled 'Commercial Communications in the Internal Market' (COM(96) 192) has yet again raised the issue of bans on advertising by the professions.

Over the years there have been numerous reports on the subject. As early as 1970, the UK Monopolies and Mergers Commission addressed the issue in its report concerning the effect on the public interest of certain practices relating to the supply of professional services. The situation was reviewed again by the UK Office of Fair Trading ('OFT') in October 1986 and by an OECD report entitled 'Competition policy and the professions' published in the preceding year.

Ten years on, even after completion of the Internal Market, we still find certain professions in the European Union refusing to move with the times.

All of these reports produced similar conclusions, namely that competition through advertising produces benefits for consumers as a result of more widely available information and more efficient services. And yet ten years on, even after completion of the Internal Market, we still find certain professions in the European Union refusing to move with the times.

For the purposes of this article I shall focus on just one of them, the audit profession, as it is closest to my heart.

The audit profession

A study completed in 1996 for DGXV entitled 'The role, position and liability of the statutory auditor in the European Union' identified no less than seven Member States in which some form of advertising restrictions were still imposed on the audit profession. These were Belgium, Luxembourg, Italy, Spain, Portugal, France and Germany. In addition, unsolicited

offerings are prohibited in a further four Member States (Austria, Ireland, the Netherlands and the UK).

Based on their research, the authors of this study, the Maastricht Accounting and Auditing Research Centre ('MARC'), concluded that there is no evidence that these restrictions make a direct positive contribution towards audit quality. Conversely, they concluded that there is convincing evidence on the negative effects of these restrictions on (intra-Union) competition. As such, MARC recommended that current national restrictions regarding, inter alia, unsolicited offering of services and advertising should be removed.

The MARC conclusions were echoed by Claus-Dieter Ehlermann when he was Director General of DGIV, the European Commission's competition directorate. Mr Ehlermann questioned why it was that 'if certain professions in some Member States can provide quality services without being subject to restrictions on advertising and without the public good being adversely affected, why should the same professions in other Member States need to be regulated to such a point that virtually all forms of advertising are prohibited?'

So why, despite this overwhelming consensus that advertising restrictions are 'not a good thing', does the audit profession in some Member States seem so keen to retain them? There are really two answers to this question, depending on whether you are in favour of restrictions or against them.

The pro-restrictions camp believe that such restrictions preserve the integrity of practitioners and the quality of their services so as to safeguard the public interest. The opposing view is that restrictions on advertising act as a barrier to the provision of cross-border services, are therefore protectionist and anti-competitive, contrary to the concept of an Internal Market and, ultimately, not in the interest

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of the consumer.

So who is right? To answer this we should look at some current examples of the rules at work.

The continental approach

In 1996 a censure was issued by the Association of Tax Accountants in Germany (the Steuerberaterkammer) and approved by the nation's Constitutional Court against a small, five-partner firm of auditors and tax accountants. So what heinous crime did this luckless firm commit? It would appear that one of the partners was approached by a local journalist when it became known that the firm was moving into a building of historic interest. The partner referred to his firm as 'eminent' and also told the journalist how many people were employed in the firm's three offices.

In the ensuing court case, the partner was found guilty of prohibited advertising because he both referred to the firm as eminent and disclosed the number of employees, thereby giving an indication of his firm's size. On appeal, the Constitutional Court upheld the local district court's decision and ruled that the advertising ban is necessary 'to prevent the profession's true image being distorted by the use of commercial advertising methods'. No doubt the German public can sleep soundly at night, safe in the knowledge that their interests are being so rigorously protected by the Courts.

Another continental example concerned our French firm. On 12 June 1995, Andersen Consulting became the first French consulting firm to take to the national airwaves with a television advertising campaign. However, the campaign ran foul of the French state body of Chartered Accountants, the Ordre des Experts Comptables.

The Ordre has taken the view that the Andersen Consulting campaign is deliber-

ately provocative and is an indirect promotion of all Arthur Andersen business units in France, including Barbier Frinault, our French member firm. Under the Ordre's strict advertising rules, Barbier Frinault is prohibited from any form of advertising.

The Andersen Consulting campaign was decided, conceived and launched without any consultation with Barbier Frinault. What is more, Andersen Consulting in France is a completely separate legal entity from Arthur Andersen with no common shareholders, or management, or staff. Ironically, the principal objective of the Andersen Consulting campaign was to differentiate itself from Arthur Andersen by developing its own distinct image.

The UK approach

Germany and France are examples of countries at one end of the regulatory spectrum. In the UK, the regulation of, and the powers of self-regulation granted to, the professions are generally more flexible than others in the European Union. The UK auditing profession removed all bans on advertising back in 1984, although restrictions on unsolicited offerings still persist.

After an initial flurry of television commercials by some of the Big 6 ac-

The firms soon realised that the benefit of a television advertising campaign was negligible. The cost on the other hand was not.

counting firms, reality set in. The firms soon realised that the benefit of a television advertising campaign was negligible. The cost on the other hand was not.

Since that time, UK accounting firms have developed marketing strategies that are better suited to their particular audiences. A TV commercial might do something for an accounting firm's image but one isn't likely to pick up the audit of a

blue chip company on the strength of it.

It isn't just the accounting firms who advertise. In 1995 the Institute of Chartered Accountants in England & Wales ('ICAEW') came out with a high-impact advertising campaign stating 'It's easier to sleep with a chartered accountant'. Some accountants were shocked by the sexual innuendo; others thought that a campaign to revamp the accountants image was long overdue having had to tolerate jokes about lion-tamers, courtesy of Monty Python, since the mid 1970's.

The process of change is rapidly rendering obsolete existing restrictions, many of which have their roots in the distant past.

The OFT believed, back in the 1980's, that the application of the British Code of Advertising Practice would provide sufficient guidance for the professions on acceptable forms of advertising. In retrospect, they were right. The concept of 'legal, decent, honest and truthful' is still as effective today, despite the rapid pace of technological change and the globalisation of the market place over the last decade.

Preliminary conclusions

On balance, one has to question whether professional advertising bans are relevant in today's society. The German example above may not be representative, but it does serve to prove a point.

Today's modern consumer needs information about the range of services that are available in the market place. And that market place, and the consumer too, are changing at a frightening pace. The process of change is rapidly rendering obsolete existing restrictions, many of which have their roots in the distant past.

How, for example, can restrictions on advertising be applied in one country when residents of that country can dial

into the Internet and access the web-site of a service provider in another country? The answer, quite simply, is that they cannot. This point has not gone unnoticed in a number of countries.

Shortly after the MARC study was completed, the Institute des Réviseurs d'Entreprises in Luxembourg at its Shareholder's meeting lifted its ban on advertising. In Netherlands, professional accountants believe that restrictions will be lifted within the next two years. In Germany, recognising the threat that the Internet poses, the local regulators have tried to insist that firms should apply their local advertising restrictions to the activities of their foreign affiliates - a clear sign that something has to change.

So what should be done? Direct action by the European Commission is not realistic. For one thing, the professions are unlikely to want action from Brussels as this may be seen as a threat to the continuation of a self-regulatory system. More importantly, the Commission's hands have been too effectively manacled by the chains of subsidiarity. But we can see that when left to take the initiative, the professions can be painfully slow at taking action.

The solution has to be a compromise. The primary goal must be a removal of all advertising restrictions within the European Union, not just for auditors but for other professions as well. In addition, the opportunity should be taken to consider the removal of other 'self-imposed' restrictions. For example, if lawyers and accountants are allowed to advertise, why can't they also work together in partnership if that is what they, or the market place, would like?

These issues need to be raised at a European level to enable a healthy debate. The Commission's Green Paper on Commercial Communications was an important first step in this process.