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Sales promotions - the reasons underlying restrictions in Europe

J. Bergevin, DG XV, The European Commission[1]

It seems opportune to consider why regulations on sales promotions differ across Europe, given their importance in the marketing mix and particularly in the field of on-line marketing practices. The Green paper on Commercial Communications showed that this is one of the fields where there exists a wide divergence of restrictions in Member States. It is useful to consider the reasoning behind these restrictions in order to try and understand the policy implications at European level.

It would appear there are two reasons for restricting promotions which underlie the rules and regulations of the Member States. The first is the risk of misleading the consumer and the second is the risk of 'destabilising' the market through the use of what are considered to be 'disloyal' or 'unfair' marketing practices.

Evidence suggests that these reasons give rise to contradictory views on how to regulate promotional activities. The Green paper gave an overview of the differing regulations for price advertising, promotional gifts/offers or prize competitions. Leaving aside a few peculiarities to be found across these rules, a trend appears. If the rule derives from unfair competition law and therefore can be deemed to target the risk of 'destabilising' the market place, it is likely to be far more restrictive than if it seeks to protect consumers from being misled.

There is a positive correlation between the level of restriction on sales promotion services and the emphasis given by the regulator to protecting 'unfair' competition. Examination of the national laws indicates that, contrary to what is often claimed by certain lawyers, traders and consumer associations when examining this issue, the objectives of consumer protection and protection against 'unfair' competition give rise to contradictory conclusions as to how sales promotions should be regulated.

It is only by examining the reasons given under each category of justification that we can begin to understand why the two objectives lead to differing levels and types of restrictions.

The unfair competition defence is best understood by considering the source of this body of law[2]. The putting into place of such laws varies across Member States but typically dates back to a period between the mid-nineteenth century and the early twentieth century. This legal development is inextricably linked to the industrial revolution. Rules relating to trades and crafts, which determined entry into them and what a particular tradesman or craftsmen could or could not do[3], were replaced with these rules which sought to encourage investment by the new business classes by preventing abuses of the newly established commercial and industrial freedoms to compete. The deregulation of trades and these new laws were purely business

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Mike Sainsbury, *Editorial Director*
Kate Maitland Smith, *Managing Editor*
Diane Luquiser, *Consumer Affairs Editor*
Esther Grant, *Production Manager*
Toby Syfret, *Research Consultant*

Published by **asi,**
34 Borough Street
Brighton BN1 3BG, UK
Tel: +(44) 1273 772741
Fax:+(44)1273 772727
e-mail:asi@dial.pipex.com

driven and sought to encourage mobility (particularly of labour) between trades in order to stimulate investment of capital in large scale production processes by ensuring high returns to capital invested[4].

The scope of the unfair competition laws that resulted covers numerous issues such as the use of trademarks and comparative advertising. Many of these can be justified in economic terms. However, the restrictions on the use of promotions that also arose in certain national regulations carry less economic credence since they reflect an attempt to maintain a certain level of protection for particular types of business. As we move to the information and communications 'revolution' offered by the advent of the Information Society, it is these provisions that could act as significant Internal Market barriers to its development.

Two justifications are commonly made to maintain such restrictions. First, it is suggested that the use of attractive promotions or loyalty schemes in an exaggerated manner will portray either the gift or the promoted product/service as being less valuable than it really is in the mind of the consumer and thus totally undermine the relevant market.

Secondly, the argument is made that the 'small' need to be protected from the 'large'. More specifically, it is suggested that promotions can only be afforded by large volume producers or traders and that such campaigns lead to unfair competition against smaller players.

The first justification is shown to be somewhat dubious given the manner in which some of these laws can be applied. For example, in Germany, where these restrictions are the strictest, consumers cannot even have access to justice in this field since only competitors or the retail trade can take action before the Courts under the provisions restricting promotional services. Furthermore, it assumes that consumers are naive or gullible. As the German Minister of Justice suggested in his cover article for the August issue of this newsletter, in the restrictive German law such restrictions:

' are traditionally measured not against the yardstick of a 'reasonable' consumer but rather that of a 'fleeting' consumer, which is a more stringent yardstick.'

The Minister himself disapproves of this position and feels that German law should be deregulated on the grounds that well-informed consumers should be able to tell what a promotion is and will realise when they are being misled. No doubt his Austrian counterpart would agree since the Austrian authorities have recently deregulated their restrictions on promotions.

The second 'large versus small' justification can be contested from three perspectives:

First, not only does it assume that all manufacturing industry or service sectors are characterised by economies of scale and scope and therefore that large companies make larger profit margins which can be ploughed into promotions but, more worryingly, it also assumes that those same higher margins will not lead to new entry in the sector. This second assumption only holds if competition policy is not being applied since, as long as competition law is enforced and large companies are not allowed to abuse dominant positions, there is no reason to believe that they will have sustainable inflated margins from which such promotions can be financed. Moreover, actual observation suggests that the correlation between promotions and inflated margins is difficult to assume. If anything, in high volume sectors typified by promotions such as fast moving consumer goods, the segment of the sector which is dominated by large firms tends to be the most competitive and often has relatively low margins. For example, margins in retailing operations tend to be lower in those countries where the sector is highly concentrated i.e. where a relatively high proportion of turnover is attributable to a small number of large groups.

Secondly, the reasoning implies that sectors are characterised solely by price competition. This is again out-dated. Competition in a modern

economy is often driven by qualitative differences. Taking the example of the retail sector, which too often is treated as a homogeneous, 'no thrills' service, our daily purchasing experiences witness how we recognise that this is not the case. The small shop offers a different kind of service to the hypermarket or major retail store. For example, it is easier to access, it's probably nearer to your home and you don't spend half an hour at the checkout when you just wish to get a few items! Also, the personal service input of the small shopkeeper distinguishes it from the impersonal, comprehensive service, offered by his large competitor. The repeated contact between the the small shopkeeper and his local customers also allows him to marry more accurately his supplies with the needs of his customers that can lead to very successful strategies.

Finally, it is rather absurd to suggest that small firms or retailers cannot afford promotions. In fact, promotions are far more affordable to the small operator than advertising or other forms of commercial communications, which are characterised by scale economies due to media costs etc. In our example of the retail sector, the possibility of using promotions does not appear to have any discernible effect on the structure of the sector in terms of helping the larger groups dominate the smaller ones. Relatively light regulatory regimes on promotions exist in both Italy and the UK and yet the former has a highly fragmented retail sector whereas the latter has a highly concentrated one.

Thus, the reasoning underlying strong limitations on promotions from the unfair competition perspective is not convincing when one looks at behaviour in markets and the economic principles that underpin that behaviour. How about the arguments under the consumer protection side?

A hint of their appropriateness and nature was given above when referring to the German Justice Minister's position. In effect the regulations justified primarily on this basis, for example in Sweden[5], tend to ensure the consumer is made well aware of the nature of the offer, i.e. they are content related, ensuring that the consumer is provided with sufficient information to make an informed choice. They prevent misleading advertising rather than promotions themselves. This is an efficient approach in that it ensures the 'reasonable' consumer is provided with the necessary information presented in a transparent manner to make the most beneficial consumption choice.

What are the implications of this analysis of differences in national regulations on promotions in Europe, where cross-border promotions are likely to become increasingly present thanks to the advent of the Information Society? As the Green paper noted, there is a wide divergence in Member States' regulations in this field. Mutual recognition is therefore unlikely to be a politically viable option for the countries with the strictest regulations. The German Minister of Justice reflects this view in the call for deregulatory harmonisation in the above-mentioned article. However, whether the application of Community law proceeds via the questioning of 'disproportionate' national restrictions or 'proportionate' harmonisation will depend crucially on whether one considers such restrictions to be justified in the first place and proportionate to the public interest objective they invoke.

The points made above tend to suggest that such restrictions are likely to raise doubts of disproportionality when they seek to meet the objective of protecting unfair competition (which in itself, if it is largely associated with economic protection, might not be considered to be a valid public interest objective). As regards the protection of consumers, depending on their form, certain restrictions in this field may well be considered to be counter-productive by inciting anti-competitive behaviour by market operators. No doubt unfair competition lawyers who defend restrictions on levels rather than the content of sales promotions will consider such views to be heresy. Future issues of this newsletter should be an ideal platform for them to defend their positions and the views of consumer bodies and trade bodies in favour of such restrictions would be welcome.

As we move to a border-less commercial communication services age it is time for these debates to be advanced since there can be no doubt that there is need for a qualitative European regulatory framework for sales promotions in Europe to be established. At present, it seems that the only valid argument in favour of these restrictions is that consumers are extremely gullible. Have you recently received a free gift or offer? Do you consider yourself to be gullible and in need of such protection?

[1] The views in this article are those of the author and need not reflect the official position of the Commission's services.

[2] Covered by the Law of Torts in the UK.

[3] The only vestiges of such rules remain in the fields of the regulated professions.

[4] In this respect, it is particularly ironic to find that these laws, seeking to protect the rights of businessmen, are today most strongly supported by certain Trades Unions and consumer associations! It took many more years following their introduction before social legislation and workers rights were introduced!

[5] The only exception in Sweden is the restriction on promotions for alcoholic beverages, which reflects the restrictions on all forms of commercial communications in that country for this product for health reasons.

The De Agostini ruling and advertising regulation

Reprinted from an article originally published last December in the Gazette du Palais.

Marc Lolivier
Southern Europe
Legal Adviser
Reader's Digest
&
Chairman
Legal Affairs
Committee
European Federation
of Direct Marketing

Issued at the height of summer in July, this ruling, full of insights, caught the attention of commentators with the return to work after the holiday season. It represents, in fact, an important step in the construction of a European case law in the field of advertising regulation.

The facts of the case go back to 1993, the year when the Swedish subsidiary of the well-known publishing group de Agostini launched a television advertising campaign aimed at promoting a magazine for children published by the parent company in Italy. The advertisement in question was broadcast by TV3, a company established in the United Kingdom which broadcasts from England television programmes, by satellite, to Denmark, Norway and Sweden. In parallel, the same advertisement was re-transmitted by TV4, a Swedish television channel. Following the broadcasting of this advertisement over Swedish territory, the consumer ombudsman submitted to the Stockholm Commercial Tribunal a request for a ruling banning the advertisement on the grounds that it contravened the provisions in the Swedish broadcasting law prohibiting television advertising aimed at capturing the attention of children. A subsidiary request was also put to the Tribunal, that it should compel the advertisement, which was deemed to be lacking in clarity, to carry additional information in order to enlighten the consumer on the offer being made to him.

The Stockholm Tribunal then decided, using the procedure provided for under Article 177 of the EC Treaty, to refer to the Court of Justice of the European Communities (ECJ) two prejudicial questions relating to the application of the principles of the freedom of movement and to the interpretation of Directive 89/552/EEC, more commonly known as the 'Television without Frontiers' Directive[1]. Thus, the ECJ was asked to rule as to whether Articles 30 and 59 of the EC Treaty or the 'Television without Frontiers' Directive: 1) prevented a Member State from introducing measures against a television advertisement broadcast by an advertiser from another Member State; and 2), prevented the application of the Swedish law banning advertising targeted at children.

The first of these two questions applied equally to two other cases involving television shopping programmes broadcast by TV3 on behalf of the company TV Shop. In particular, these cases related to certain television shopping programmes offering cosmetic (Case C - 35/95) and cleaning products (Case C - 36/95), whose contents seemed to contravene the Swedish law against misleading advertising. The Court ruled to treat these three cases together.

The principles of freedom of circulation and cross-border television advertising

To what extent can legislation banning or limiting television advertising emanating from another Member State be deemed to be compatible with the principle of the free circulation of goods and of the free provision of services, as defined respectively in Articles 30 and 59 of the EC Treaty ?

1 The principle of the free circulation of goods (article 30 of the EC Treaty)

The Court took up here the principle established in the *Keck and Mithouard* ruling[2], according to which, national measures which limit or prohibit 'certain sales practices' do not fall within the scope of Article 30, so long as they are applied to all those operating within the national territory and that they affect in exactly the same way, both in law and in practice, the marketing of national products and those originating from other Member States.

In keeping with the view which had already been reached in the *Leclerc-Siplec*[3] ruling, relating to French regulations prohibiting television advertising by retailers, the Court recalled that national legislation

[1] Directive 89/552/EEC of 3 October 1989 aimed at the co-ordination of certain legislative, regulatory and administrative provisions of Member States relating to the exercise of television broadcasting activities.

[2] Keck and Mithouard ruling, ECJ, 24 November 1993, C-267/91 and C-268/91. Rec. P. I - 6097.

[3] Leclerc-Siplec ruling, ECJ 9 February 1995, C-412-93, Rec. P.I. 779.

which banned advertising in a particular sector was in fact relevant to the 'sales practices' of the targeted products.

Consequently, it followed that the Swedish legislation did not fall within the scope of Article 30 unless it could be shown that it did not apply to all those operating within the national territory and that it did not affect in exactly the same way, both in law and in practice, the marketing of national products and those originating from other Member States. If in the eyes of the Court there was little doubt that the legislation did in fact apply equally to all operators, there was less certainty as far as the effects of this law on the marketing of imported products was concerned. Thus, the ruling noted, it was not inconceivable that a ban on television advertising could have a greater impact on products originating from another Member State.

Under such circumstances, the Court continued, it was for the referring jurisdiction to verify, on the one hand, that the ban was justified by public interest objectives or by one of the objectives set out in Article 36 and, on the other, that the goal being pursued could not be reached by other measures with a less restrictive impact on intra-Community trade.

It thus appears that for them to be deemed contrary to Article 30 of the Treaty, measures taken by a Member State on the basis of national legislation ought to penalise more heavily the marketing of products originating from another Member State, compared to that of national products. In addition, it is necessary to establish that the measures in question are not needed to meet public interest objectives or one of those set out in Article 36 of the Treaty, and that they are not proportional to those goals, or that these essential objectives or needs could be met by measures with less of a restrictive effect on intra-Community trade. This represents the principle of proportionality created by Community case law.

The De Agostini Ruling

The 'Television without Frontiers' Directive. Misleading advertising in the host country. Host country legislation banning advertising targeted at children.

The European Court of Justice - 9 July 1997 - Joint cases C-34/95, C-35/95 and C-36/95. Articles 30 and 59 of the EC Treaty - the 'Television without Frontiers' Directive - Advertising broadcast from a Member State - Possible application of host country regulations concerning misleading advertising (yes) - Possible application of legislation banning advertising targeted at children (no).

The Court, ruling on the questions put to it by the Marknadsdomstolen, by its opinions dated 7 February, hereby states that :

1) The Council Directive 89/552/EEC of 3 October 1989, aimed at the co-ordination of certain legislative, regulatory and administrative provisions of Member States relating to the exercise of television broadcasting activities, does not prevent a Member State from adopting, in applying a general regulation relating to the protection of consumers against misleading advertising, measures against an advertiser responsible for television advertising broadcast from an other Member State, providing that these measures do not prevent the retransmission in its own territory of television broadcasts originating from this other Member State.

2) Article 30 of the EC Treaty ought to be interpreted in the sense that it does not prohibit a Member State adopting, using national legislative provisions, measures against an advertiser responsible for a particular television advertisement, unless these provisions do not affect in the same way, either in law or in fact, the marketing of national products and those originating from other Member States, that they are not necessary to meet the public interest need or one of the objectives set out in Article 36 of the EC Treaty, that they are not proportional to that end, or that these essential objectives or needs could be reached using measures with less of a restrictive effect on intra-Community trade.

3) Article 59 of the EC Treaty ought to be interpreted in the sense that it does not prohibit a Member State adopting, using national legislative provisions, measures against an advertiser responsible for a particular television advertisement. It is nonetheless up to the jurisdiction of referral to check that the provisions are needed in order to meet essential needs justified by the public interest or by one of the objectives set out in Article 56 of the EC Treaty, that they are proportional to these goals, and whether or not these objectives could be achieved by measures with less of a restrictive effect on intra-Community trade.

4) Directive 89/552 ought to be interpreted as preventing the application to television broadcasts originating from other Member States of a provision of a national broadcasting law which stipulates that an advertisement broadcast during slots intended for television advertising ought not to be aimed at children of under twelve years of age.

This ruling risks disappointing those who had hoped for a sharp change of direction concerning the scope of application of Article 30 in the area of advertising. In fact, on this issue, the ruling reconfirmed the rule established since the *Keck and Mithouard* ruling of 1993, whereby the ECJ, anxious to put a brake on the multiplicity of cases bringing into question national restrictions on advertising, limited the scope of application of Article 30. Nonetheless, the fact that the Court took care to note that a ban on television advertising by a Member State could have a greater impact on the marketing of products originating from another Member State was no doubt deliberate. This comment could be interpreted as an opening which may allow new cases to be brought forward under the scope of Article 30.

This ruling equally reminds us that proportionality remains an essential requirement in any event in order to legitimise, under Community law, obstacles to the free movement of goods, if these are motivated by public interest objectives.

2 The principle of the free provision of services (article 59 of the EC Treaty)

The *Bond van Adverteerders* ruling established that an advertisement broadcast by a television channel based in one Member State, on behalf of an advertiser based in another Member State, constitutes the provision of a service as defined by Article 59[4].

It thus fell to the Court in the present case to assess whether the Swedish legislation constituted a restriction on the free provision of a service by an English television channel.

In this respect the Court established that, by limiting the ability of a broadcaster established in the broadcasting Member State to broadcast on behalf of advertisers located in the host Member State television advertisements especially aimed at the public of the latter state, the legal provisions in question did in fact constitute a restriction on the free provision of services.

Consequently, the ruling noted, it was for the jurisdiction of referral to assess whether the measures in question were necessary to satisfy public interest objectives or one of those set out in Article 56; whether they were proportional to those ends, and whether these goals could not have been achieved by other, less restrictive, means.

Thus it appears that Article 59 does not prohibit a Member State from implementing measures, based on national legislation, against an advertiser because of a television advertisement. However, these measures must be justified by a public interest objective and they must respect the principle of proportionality as defined by the Court.

The fact that the ruling, with respect to Article 59, did not see the necessity to prove the discriminatory nature of the national legislation, both in its scope as well as in its impact, shows that this criterion, seen as a precondition for the application of Article 30, is not relevant to Article 59. This ruling contradicts in the clearest manner possible those who had predicted an extension of the *Keck and Mithouard* precedent to Article 59. It ought, consequently, to encourage those facing similar circumstances, where possible, to try and place themselves under the scope of Article 59, which retains a wider range of conditions for its application than those needed for Article 30.

This ruling contradicts in the clearest manner possible those who had predicted an extension of the* Keck and Mithouard *precedent to Article 59.

The 'Television without Frontiers' Directive and television advertising

Does the Directive allow Sweden to apply its own legislation to television advertisements which originate from another Member State? This question raises the thorny issue of which is the applicable law when an advertisement broadcast across the territory of one Member State actually originates from another Member State, in this case the United Kingdom. In other words, can the advertiser limit himself to respect-

[4] Bond van Adverteers ruling, ECJ 26 April 1986, C-352/85, Rec. P. 2085.

ing the laws of the country from which the advertisement is transmitted, viz. the country of broadcast, or, on the contrary, does he need equally to abide by the laws of the host country, in which the advertisement is received? The problem, in this instance, concerned the application of two areas of legislation: on the one hand, legislation on misleading advertising and, on the other, the particular provisions under the Swedish law on broadcasting, which prohibit television advertising targeted at children. The solution reached by the Court was not the same in both cases.

1 The application by the host country of its legislation on misleading advertising.

According to Article 2 of the 'Television without Frontiers' Directive, which one will recall aims to secure the free circulation of television broadcasts, Member States are obliged to ensure freedom of reception and not to prevent the retransmission on their territory of programmes originating from other Member States for reasons based on criteria set out in the Directive. In this respect, it is worth noting that the EU text does in fact contain provisions relating to advertising, some of which address advertising content. The text provides notably for a set of rules relating to the respect for human dignity, to the protection of health and of children, and also to the issues of tobacco and alcohol advertising. Nonetheless, the Directive falls short of covering all aspects relating to advertising content. Thus, notes the Court, the harmonisation of legislative, regulatory and administrative provisions, in the area of television advertising, is only partially achieved by the Directive.

It is evident, moreover, from the 'whereas' clauses of the Directive itself, that the latter does not prejudge other Community acts, current or future, which have as their objective the needs of consumer protection, the fairness of commercial transactions and of competition.

The Court recalled that Directive 84/450/EEC relating to misleading advertising requires Member States to ensure that adequate and efficient means exist to control misleading advertising. Thus, according to the ruling, preventing a host country from taking measures against an advertiser would empty the Directive of its meaning.

Consequently, it appears that the 'Television without Frontiers' Directive does not prevent a Member State from taking measures against an advertisement broadcast on its territory from another Member State, on the basis of its national legislation relating to misleading advertising, providing these measures do not prevent as such the broadcasting of cross-border programmes.

If the ruling allows for the possibility of the authorities in the host country to intervene against the contents of a cross-border advertisement which contravene national legislation on misleading advertising, this intervention must not prevent the effective broadcasting of programmes from another Member State by imposing, for instance, a pre-emptive control on these programmes.

The Court took care to specify that the national regulations of the host country must nonetheless not impose a second control additional to that which the broadcasting Member State is meant to impose.

It remains the case, nonetheless, as the company de Agostini correctly emphasised, that measures taken against advertisements, even when taken after the event, have in general an impact on the retransmission of television programmes, whilst the Directive aims to guarantee the freedom of reception and of re-transmission within the European Union.

This ruling, which also has relevance for other advertising media besides that of television, will have an impact on the development of cross-border advertising. In allowing the possibility of the host state to intervene on the basis of its legislation

The ruling, which also has relevance for other advertising media besides that of television, will have an impact on the development of cross-border advertising.

against misleading advertising, the ruling forces advertisers to comply in cases of cross-border advertising with the legislation of the host country with the most restrictive rules. This means that an advertiser wishing to disseminate the same advertisement across the fifteen Member States of the Union, will be obliged to research in advance the legislation in force in each of the countries before defining the content of his advertisement in terms of the most restrictive national legislation, which could mean his having to renounce promotional techniques or practices which would be allowed in the fourteen other States. This situation will not do much to promote interest in cross-border advertising campaigns; as the Green Paper on commercial communications recently underlined, enthusiasm for these types of operations is lacking, due to the difficulties, notably, relating to the disparities in regulation[5].

It is to be regretted that the Court did not follow the conclusions of the Advocate-General, for whom the 'Television without Frontiers' Directive ought to be interpreted as preventing a Member State from restricting the retransmission, on its territory, of television programmes originating from another State, on the grounds that the programmes infringe its national legislation on misleading advertising[6].

The ruling has nonetheless the merit of clearly showing the limits of the 'Television without Frontiers' Directive, as well as the short-comings of the Directive on misleading advertising which, in its current form, by failing to apply the principle of mutual recognition, does not ensure freedom of movement for advertisements in the European Union.

The host state is thus not allowed to apply measures aimed at regulating the content of television advertising with respect to children.

2. The application, by the host country, of its legislation prohibiting television advertising aimed at children

Article 11 of the Swedish Broadcasting Law (Radiolag 1966 : 755), prohibits advertisements broadcast during the programming slots scheduled for television advertising from targeting children under the age of twelve.

According to the ruling, the article of the Directive freely allows Sweden to apply this provision, which has as its objective the protection of children from television broadcasting organisations based in Sweden. In contrast, this measure was not applicable to television advertisements originating from other Member States.

The Court argued that the Directive includes a full set of provisions specifically aimed at the protection of children in terms of television programming in general and television advertising in particular. These measures are to be respected by the broadcasting country.

Given that it relates to an area covered by the Directive, the host state is thus not allowed to apply measures aimed at regulating the content of television advertising with respect to children. As the Court correctly emphasised, intervention by the host country in an area regulated by the Directive would amount to a restoration of a second control, adding to that which the State is required to implement in accordance with the directive.

This solution can only be applauded, given that the alternative view would have led everyone to question the value of the Television without Frontiers Directive. What would be the utility of this Community measure if, even in the areas it regulated, each Member State continued to apply its own legislation to programmes broadcast from another Member State? It is to be noted, finally, that the Television without Frontiers Directive has recently been modified[7]. This modification has introduced several new rules, notably in the area of tele-sales, broadening the scope of the Directive and the areas over which the law of the broadcasting country is, in principle, the only applicable law.

[5] Green paper on Commercial Communications within the single market ; COM (96) 192 - 8/5/96. See also M. Lolivier 'Towards an internal market in commercial communications', *la Gazette du Palais*, special edition on advertising, June 1997.

[6] Conclusions of the Advocate-General M.F.G. Jacobs of 17 September 1996.

[7] Directive 97/36/EEC of 30 June 1997 amending Directive 89/552/EEC of 3 October 1989.

Commercial communications

Why consumer organisations worry about them

Jim Murray
Director
BEUC
(The European Consumer Organisation)

Commercial communication is an important contributing factor to the operation of competition, the free market system and the principle of consumer choice to all of which, as a consumer organisation, BEUC is committed.

The objective of the Commission's Green Paper on Commercial Communications is to try to remove certain barriers to such communication and yet it attracted strong criticism from us. We felt, *inter alia*, that the Green Paper adopted a one-dimensional approach to commercial communications, focusing on barriers to the further proliferation of commercial communications while ignoring increasing concerns among consumers, and particularly parents, about certain aspects of the development of such communications.

In this article I will try to describe some of those concerns, using as examples the recent McDonalds libel case in the UK, the results of a BEUC Survey on Children and Advertising and the intervention of the Danish Consumer Ombudsman in relation to some Internet commercial web-sites. In these examples, a High Court Judge, a reputable and long established European consumer organisation, and a senior public official with responsibility for monitoring marketing standards, all criticised certain aspects of certain commercial communications. While each of these examples must be considered on its own facts, I believe that they have something in common.

In the recent McDonalds libel case in the UK High Court, Mr Justice Bell found decisively in favour of McDonalds, but not on every point. The defendants in the case had published a leaflet containing a large number of allegations against McDonalds, including allegations about their advertising, which the Court held to be defamatory and untrue. However, the Court did uphold one claim against the advertising in question as the following extract from the judgement will show.

'In my view, having considered the evidence, the answers to the questions which I posed earlier are as follows.

McDonald's thinks that children's advertising and marketing is very important. A considerable amount of its advertising and marketing is, as a result, directed at children.

McDonald's advertising and marketing is not directed at children specifically to trap them into thinking that they are not normal if they do not go to McDonald's. It is simply designed to make McDonald's attractive so that they will want to go there.

McDonald's advertising and marketing is in large part directed at children with a view to them pressuring or pestering their parents to take them to McDonald's and thereby to take their own custom to McDonald's.

This is made easier by children's greater susceptibility to advertising, which is largely why McDonald's advertises to them quite so much.

The Green Paper adopted a one-dimensional approach to commercial communications, focusing on barriers to the further proliferation of commercial communications while ignoring increasing concerns among consumers, and particularly parents, about certain aspects of the development of such communications.

The Plaintiffs use gimmicks, but not to cover up the true quality of their food. The gimmicks are aimed at making the experience of their visiting McDonald's seem fun, but McDonald's food is just what a child would see it and expect it to be: beef burgers in buns or chicken in a coating, for instance, soft drinks, milk

shakes and "best bits" of all, I suspect, chips or fries. No cover up could last long. No cover up is necessary anyway.

It follows that in my judgement the defamatory charge that the Plaintiffs use gimmicks to cover up the true quality of their food is not justified, but the sting of the leaflet to the effect that the Plaintiffs exploit children by using them, as more susceptible subjects of advertising, to pressurise their parents into going to McDonald's is justified. It is true.

I assume that their advertising was not previously thought to be in breach of the standards commonly accepted and applied by the advertising and commercial communications industry as a whole, and I interpret the principles underlying the judgement as a criticism of those standards.

In my judgement McDonald's advertising and marketing makes considerable use of susceptible young children to bring in custom, both their own and that of their parents who must accompany them, by pestering their parents. It may be said that this is an inevitable result of advertising at all to children who cannot buy for themselves. So be it. McDonald's have, after all complained about the allegation.'

In this instance, of course, the High Court Judge was deciding on the facts of the particular case before him but I believe that the criteria which he brought to bear in his assessment reflects a wider concern among consumers (and particularly parents) about certain aspects of the development of commercial communications in recent years.

I should make clear here that my remarks are not directed at McDonald's as such. I assume that their advertising was not previously thought to be in breach of the standards commonly accepted and applied by the advertising and commercial communications industry as a whole, and I interpret the principles underlying the judgement as a criticism of those standards. I see the Court ruling as echoing what is in fact a wider sense of public concern about developments in commercial communications generally.

I suppose that many people involved in commercial communications might find the Court's criticism to be somewhat severe; I believe that most consumers, and most parents, would applaud it. I believe that the industry (and the policy-makers who drafted the Green Paper on Commercial Communications) are not adequately responding to the concerns of consumers and parents in this area.

This concern was very clearly evident in the course of the survey on Children and Advertising conducted by BEUC among its member organisations in 1996. Our members are the main national consumer organisations in all the EU member states, and elsewhere in Europe, and the vast majority of them reported increasing dismay at certain trends in advertising, sponsorship and commercial communications directed towards children.

The concerns clearly relate to traditional forms of advertising and sponsorship, but new forms of commercial communication, through the internet for example, have also given rise to new concerns. In 1996/97, the Danish Consumer Ombudsman formed the opinion that the Disney and Kellogg's websites containing material directed to children were in breach of the Danish marketing practices law and also, in his opinion, in breach of the ICC Code of Advertising Practice. Again, the opinion of the Consumer Ombudsman related to two particular cases at a particular time but the principles which he brought to bear to those cases would be echoed in the wider concerns about commercial communications which are the subject of this article.

In the area of privacy, for example, it

seems to me that much current marketing on the Internet, to children and otherwise, is in breach of established standards and laws relating to the collection and processing of personal data.

These three instances, the McDonalds verdict, the BEUC Survey and the opinion of the Danish Consumer Ombudsman all raise serious questions relating to commercial communications. Without claiming to offer a comprehensive analysis it may be possible to identify some common significant elements in the concerns I have mentioned above.

We could take as a starting point the increasing proliferation of commercial communications in all its forms. I am tempted to use the cliché 'from cradle to grave' to describe the prevalence of commercial communications in daily life, but that would not be quite accurate. I do not know (yet?) of any instances of sponsored funerals or sponsored tombstones in Europe, on the one hand, although, on the other hand, efforts to influence the consumption of new-born babies, by influencing their parents' decisions, start long before the cradle stage in the form of commercial messages directed to future parents. Between the cradle and the grave, children and their parents are subjected to commercial communications in every aspect of their daily lives, at breakfast, through the mailbox, on the way to school, at school, playing games, in newspapers, television, cartoons, strips and other forms of entertainment. One individual message in itself may not be the problem: it is the ubiquity and the sheer prevalence of commercial communications as a whole, and the cumulative pressure which they generate, which causes most concern.

Another source of concern is the increasingly hidden nature of much commercial communication. Representatives of the advertising industry have reacted with some shock to my use of the term 'hidden advertising' but I am not accusing them of reviving the more crude forms of subliminal advertising which existed, at least in legend, in the past. This is not what I mean by hidden advertising. I use the term to refer to such developments as advertorials, infomercials, product placements, the influences of sponsors and advertisers on editorial and programme content, the increasing erosion of the distinction between editorial and advertising material and the use of integrated marketing and merchandising strategies where editorial, programming and advertising material are parts of a single marketing effort.

Under Article 11 of the ICC International Code of Advertising Practice

'Advertisements should be clearly distinguishable as such, whatever their form and whatever the medium used; when an advertisement appears in a medium which contains news or editorial matter, it should be so presented that it will be readily recognised as an advertisement.'

This important principle is widely accepted by the advertising industry but it becomes almost meaningless when, for example, stories and entertainment material are created for cartoon characters linked with a particular product or company. When we consider the pervasive links between children's films and merchandising nowadays, we may assume that the story-line, layout, plot and the presentation of characters are designed, not only to entertain but to sell the accompanied merchandise, and vice-versa. In this integrated mix of marketing and merchandising, where the merchandises is used to sell the film or book and the film or book is used to sell the merchandise, every element of the mix can be said to consist of commercial communication.

On many internet sites directed to children and their families there is no real

It is the ubiquity and the sheer prevalence of commercial communications as a whole, and the cumulative pressure which they generate, which causes most concern.

distinction between advertising messages and editorial or programme content; they are each part of a single integrated marketing effort. One of our criticisms of the Green Paper on Commercial Communications was precisely that it displayed very little appreciation of the trend to integrated marketing. On the contrary, indeed, packaging is excluded from the scope of the Green Paper despite the increasing importance of packaging as part of an integrated marketing strategy.

The Green Paper also tends to view restrictions of sponsorship simply as denying sources of funding to the cultural activity or sporting or other activity in question. This is naive, because it overlooks the significant influence which sponsorship may have on the activity which is sponsored, whether that is a sporting or cultural event, a hospital department or a school. This is not to claim that sponsors are crudely directing the content of programmes or the policy of hospital departments, for example. Such crude forms of interference are usually but not always prohibited, in one way or another, but sponsorship can still exert a powerful influence on the activities sponsored and indeed on public policy. At a minimum, sponsorship buys access to the decision-makers of the activity sponsored. Apart from any overt demand from the sponsor, the policy of the sport or other sponsored activity may be shaped in such a way as to make it more attractive to potential sponsors. More recently, we have seen how the fact of sponsorship and advertising has created a constituency, apart from the tobacco companies themselves, in opposition to restrictions on tobacco advertising and sponsorship. (Since this matter became the subject of political controversy, I should make it clear that I do not here imply any impropriety on the part of the people concerned. I simply wish to point out that the mere fact of sponsorship of a particular activity does have an important influence on public policy and is, I assume, part of the reason that sponsorship exists.)

I raise these issues not to argue for an outright ban on sponsorship (apart from tobacco sponsorship) but to make the point that sponsorship in our days raises issues of serious public concern and it is naive simply to see it simply as a benign source of funding for various worthwhile activities, as the Green Paper tends to do.

These then are some of the consumer concerns about developments in commercial communications. In some cases these concerns are specific but they are also general - in the form of a growing feeling or sentiment that there is too much pressure from commercial communications, and in the ubiquity, force and nature of the messages to which, in particular, children are exposed. I do not suggest that there is an easy or simple answer to all of these concerns but they must be addressed and not ignored as, in large measure, they were in the Commission's Green Paper.

We hope that the Commission will address these concerns in any follow-up communication to the Green paper (and that DG XXIV will produce a paper on Children and Advertising). It is time also to revive and refine the concept of 'unfair' advertising which was originally a part of what became the directive on misleading advertising. It is a concept which may offer a flexible way of dealing with many of the concerns which I have highlighted above, and which might help to combine elements of the mandatory and self-regulatory approaches to preserving and promoting high standards in commercial communications. That is a topic for another day.

It is time also to revive and refine the concept of 'unfair' advertising which was originally a part of what became the directive on misleading advertising.

Alcohol advertising

How public interest objectives can reasonably be met

Chris Scott-Wilson
Director of European Affairs
Guinness plc

Articles on alcohol advertising and, in particular, the French Loi Evin, featured prominently in the October edition of this Newsletter. However, at risk of boring the reader, this article returns to the subject and adds a few comments of my own. I should say, at the outset, that these are my personal views and are not necessarily shared by anyone else.

The debate on alcohol advertising covers two distinct, if related, sets of issues: questions relating to the consumption of alcohol on the one hand and questions concerning the role of advertising on the other. The complex interaction between these issues is further compounded if one includes the question of the protection of minors (which arises in both) and the need to create and maintain the single Market which is central to the role of the European Union.

In an attempt to tease out the real issues and answer some of these questions it is sensible to consider the issues separately before trying to arrive at an overall conclusion.

The consumption of alcohol

Alcohol is not a harmful product per se. Indeed, it is generally accepted that for most people the moderate and responsible consumption of alcohol can be beneficial; and that moderate drinking can be enjoyed as part of a balanced and healthy lifestyle. However, the fact that excessive consumption or abuse can cause serious problems is equally well understood. The challenge, therefore, is to find ways of preventing (or, realistically, of minimising) alcohol abuse; and of encouraging moderate and responsible consumption.

This is an objective which all sides of the debate can agree and share. However, achieving it is easier said than done; and opinions differ as to the means of doing so. In particular, as Dr Craplet observed in his article in October, there are those who seek to control abuse by means of restrictions on the average consumption of the entire population and others who argue for a more targeted approach aimed at preventing abusive consumption without imposing undue restrictions on the population as a whole.

I fall squarely into the latter camp: not, I may say, for the legal reasons adverted to by Dr Craplet but because I believe that, while more difficult to devise, measures which address the identified problem are more likely to be effective in dealing with it. After all, we have seen more general restrictions (up to and including prohibition) over the years and these do not solve the problem and, if taken to the extreme, may even have made things worse.

We might reasonably propose that any measure should be evaluated by reference to the degree to which it reduces the level of alcohol abuse while minimising the imposition on the general population who drink moderately.

Be that as it may; in the final analysis, we might reasonably propose that any measure should be evaluated by reference to the degree to which it reduces the level of alcohol abuse, whilst minimising the imposition on the general population who drink moderately.

Advertising issues

There are a range of issues concerning advertising generally which have nothing to do with alcoholic beverages. A discussion of these would be beyond the scope of this article. However, it is clear that there has been a substantial increase in the overall level of commercial communications in recent years; which is part and parcel of the expansion of broadcast media and the evolution of the so called in-

formation society. That these changes are raising questions of public policy is only to be expected; and the international nature of electronic communication means that these issues will inevitably arise at the EU level. Whether, in fact, the level of commercial communication is creating problems is another matter.

I take issue with this conclusion and can only ask how a restriction on advertising which has no measurable effect could possibly be justified on grounds of public health (or any other grounds).

So far as alcohol advertising is concerned, it is generally argued, by those who would impose restrictions, that this should be done in order to protect public health and/or to protect minors. With regard to public health, it is appropriate to apply the test set out above and to ask:

a) does the measure proposed lead to a reduction in alcohol abuse and, if so,

b) to what extent does it impose on the general public?

Public health

Applying this test to the Loi Evin in France, should give regulators serious pause for thought. The facts are that the introduction of the Loi Evin has had no noticeable effect on the consumption of alcohol in general let alone on the level of alcohol abuse. This is not in dispute. Dr Craplet, speaking in support of the Loi Evin, observes that 'the effect of advertising on sales and consumption being surely weak and perhaps not measurable the regulation of advertising can only form part of an overall strategy of prevention .....'

With respect, I take issue with this conclusion and can only ask how a restriction on advertising which has no measurable effect could possibly be justified on grounds of public health (or any other grounds).

Protection of minors

The only answer to be found appears to lie more in the field of social engineering than of health policy. It is accepted that alcohol advertising is doing no more than to strengthen preconcieved ideas which are enshrined in our cultural background; however, it is then concluded that harsh measures are necessary to prevent this and to eradicate these cultural preconceptions from future generations.

I consider this to be a highly dubious proposition and one which has little to do with the protection of minors. Just as alcohol can be enjoyed as part of a healthy lifestyle, so alcoholic beverages have been a positive aspect of our European culture for millenia. I see no reason to try to change this and no grounds for believing that advertising restrictions could affect such a change.

So far as minors are concerned we are faced with two, sometimes conflicting, needs; the need to protect children and the need to educate them. It is extremely important that children grow up able to understand and cope with the world around them which will include both advertising and alcohol. Co-incidentally, another report in the October issue of this newsletter considered a Danish study on television advertising directed at children and concluded that this only makes up a small part of the influences the children are under. I would argue that these children probably benefit from being exposed to – and perhaps immunised to – advertising at an early age.

Similarly, I would argue strongly that we should be trying to ensure that children are given a proper understanding of alcohol and society; and are provided with balanced and objective information

regarding the good and the bad sides of alcohol consumption and abuse. In this regard, advertising restrictions achieve nothing.

The single market and the Loi Evin

In closing, I would like to return to the specific issue of the Loi Evin and its compatibility with the single market. This issue turns, first and foremost, on the principle of proportionality. Lest there be any confusion, this principle states that if a national measure gives rise to barriers to free movement in the single market; and if the Member State concerned seeks to justify that measure by reference to one of the policy areas referred to in Article 36 of the Treaty (e.g. public health) then the measure will be proportionate if:

- It is genuinely directed towards that policy objective
- It is effective in addressing that objective
- That objective cannot be achieved just as well by other means which do not give rise to barriers to free movement.

It is clear, and Dr Craplet states in his article, that the Loi Evin does give rise to barriers to free movement of services; and, moreover, the French Government has sought to justify this on grounds of Health Policy. Applying the proportionality test, it is not necessary to question the *bona fides* of the French Government: it is clear from the above that the Loi Evin has had no effect on the level of alcohol consumption and so, by any measure, it cannot be said to have been effective in addressing the public health objectives. On the other hand it clearly does impose on the general public.

In the circumstances, it is equally clear that the public health objective could be better achieved by other means. Indeed, any measure which might achieve a reduction in alcohol abuse would be more efficaceous; and, provided it did not result in other barriers to free movement, more proportionate.

It is incumbent on the Commission to challenge the Loi Evin insofar as it results in barriers to free movement; and the French Government should be encouraged to reverse their decision (taken following the introduction of the Loi Evin) to reduce expenditure on targetted measures for the prevention of alcohol abuse.

In the circumstances it is incumbent on the Commission to challenge the Loi Evin insofar as it results in barriers to free movement; and the French Government should be encouraged to reverse their decision (taken following the introduction of the Loi Evin) to reduce expenditure on targetted measures for the prevention of alcohol abuse.

Alcopops advertising

The need to warn teenagers of the dangers of alcoholic drinks

Diane Luquiser
Consumer Affairs Editor
Commercial Communications
&
Bill Miller
MEP

Alcopops, or lemonades mixed with alcohol, have generated a lot of debate. In fact, they are not classified as alcoholic drinks and therefore are subject neither to any of the legislation in this field nor to any dissuasive taxation. However, some do not agree with this approach, because teenagers can obtain these drinks freely over the counter. According to health organisations, advertising encouraging the sale of these products induces antisocial behaviour in teenagers and does not protect them from the detrimental effects of alcohol.

At the Environment, Public Health and Consumer Protection Commission of the European Parliament, the British MEP, Bill Miller, has taken a stand against the lack of protection of teenagers nowadays in the European Union. This stand applies equally to energy drinks, whose advertising is just as captivating for this age group. He is not campaigning for a ban on the sale of these products; he merely argues that teenagers among the most vulnerable age group, i.e. between 13 and 16 years old, are not prepared for such attractive advertising of a product not explicitly described as being an alcoholic drink.

The declaration asked for guidelines over the promotion of such drinks; it looked to bring them within the tax framework for alcoholic beverages and to promote health policies for young people with regard to alcohol. It sought to promote responsible drinking. It did not suggest that these products should be banned.

In this issue of *Commercial Communications*, Bill Miller describes the current situation in this area and his position on the issue:

'In January 1997, a study from Media Business Group in the UK found that alcoholic lemonade was the second most popular drink in the UK after Coca Cola with children as young as 12. A study published in the British Medical Journal showed that the alcopops and energy drinks appealed most to 13-16 year olds. A further survey published by the British Health Authority found that a quarter of 11-18 year olds felt that alcopops were designed for "people my age". It was seen that the consumption of such drinks induced antisocial behaviour and public concern grew throughout the first half of this year.

Industry critics claimed that the drinks were an attempt to attract young people towards starting drinking at a younger age by blurring the boundaries between soft and alcoholic drinks. Claims were made that industry self-regulation was not working. The media began to expand on the problems of underaged drinking, focusing upon the real or perceived impact of "Alcopops". This was sometimes sensationalised as in the headline "Alcopop Boozer at 10. Scandal of kids who hit the bottle".

The Declaration on Alcopops and Energy Drinks, sponsored by my colleague Eryl McNally MEP and myself, which went before the European Parliament in May and June, sought to attract the attention of decision makers to public concern over the targeting of Alcopops and Energy Drinks at the young. The declaration asked for guidelines over the promotion of such drinks; it looked to bring them within the tax framework for alcoholic beverages and to promote health policies for young people with regard to alcohol. It sought to promote responsible drinking. It did not suggest that these products should be banned.

Over 200 MEP's from all Member States and from across the political spectrum signed the European Parliament declaration. Concern was growing in the

national capitals at the same time and national ministers were acting. In the UK, the new Government took measures to reinforce existing industry guidelines for self-regulation under George Howarth, the Parliamentary Secretary of State for the Home Office. These focused upon the prevention of alcohol sales to under-aged drinkers. A Ministerial Group on Alcopops was formed which pressed the industry to strengthen self-regulation and to make this work within a year, when the group would meet again. Failure to satisfy the Ministerial Group would lead to the government taking further steps. The industry reacted quickly by drawing up a code of practice to reinforce it's existing guidelines which was adopted in April.

The Code of Practise on "the naming, packaging and merchandising of alcoholic drinks" was drawn up by the Portman Group, an industry funded organisation which seeks to promote sensible drinking and to combat alcohol misuse within the UK. The industry also pledged money to extend a proof of age card scheme for 18-20 year olds wanting to buy alcoholic drink. Principle targets for the code were the marketing and promotion of alcohol. In particular, packaging was not to focus upon alcoholic strength, there was to be no link with violent or anti-social behaviour, no illusion to illicit drugs should be made and no reference to sexual success. Products were not to be seen to be marketed at those under 18 or towards the young. Names of drinks should indicate the contents rather than focus upon an image. Finally, an independent panel is to take up complaints against any products which might infringe the code. The code was welcomed by the UK government. The industry is keen to stress it's achievements and already four companies have agreed to withdraw products whilst seven are being renamed or repackaged.

Criticism is sometimes made at legislators that we are trying to prevent everything and regulate the alcohol industry out of business. This is patently untrue but if an industry, in this case the alcohol industry, acts in a manner which is irresponsible then legislation has to be introduced to control the worst excesses of that industry. Fortunately within the UK, some modicum of common sense has returned and the industry itself is beginning to regulate its own members. The problem arises if a producer is "outside" the industry and therefore does not adhere to the industry's voluntary code.

If an industry, in this case the alcohol industry, acts in a manner which is irresponsible then legislation has to be introduced to control the worst excesses of that industry.

A further complication emerges when you cross the channel as many of the producers of alcopops and designer drinks are not affiliates of the Member States' alcohol industry and again would not be subject to any code of practice, if one existed.

It is therefore important for the legislators, in this instance the Parliament and the Commission, to continue to supervise the actions of the alcohol industry and, where applicable, introduce best practice, hopefully by persuasion but if necessary, by legislation.'

European television markets - a structural review

Bruce Roberts
& Luc Welter
SES ASTRA

Broadcasting via satellite has been one success story which has exceeded critical expectations. In the nine years since the launch of ASTRA 1A in December 1988, the market in Europe has grown to 27 million households.

In the 1980s the first satellite channels, such as Sky Channel, MTV, Sat.1 and RTL, provided a stimulus to the fledgling cable industry, and by 1989 it was strong enough to withstand the competition of Direct to Home (DTH) and actually took advantage of the explosion of channels on offer from the new DTH satellites.

By mid year 1997, over 46 million European households were on cable. Altogether 45% of European TV households are now receiving satellite delivered channels. This rapid re-configuration of the television market has been unprecedented in its scope, but the introduction of the first digital services in early 1996 means the satellite industry is now embarking on a second development more profound than the first. Interactive services, multiplexing and information convergence can transform passive television viewers into pro-active controllers of their own multimedia environment.

Will this digital revolution turn Europe into a single television market? Satellite technology ensures that the same services are accessible across all Europe. Nonetheless, trends suggest country variations will persist. These will influence programming bouquets and advertising opportunities. Digital television will remain a series of discrete markets, segmented by country and demographics. Pay-TV and subscriber management systems have already forged a direct relationship between broadcaster and viewer, especially in France with Canal Plus and in the UK with BSkyB. This is set to develop, but not uniformly in all markets. In Germany, a free to air digital line up will be essential if programme suppliers want to convert the majority of existing satellite households.

Why will country variations persist? Socio-demographics are one factor. Within the twenty-two European countries researched by SES ASTRA, only five have large populations and high living standards: France, Germany, Italy, the UK and Spain. Based on 1996 data, they account for 76% of the total European incomes and 67% of the 441 million inhabitants.

Apart from Poland, other countries' populations total 15 million or lower. Where populations are stable or falling, the other dynamic for eradicating variation is wealth and EU income levels are not forecast to harmonise in the near future. The five largest countries will remain the crucial markets for multinational media conglomerates and multinational advertisers.

Mode of reception is a second factor. There is a 'great divide' between the 81 million households in countries to the south and west and the 83 million to the north of Italy and east of France. In the former only 16% receive satellite channels in 1997, via DTH, Satellite Master Antenna TV (SMATV) or Cable, in the latter over 73%. Such disparity is surprising for both halves have a similar GDP per capita, 15,936 US$ and 14,861 US$; both consume similar levels of television and purchase similar numbers of VCRs and computers. The reasons for the divide lie elsewhere.

There exists a correlation between wealth and cable growth; none of the less wealthy countries has high cable coverage, in all it is below 50% of TV households. Cable has been most successful in small wealthy countries where it was government policy to support low cost public networks, a process well under way in the Low Countries and Switzerland in the 1980s. Of the large countries only Germany adopted this policy and cable coverage has reached 54%. In France, Spain, Italy or the UK it is less than 10%.

The DTH market shows no correlation with wealth, rather with a consumer

Cable has been most successful in small wealthy countries where it was government policy to support low cost public networks, a process well under way in the Low Countries and Switzerland in the 1980s.

demand driven by attractive programme offers. Coverage is already above 20% throughout Scandinavia, Austria and several Eastern European countries. Germany is the only large country with a coverage of 30%, 10.7 million households. The UK follows at 17%, 4.1 million households. But, the UK is Europe's leading satellite subscription market in analogue and could also be so in digital. The immediate potential for DTH growth centres on France, Italy and Spain where digital programme packages are now the drivers.

Different factors determine satellite evolution. In the Low Countries cable offered enhanced reception of national channels and a bouquet of cross border terrestrial channels. Satellite was merely an afterthought. Government support via Deutsche Telekom played a significant role in the German cable market, but consumers were motivated by strong German programming on ASTRA. This drove the DTH and cable markets in parallel. In the UK, an attractive English language bouquet from BSkyB harnessed to BSkyB's direct marketing strategy drove the DTH market. In turn these satellite bouquets fuelled DTH demand in smaller countries where German or English were understood, for example in Ireland and Hungary. Own language channels followed later. In France, Spain, Italy and Portugal satellite growth was constrained by the presence of popular commercial terrestrial channels and the lack of demand for foreign programming unless dubbed into own language.

These factors have influenced the rate of development. In the Low Countries cable was available in more than 60% of households by 1990; in German speaking countries a parallel DTH/Cable development mainly occurred between 1990 and 1993, with growth still continuing. In Scandinavia and Central Europe the process has been more gradual, though in Sweden and Finland coverage has now been static for three years. In the major markets of the West and South, growth is still getting underway.

Deregulation and the arrival of satellite had two repercussions: an explosion of new channels and a blurring of national boundaries. An analysis of 74 major channels in 15 European markets indicates 33 of them are public, 23 are commercial and a further 17 are only on satellites. Moreover the new commercial channels are as popular as the public networks, both in terms of daily reach and minutes viewed. There is a further evolution: 28 public and commercial channels also broadcast via satellites. Others like RTL Television, Sat.1 and PRO7 were launched on satellite but later gained terrestrial transmission rights. Today 45 of these 74 channels broadcast via satellite.

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It dispels the myth that satellites pose a threat to terrestrial broadcasting structures; coexistence is now the norm with public networks seizing opportunities offered by satellite and digital. Moreover, audience data reveal that viewing to terrestrial channels is reduced, but not replaced, by the presence of satellite channels. In almost every European market terrestrial channels continue to occupy the higher ground - though increasingly the ground is shared.

The proliferation of new channels has attracted additional investment from the advertising community. As a percentage of GDP, expenditure on television advertising rose on average from 0.16% to 0.22% in the first half of the decade, an increase of 37%.

The issue of TV cost inflation is more complex and there are contradictory trends. If each country is given equal weight, aver-

THE KEY MEDIA GROUPS

Kinnevik, after starting in Sweden with Scansat in 1989, has extended into Norway and Denmark with share holdings in TV3, TV4, TV6, TV 1000 and ZTV amongst others, and an operating base in the U.K. Kinnevik is also focussing on the Baltic States.

CLR (Compagnie Luxembourgeoise de Radiodiffusion) began in Luxembourg in the 1930's. The company changed its name to **CLT** in 1954 when it launched its first TV channel. This Luxembourgish channel is today called RTL Télé Lëtzebuerg. Later the CLT invested in Belgium with RTL-TVi and Club RTL, in France with RTL9 and shares in M6. The CLT also acquired a share in TPS, the second French digital package. In the UK, CLT has investments in Channel 5. In the Netherlands, it is a shareholder in RTL4, RTL5 and Veronica. In Germany, the company controls, RTL-Television and has shares in RTL2 and Super RTL. In Poland, CLT launched RTL 7 in December 1996. The company also has investments in 22 radio stations.

Bertelsmann, one of the world's largest media groups, started in Germany and invested through its media arm, UFA, in RTL-Television, VOX and Premiere. Following the merger of the CLT with UFA, completed in early 1997, the interests of the new company include all the channels mentioned and extend throughout Europe. CLT-UFA was awarded a license in July 1997 to establish a new channel in Hungary.

Canal + launched a terrestrial pay-TV channel in France in 1984. Later, Canal+ developed an analogue package: 'CanalSatellite'. In April 1996, Canal+ launched the digital package 'CanalSatellite Numérique'on ASTRA. In Germany it is involved in VOX and in Premiere, whilst in Spain it has interests in the analogue package CanalSatélite, the terrestrial pay-TV channel Canal+ España and the CanalSatélite Digital package. NetHold which originated in South Africa, had investments in analogue and digital in the Netherlands, Belgium, the Nordic Countries, Eastern European and Italy (Telepiù). The merger of Canal+ and NetHold gave the new group quasi-European coverage.

Berlusconi's **Mediaset** originated in Italy, owning Canale 5, Rete 4 and Italia 1. The Fininvest group has shares in Telepiù and interests in Spain and Germany with Telecinco and DSF.

The '**Kirch Gruppe**' was formed in 1956 with Leo Kirch buying the rights for Germany of Fellini's film 'La Strada'. Three years later he created Betafilm to distribute films worldwide. Now the group has shares in Sat.1, DSF, the digital packages Premiere and DF1, broadcasting groups in Italy and Spain.

BSkyB's origins go back to Sky Channel, the first European satellite channel, launched in 1982. News Corporation acquired a majority share holding by 1984 and launched the original Sky Package on ASTRA in 1989. The present company is the result of the merger of BSB and Sky. In addition it has investments in Germany with VOX.

age TV advertising costs have risen relative to inflation. The greatest rise was in 1992 but the divergence fell back in the following two years from 10.5% to 7.4%. Competition from new commercial channels encouraged all channels to adopt more aggressive pricing and suddenly public channels introduced market-orientated approaches to advertising sales. There have been some notable exceptions however, for example Germany where real costs per '000 (C.P.T.) fell by 33% in five years as supply temporarily outstripped demand.

The burgeoning television market has brought to the fore a number of key media groups. Some, such as CLT, have been in existence since before the Second World War, others only in recent years, such as BSkyB, Kirch Gruppe and Canal +, and their rapid development has attracted enormous press coverage. A highlight on these six players shows the market's complexity: Kinnevik, CLT/UFA, Canal+, Mediaset, Kirch Gruppe and BSkyB. All have a 'home base', and all have invested in broadcasting ventures within other countries. (See box)

In essence these media groups have a common strategy: investments in different markets provides opportunities to share programming, muscle to buy programming rights, and money for joint productions with other broadcasters and commercial operators. The outcome has been a proliferation of channels on Satellite. SES ASTRA alone is now broadcasting nearly 90 TV and 60 radio channels in analogue. Household coverage has grown 2.5 times since 1991, and demand for transponder space outstrips availability, offering the incentive for all operators to provide more capacity, which means more satellites.

Capacity requirements initiated interest in digital compression. The European digital television standard, DVB, which uses the compression system MPEG-2, allows one transponder to carry six to eight

TV channels instead of one in analogue. Since 1995, ASTRA has launched 2 satellites with capacity in the high band; when ASTRA 1G is launched before the end of 1997 the three satellites together can carry around 400 digital services. It is a misnomer to think of these as 500 separate analogue channels as they are a range of inter-related services. Demand drives innovation: ASTRA is intending to utilise the Ka-band on 19.2°E as a return path, via ASTRA 1H. In 1998, ASTRA 2A and 2B will open a second orbital position at 28.2° East, covering the whole bandwidth designated for digital services. Today three satellites are needed.

In Europe, the digital era started in France with CanalSatellite Numérique; it is the major digital market attracting 900,000 subscribers by mid November 1997. In the Netherlands 100,000 households subscribe to Canal+ Nederland which started in July 1996. The German digital pay services Premiere and DF1 have experienced a problematic start with 90,000 subscribers.

Besides pay packages, free-to-air analogue channels are transmitting in digital in 'simulcast'. This is producing an attractive line-up of 37 channels including Andalusia TV, Deutsche Welle, ARD, CNN, PRO7, RAI Uno, Sat.1, RTL Television, TV5, Wereldomroep and ZDF with many intending to launch new digital services in addition. Simulcast allows consumers to opt for digital equipment without losing analogue channels. By November 1997 nearly 180 digital video and 70 audio services were transmitting on ASTRA and around Europe there are more than 1.4 million digital households. Other operators are also about to start. In 1998 Canal+ plans to start a Nordic digital package, SRG / ORF one for Switzerland and Austria, and BSkyB will launch its UK and Ireland package.

Digital is sometimes perceived as complicated but reception simply requires a 50 cm dish equipped with a universal LNB, a digital set-top-box and a standard TV set. With a few enhancements consumers can take advantage of all digital facilities. The set-top-box can be connected to the VCR or Hi-Fi for digital sound quality, to the telephone line for ordering films with the pay-per-view facility, and to the PC for down loading software.

Digital broadcasting will benefit the advertising industry. Programme diversification facilitates tighter targeting of niche audiences. The 'Great Television Divide' will still exist, but in future it will be between those who receive digital services and those who do not.

Digital Home-Shopping services are a direct marketing tool. Ordering is made simple, through the remote control, as for films on-demand. Digital is creating a new television, with personalised offers tailored to individual needs. Applications like Near Video on Demand, Tele-banking, Computer Online services or Home-Shopping are going in this direction. Digital allows the convergence of image, sound and text referred to as 'multimedia'. This is best described by the term 'Media-Kiosk'; consumers make their choice out of a range of individual services. Viewers become consumers and producers, a phenomenon described as 'Prosumers'.

The driving force will still be content: distinctive linguistic services complemented by new formats offering time convenience, exclusiveness of events, and programming on request.

Digital broadcasting will benefit the advertising industry. Programme diversification facilitates tighter targeting of niche audiences. The 'Great Television Divide' will still exist, but in future it will be between those who receive digital services and those who do not.

Why Pay-Per-View is no killer application

François Godard
Consultant

Analogue Pay-Per-View (PPV) never established itself as a potent delivery system anywhere (possibly with the exception of porn movies in the US). And this is truer still in Europe where there is only a handful of regular analogue PPV services operating with low overall distribution.

The introduction of digital transmission has, however, allowed Europe to somewhat jump the analogue stage. PPV services with extended capacity have now been launched on national digital services in all major Continental markets.

The first regular digital commercial service, Kiosque, was from Canal Plus in France and started operating in April 1996. Since then similar services were launched by Kirch in Germany, in Spain by Canal Plus, and in Italy by Tele+ (now owned and operated by Canal+).

On all the new digital bouquets, PPV is the main feature that differentiates them from their analogue ancestors and rivals. Despite all the hype about the technology, it must be pointed out that these packages feature few, if any, innovations. Premium services are now multiplexed on up to four channels. Marginal, low cost services like weather channels have been introduced, and that's about it. New channels like Disney and Fox Kids in France are launched on digital bouquets, but they could have been introduced in analogue and, actually, in the UK they are in analogue.

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To summarise, apart from the crucial innovation of PPV, digital Direct to Home (DTH) and cable bouquets on the Continent remain poorer in programming (that is in quantity) than the BSkyB analogue package.

Thus one would have expected the operators of digital services to use PPV as their main sales driver. The success of digital television in the United States is very much associated with PPV and specifically with DirecTV's PPV and many would have expected the same in Europe.

But it is not the case. European digital operators are using PPV as an optional service, which is aimed at complementing the existing basic and premium tiers. No operator yet seems to manage its PPV service as if it hoped to get substantial revenue from it. None seems to think PPV is the 'killer application' industry gurus have been calling for.

So far digital PPV services are owned by the same groups, like Canal Plus and Kirch/Bertelsmann that operate dominant premium services. Their priority seems to be to develop the new technology without hurting their existing business. A further argument, which would support the low profile approach of operators, is that on most of Continental Europe video rental never was an industry as large as in the United States. Thus movies in PPV, which is a substitute for rental, will take some time and some 'consumer education' before gaining acceptance.

Markets where rental is big business are the same where digital bouquets have not been launched yet, namely the Benelux, the Nordic countries and the United Kingdom. In these countries I suspect that the performance of PPV in the medium term will depend on whether it is managed by the premium operators or by others, like cable operators.

The US experience

I would like first to go back to the US where PPV was first introduced and to where European operators have found the models to copy. In the US, though it was introduced in the 1980s, PPV never was very successful up to the introduction of near-video-on-demand (NVOD) on digital bouquets from 1995. The analogue services have generated low buy rates. And in turn studios have been reluctant to use PPV for exclusive releases.

Digital operators have drawn a number of conclusions from the under-performance of analogue PPV:

- The number of channels must be large enough both to offer a wide selection of recent films and to have start times at quick

intervals;

- Prices must be competitive with those of the video stores;
- Buying must be impulsive, that is through the remote control with no need for a telephone call to a booking centre.

The digital near-video-on-demand services were designed to meet these requirements. The biggest operator, General Motors' Hughes' DirecTV has had the most aggressive PPV strategy and, apparently, the most successful. DirecTV has by far the largest PPV offering. Its DirecTicket service has 47 channels, four times that of its competitors (though they are upgrading) and it introduced first the $2.99 by film price, against the $3.99 usually seen on cable and other DTH bouquets.

The same channels are used for sports season tickets and thus, depending on the volume of sports programming, the actual number of films varies. On the best evenings 55 different titles are on offer. However, for blockbuster films, the start times -every 30 minutes- still falls short of what one would expect from NVOD. However, DirecTV claims that every thirty minutes fits well the traditional pattern of American television scheduling and seems optimal.

Themed PPV channels are also introduced, like the Director's Cut service of foreign and so-called 'independent' films. Special channels can be created for a season, like the Halloween Channel offering horror movies which ran this autumn.

DirecTV claims a buy rate of over 200%, that is two films per month per household, which is about ten times the rate on analogue cable. Its Direct Broadcast by Satellite (DBS) rival PrimeStar's buy rate is believed to be less than 150%.

The success of digital PPV seems to be attributed to a substitution effect against video rental. According to a 1996 Nielsen survey for the Satellite Direct magazine, 64% of DBS homes with a VCR had not rented a cassette in the previous three months; 57% of subscribers claimed to make a PPV purchase at least every two weeks; 88% at least once a month.

DBS is responsible for the bulk of the growth of the US PPV industry's turnover, rising at 25% per year.

The overall American PPV sector (digital and analogue) can be segmented in three tiers. According to research from Request, the TCI-owned operator, in 1996 non-porn films accounted for just 51% of total PPV revenue, against 32% for events, mostly boxing, and 26% for sex movies. I want to look at each segment.

First the films, for which prices have been decreasing and for which the $2.99 tag set by DirecTV is spreading. Another recent innovation that seems to boost sales is the all day movie ticket. For the same regular price the subscriber can watch the film as many times as she wants in a set day. However, only some films are allowed by their distributors to be sold on that basis.

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Windows are also an issue as films are usually released in home video about 45 days before PPV, and the home video industry fights to keep this delay. The shorter the window, the better the buy rate. Halving the window may double the buy rate. The films released in sell through, that is put for sales at $20 or less, generate generally significantly lower PPV buy rates. Equally, films not available in sell-through may sale twice as much in PPV than the others.

Events, the second segment, sees no trend in price decrease. They can go very high for top boxing shows (like $45 for the high profile Tyson matches); but the growth potential seems limited: other sports do not make their games available in PPV and other products, like music concerts, have not proved very successful.

Thirdly, the so-called adult movies, for which indications are that growth potential is very strong. These are usually supplied by separately branded services like Spice or Playboy.

The European experience

This side of the Atlantic analogue PPV never picked up. Part of the explanation comes from a closer look at three examples: MultiVision, Movie House and Bio Hemma.

MultiVision

Launched in 1994 on French cable, MultiVision took two years to secure its first films in their PPV window. Before May 1996 all movies were screened in their post-Canal Plus window. Since December 1996 the service is also available in digital on seven channels, the later being on the (Television Par Satellite) TPS (Direct To Home) DTH platform and were to be available on the digital tiers of some French cable operators by the end of this year. I shall look at the digital version later.

The analogue version, still the only one available on cable, grew from one to two to three channels. On the main systems where it is available MultiVision is on the D2-Mac tiers, to access which requires the infamous Visiopass decoder. But despite this requirement the penetration of the service rose to over 50% of subscribers on the systems of Lyonnaise Cable. On these the Visiopass penetration was mainly driven by the availability of Canal Plus and of a mini-pay movie package on the D2-Mac tiers.

If penetration was relatively high, the buy rate remained very low, at less than 15% on the Lyonnaise systems in 1997. This despite the facility of impulse buying which was available to about a quarter of the PPV homes.

Max TV

In the Netherlands, the Casema Max TV PPV service is widely seen as a commercial failure. With 12,000 subscribers in mid-1997, it uses six channels of which one, Passion TV6, is exclusively devoted to porn films. The problem here is not the buy rate, which is, at 150%, not too bad (though not impressive within a self-selected film addict universe), the failure is rather with the low penetration of the service: a mere 1.5% of the 750,000 addressable homes. The cost of renting a decoder at Fl10 per month is mainly to blame. New films are sold at Fl8.95 and older and porn movies are priced at Fl5.95. Thus most of the average Max TV homes' monthly bill goes into the hardware, which is certainly a disincentive to potential subscribers.

The experience seems to prove that PPV alone can hardly drive the penetration of decoders (here we are talking analogue, but the lesson is also valid for digital). The price of an individual movie is not the main buying factor according to the company, which says that availability at the right time is critical. Prices are set to be competitive with video rental stores and 50% of sales come from the erotic channel. According to Casema research, Max TV homes keep renting videos.

Bio Hemma

The Swedish PPV service Bio Hemma ('home cinema'), launched in January 1996 on three channels on the cable systems of Telia, was enlarged to a fourth channel in May 1997. It is only available to subscribers with at least one optional tier and thus the decoder. The films are mostly TV premieres priced at SKr39 each. One channel is devoted to adult movies. The service is not interactive; subscribers have to call an automated telephone server to order a film. Buy rates have not been disclosed, though Telia says it has increased regularly since launch, with sales concentrated on the big blockbusters. Nor is the number of homes disclosed, but here Bio Hemma has an advantage over MaxTV since Telia subscribers willing to take one of the two premium services available - Canal Plus or TV100 - must first rent the Telia decoder.

To summarise, these analogue services have met the same shortfall as their American cousins, with a further problem: their limited distribution.

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Digital PPV services

Digital allows the two major problems met by analogue PPV in Europe to be avoided: the number of channels can be dramatically increased, and there is no tiering problem as PPV is available to all digital subscribers.

Nevertheless the new digital PPV services launched since 1996 in Europe have not followed the path of DirecTV. This is partly because they didn't want to, partly because they couldn't. I want to consider first how the services are sold. Here we have three major differences with the DirecTV approach.

First, the number of channels is limited. No operator has more than a dozen channels and most have only eight. Secondly, the marketing is low profile. PPV is usually not mentioned in the literature aimed at prospect subscribers or in the advertising material. When mentioned, it isn't prominent and never leads the sales argument. Thirdly, and more crucially, the prices are nowhere as aggressive as DirecTV and often distinctly high. The DirecTV price is lower than the average domestic cinema ticket price, while on the Canal Plus-controlled PPV services it is higher.

The operators justify their approach by the argument that 'consumers must be educated' to the new medium, and this point may not be as patronising as it sounds.

Although using the same technology, multichannel operators across Europe are facing consumers whose degree of sophistication in regards to pay television varies considerably. And in the regions where digital PPV was introduced, the bulk of the population neither subscribes to a premium channel or to a multichannel cable or satellite bouquet.

Despite the potential of the technology, it seems that selling pay television to consumers has to respect what one could call the 'historical hierarchy of services'. First comes the ad-supported and public channels, then the premium movie and sports services, later the theme channels and only then PPV.

It seems only those consumers already familiar with premium and theme channels can be offered multiplexing and PPV. By general reckoning consumers used to only a handful of terrestrial channels just do not see the point of PPV and multiplexing. For them the main sales argument must revolve around premium programming.

As managers at TPS in France or Via Digital in Spain explain, their target group features people who are used to half a dozen channels and who do not rent videos regularly. Not only do they not understand the possibility of paying for what they watch, and watching it when they want it, but they do not even see this as desirable.

Supporting this point of view is the pattern of film buys on Kiosque: according to TPS the bulk of sales are between 20:30 and 21:00, the traditional starting time of the evening's big show on French TV with very small sales at the 21:30 starting time. The second, and usually less acknowledged, reason for the PPV low profile is this. The main operators of NVOD services are also the owners of premium subscription channels. Unlike America's DirecTV (and its main competitors) which is a pure distributor, these groups have a vested interest in avoiding cannibalisation of their premium service by NVOD. This is even more crucial for premium channels that have hardly any original programming and can be merely called 'film tabs'. These premium operators have thus the strategy to secure exclusive PPV rights and to sell the film dearly.

Besides pricing, another main example of this strategy is the Canal Plus programming of PPV football league in France: the two most attractive games of each championship days are reserved for the premium service, only the other games (usually seven) are in PPV. Thus for the football fan PPV is a complement to Canal Plus and cannot be a

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substitute. In Italy, however, all the championship games are available through a season ticket and should be very soon in PPV.

The strategy described above has however one big exception, the Kirch Group's DF1 which PPV service Cinedom was positioned as one of the two main 'attractions' of the bouquet, alongside the DSF Plus channel featuring the Formula One SuperSignal. Cinedom films are priced at a very competitive DM6 and the number of channels was originally set to grow rapidly. But the overall failure of DF1, attributable to marketing and distribution errors and problems that won't be discussed here, have made the evaluation of the Cinedom experience impossible.

This decision by the studios to licence exclusive PPV rights (in France, Spain, Germany and recently in the UK) could weaken the medium as a whole.

Typically, Germany's premium channel Premiere plans to increase by something like 25% the sales price of films on Cinedom when it takes it over next winter. But if the argument for toning down PPV is right for services operated by Premiere or Canal Plus, one could argue that the Kirch approach could be used by the challengers of Canal Plus which have no premium service to defend. Specifically, wouldn't PPV be the ideal weapon for TPS in France and Via Digital in Spain, two newly-launched bouquets challenging the formerly monopolist pay services of Canal Plus?

Actually, none of the two has decided to bet on PPV. One of the main reasons is that they have not secured enough rights to make a potent offering: some studios have agreed to sell exclusive PPV rights to Canal Plus. Also in France Canal Plus has managed to prevent the emergence of a PPV window on French films to both protect its premium channel and weaken the potential of TPS's PPV.

This decision by the studios to licence exclusive PPV rights (in France, Spain, Germany and recently in the UK) could weaken the medium as a whole (in the US PPV rights are not exclusive, each service can offer all the new movies).

TPS and Via Digital also took a cautious approach because in Latin Europe the low video rental business, and the unfamiliarity of most consumers with multichannel television, makes it unrealistic for an operator to expect PPV to drive its penetration. Furthermore, TPS has its own premium tiers, and Via Digital plans to launch one next month, and both seem to prefer to build premium subscriptions rather than PPV sales.

The two PPV services, MultiVision on TPS and Palco on Via Digital, have however priced their movies more cheaply (by about 23%) than on the Canal Plus PPV services (Kiosque in France and Taquilla in Spain). But this is part of the overall positioning of the bouquets rather than a special emphasis on PPV.

One word on sports PPV in Europe (I mean PPV and not 'season tickets' or annual subscriptions). So far the offering has been very limited. The boxing matches on BSkyB in the UK were a big success, but the actual number of events with such a wide appeal is extremely limited as seen in the United States.

Football PPV resumed in Spain on the two platforms in November after they agreed to share the rights. It was also due to launch in Italy and has been available in France since last year. On Canal Plus' Kiosque domestic league football was only in PPV last year, with no possibility of season tickets. But this option was introduced in September, possibly an indication that sales were not very high.

Formula One has created its Super-Signal (coverage on six simultaneous channels) specifically for digital transmission. The SuperSignal is part of the DSF Plus channel on Germany's DF1 and all indications are that the take up of this option was low. The availability of the races on free-to-air channels like RTL or ITV seems to considerably limit the attraction of the pay version. Premiere, which is taking over DF1, plans to make the SuperSignal avail-

able to all its premium subscribers, without extra cost, because it does not believe in the product's commercial viability as a stand-alone offer.

In France, Italy and Spain the Super-Signal is sold by the Canal Plus services in PPV or by yearly subscription. No sales figure has been released.

Thus, with the few elements available so far, it seems there is hardly the evidence to justify all the excitement about sports PPV.

Canal+ and TPS released in November PPV buy rates. Both claim an average rate of 100%, split between movies and sports; 60/40 for Kiosque and 67/33 for MultiVision. Thus the film buy rates at 60% and 67% are less than a third of DirecTV's, as one would have expected. The sports buy rates include for Kiosque the season tickets for which one sale is accounted with every event covered.

Crucially, in France up to 50% of digital homes (the figure varies per operator) have not connected the modem to the telephone line. This is often because people don't want a new cable through the wall of their living room. Thus these homes do not have impulse PPV and must call to order a movie.

Digital PPV services remain to be launched in the Benelux, the Nordic countries and, more importantly, the UK. And in these regions video rental is much more popular than in Latin Europe where PPV was first introduced. Dominant premium operators, namely Sky, Canal Plus and Modern Times Group/TV1000 face the risk of new entrants (like cable, or Carlton and Granada in the UK) launching PPV services.

It could be argued that services like the Sky premium movie channels or TV1000 are more vulnerable to PPV competition and cannibalisation than channels like Canal Plus or America's HBO because they feature only a very small percentage of exclusive material. Canal Plus and HBO do have many original TV movies and shows which enhance their appeal and strengthen their brand name, and ultimately, from a consumer's point of view, PPV cannot be perceived as a substitution for them. But it could for Sky Movies. The rebranding of the two Sky film services may start to address the issue.

The control over PPV will arguably be the big issue of 1998 in these markets.

Conclusion

On paper the possibility of using digital capacity to break the very concept of 'channel', of pre-packaged programming, to leave the user in total control over her viewing schedule, looks attractive. But in the real world the usage of television can not be disconnected from the concept of 'channel'. And the salesman of new television services, which must convince consumers to sign a subscription, has to tell them they will get new, attractive channels.

Thus the conclusion must be that the main driver for digital penetration can only be premium channels at this stage. To existing premium subscribers digital can be sold on the merit of multiplexing, 16/9 format, and a few more exclusive programmes. For the consumer without prior experience of a premium channel, there should not be much difference between the sales arguments of the analogue and the digital salesmen, if only that digital has a certain trendy aura.

Consumers will not upgrade to digital or take multichannel television for the first time for theme channels or interactive services. But existing analogue subscribers can be lured for a multiplexed version of their premium channel, and those not yet familiar with multichannel TV (the majority of Europeans) will be interested in digital TV as much as they would be into analogue multichannel: to access premium films and sport events.

This conclusion seems amply justified on the ground. In France over 70% of Canalsatellite subscribers take the premium Canal Plus, whilst in Italy and Germany Telepiu and Premiere focus their marketing of digital TV on their premium services.

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Commercial Communications
the beginnings of a discussion on harmonisation?

Dr. Gert A. Nacken
Federal working party of medium- and large-sized retailers

(Bundesarbeitsgemeinschaft der Mittel- und Großbetriebe des Einzelhandels e.V)

In mid-1996, the Commission submitted the Green Paper on Commercial Communications in the Internal Market[1]. This Green Paper is the result of a resolution adopted by the Commission in November 1992 to work on future policy in the area of commercial communications and to publish the results.

The somewhat ambiguous title of this Green Paper hides a consultative approach which is of far-reaching significance. In summary, the Green Paper simply marks the beginnings of a discussion on the harmonisation of European advertising law. The scope of this undertaking becomes clear when one considers the many difficulties encountered during the recent adoption of the Directive on comparative advertising[2].

The Green Paper is remarkable in other respects. For the first time the Commission has put up for discussion the area of advertising law as a whole. It was formerly common practice to include advertising law issues in individual Directives and these thus became an afterthought to the actual contents of the provision. The Green Paper marks the first time the law against unfair competition or advertising law is recognised as an entity in itself. It is also a novel approach in terms of authority. Advertising law used to be dealt with by the then Consumer Service - now DG XXIV – and approached from a consumer protection perspective, but this Green Paper has been drafted and submitted by DG XV.

The Commission carried out extensive research before submitting its Green Paper[3]. Its starting point was of course the single market, its efficiency and realisation. Ultimately, the idea of a common market also presupposes the ability to move freely within this market, with the free trade in goods as one of the basic liberties enshrined in the Treaty of Rome. However, in its analysis the Commission reaches the conclusion that numerous actual and legal barriers exist as a result of national measures in a variety of areas, which impede this free movement of goods[4]. What is more, it is to be assumed that these legal obstacles will not only fail to decrease but rather increase further.

The Green Paper, and the conclusions to be drawn from it, aim to counter this trend. The Commission explicitly suggests the introduction, in future, of a comprehensive notification procedure in the area of commercial communications. This procedure is designed to ensure that national measures can be brought in line, reaching at least a relative degree of harmonisation. As part of the assessment procedure the Commission suggests an evaluation methodology[5].

As a further measure, the Commission considers it necessary to establish a committee at EU level whose task it will be to address these questions. On the one hand, the work of this committee is designed to make the Commission's initiatives more transparent; on the other hand, this body is expected to ensure the coherence of future national initiatives in this area, thereby also paving the way for broadly-based solutions. Finally - also an important aspect - this body will compare national laws and promote a better understanding of national differences through an improved exchange of information, making further progress on the path to harmonisation in this area.[6]

The term commercial communications is to be understood as a descriptive summary of the various methods of sales promotion. These include services such as advertising, marketing or labelling, as well as speciality suppliers such as list brokers.

The Green Paper invokes the results of a number of surveys and studies. When asked what they spontaneously considered to be obstacles in the provision of cross-border services, 23% of respondents cited legal problems as one of the key obstacles. The results of this survey will have come as no surprise to those who are professionally involved with the drawing up of cross-border advertising campaigns. Consequently, the authors of the Green Paper conclude

[1] Commercial Communications in the Internal Market, Brussels 8.5.1996 KOM(96) 192 final.

[2] cf. Volker Nickel, ZAW, speech on 10.6.1997 titled 'Concerning the properties of apples and pears'.

[3] Working paper - Commercial Communications in the Internal Market XV/958 1/96.

[4] Green Paper, pp. 24 ff.

[5] Green Paper, pp. 43 ff. Every national provision is to be subjected to various assessment criteria: what 'chain reaction' might the measure entail? What are the objectives intended by the measure? Is there an immediate connection between the measure and the objective pursued? Does the measure have consequences for other objectives? How effective is the measure?

[6] Green Paper, p. 48

that harmonisation in this field of law will result in significant economic advantages. Expenditure for legal research will be reduced. Marketing costs will fall as a result of a standardisation of advertising campaigns. Distribution costs will decrease: planning, design and accountancy are cheaper for universal concepts compared to country-specific advertising campaigns.[7]

If one considers the rapid introduction of the information society, one might conclude the Commission has adopted the right approach. The use of the new media is becoming an increasingly natural part of our daily lives. The technological penetration of markets continues inexorably and the number of PC-equipped private households increases by several hundred percent every year. We are on the eve of the introduction of new technologies which will combine TV, radio and PC into a single unit. User-friendliness and consumer acceptance increase day by day. Yet it is surely also appropriate to consider the relative market potential these media have. Similar to the mail order business in Germany - which has never gone beyond a market share of 5%, whilst continuing to describe itself as mail order business 'champions' - there will probably also be natural limitations to electronic commerce, which are predetermined by consumer habits. Even so, we can speculate how big these market shares will be. In any event, it will be of interest to companies of all types and sizes to have a share in this cake.

It is not just consumer behaviour which will change - the opportunities for suppliers are radically changing, too. The old adage in retailing that 'all business is local' does not apply to the Internet. The range of goods on offer is suddenly displayed on a world-wide scale. Problems of logistics appear solvable and temporary in nature. Even the questions of settlement and data protection in the world of bits and bytes will be resolved[8]. This, however, opens up a world of business transactions which was hitherto unknown. In terms of advertising law or antitrust law we have been used to thinking on a national scale. Advertising by a foreign national received the same treatment as advertising by a domestic national, even if the advertisement was acceptable abroad.

A first turning point in this nation-centred way of looking at things came with Article 30 of the Treat and the subsequent ECJ legislation starting with the *Dassenville* and *Cassis de Dijon*[9] rulings. Both decisions are irrelevant to the Internet: anyone may advertise in any way they choose and there is no possibility of control. International agreements, where they exist, are in their infancy, and the question as to how they will be implemented is completely open-ended.

However, this gives rise to a serious problem. As time goes on it will be difficult to make consumers, or companies using the Internet, understand that certain forms of advertising are not acceptable, that they can be prohibited and that substantial fines can be imposed for reoffenders, even whilst these forms of advertising are used on the Internet day after day. The incongruency of national laws and international practice will inevitably lead to legal uncertainty. The question as to why a law is law will be asked with increasing urgency, as consumers will be confronted with conflicting rules on a daily basis.

Nothing is more dangerous for a constitutional state than a constant breach of law without sanction. The situation appears almost grotesque - comparable to the introduction of the euro. As completely new rules of behaviour and ground rules in dealing with commercial communications are developing in a medium which is expanding exponentially, the 15 EU member states hardly even dare whisper the words 'harmonisation of advertising law' let alone pronounce them loudly and clearly. In the monetary field, too, the discussion falls far short of reality. In a world of large monetary blocks the EU affords itself the luxury of 17

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[7] Green Paper, p. 14.

[8] cf. e. g. Council resolution dated 21.11.96 concerning the new political priorities in respect of the information society (96C 376/01); Communication by the Commission on legislative transparency in the Internal Market for information society services (BR-Drucksache 700/96), 'The information society' - BMWi-Report, Fakten, Analysen, Trends, November 1995.

[9] ECJ, Rt 8/74, Sig. 1974, p. 837; ECJ s 120/78, Sig 1979, p. 649.

different currencies, quibbling about a few decimal digits during negotiations for harmonisation of the EU currency area. A single market will provoke a harmonisation process - a well-established fact since the Treaties of Rome. Harmonisation pressure will increase substantially once all EU citizens pay in the same currency, something obvious by early 2002 at the latest.

In relation to these issues, the word 'subsidiarity' is often used. This principle is a political approach to solving problems and was included in the Maastricht Treaty at the particular request of the Federal Republic of Germany. Article 3b of that Treaty stipulates 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.'

Yet how should the area of commercial communications for a single European market operate at national level?

Yet how should the area of commercial communications for a single European market operate at national level? A free single market depends upon the free and unrestricted movement of goods, with buying and selling not subject to restrictions inside the EU. But how should this game be played in a single market if 15 different ground rules continue to apply? The situation remains of course bearable - but only at the price of a continuing fragmentation of markets i.e. if the principle that 'all business is local' continues to apply. The principles of subsidiarity and commercial law in a common single market appear as a contradiction per se.

Should there therefore be a single commercial law for Europe? This apparently radical and utopian idea was once reality[10]. As we all know, there was a change in the consciousness of Europeans in the 12th and 13th centuries when they turned to rationalism and science. It was the age of Scholasticism. Teaching and science became interested in the literature of the late Antiquity. Subsequently the first universities were established, with faculties in each of the various European towns.

In jurisprudence it was the University of Bologna which established a standard model for the training of law students. This model was adapted by all European nations then in existence. As a result, the foundations of a single law in Europe were laid, with Roman law as created by the Byzantine Emperor Justinian in the 6th century (corpus iuris) as a key component. The second pillar of this single European law was Canon law i.e. the law of the medieval church. Both pillars together constituted the common law, or corpus commune. This law was applied in all countries of central and western Europe, with the exception of England. Against the background of the discussions in Brussels, for example, with its up to 15 interpreting booths, it is worth mentioning that medieval law also had a single language, namely Latin[11].

This common basis did not disintegrate until the late 18th century. Enlightenment came to the fore and with it the conviction that law should be based on national laws only. The authority of jurisprudence and the updating of law by means of court decisions (findings of reason in law) became irrelevant. It was a conflict of jurisdictions. Montesquieu had reassigned the roles: henceforth the judge was nothing more than 'la bouche de la loi', and his competence to develop and update law was disputed.

At the time the idealistic concept of a unified corpus of all laws prevailed, which citizens should have before their eyes in a clear and comprehensible manner and use rather like a manual, an answer to their everyday problems. Unfortunately, it did not spell out how to complete a tax return in 1997. The legislator, the state, was recognised as being the decisive and only factor in the making and updating of the law. It was during this time that the first major codifications took place: the Prussian general national law, the French

[10] cf. the very readable presentation by Coing, 'From Bologna to Brussels - European common features in the past, present and future', Kölner Juristische Gesellschaft, Volume 9, 1989.

[11] Coing, idem.

Code Civil, the Austrian ABGB; the unified 'EC law' of the Middle Ages had come to an end. Ever since, the fragmentation of the law has continued and the EU institutions are travelling on the long and arduous path of trying to turn back the wheel of history.

However, the Commission has a companion on the road: the European Court of Justice. As mentioned earlier, the standards set by the court in its rulings in respect of Article 30 of the Treaty have ultimately also influenced the Commission's evaluation methodology in the Green Paper on commercial communications. In the final analysis, it is the principle of proportionality which shows through time and again[12]. The formula used by the European Court of Justice in the *Dassenville* and later in *Cassis de Dijon* rulings, expressed the court's opinion that products which are marketable in one member state also have to be marketable in the other member states, unless there are particular reasons in individual cases which might prohibit this due to overriding interests of the national state in question[13]. Increasingly the ECJ has extended its rulings in this area to cover, *inter alia*, forms of advertising and thus commercial communications[14]. The course steered by the Court seems consistent - up to the ruling in the *Keck*[15] case. Since then jurists have been trying to establish just what the ECJ might have meant by this ruling and what the term 'sales modalities' means, with the ECJ ruling that Article 30 of the EU Treaty does not apply to sales modalities.

Depending on one's political point of view, one will either like or dislike this legislation. For example, this decision appears plausible to the extent that the sale of products at below cost merely constitutes a sales modality in the narrow sense. Where purely national affairs are concerned, a foreign national also has to obey the ground rules which only apply at a national level. On the other hand, a question of volume might also have played its part when this decision was made. During its deliberations on the issue of sales at below cost, the ECJ will have realised that the application of Article 30 of the EU Treaty to such matters might have resulted in an unmanageable number of complaints. This trend would have been furthered by the possibilities of modern data processing and of inserting standard blocks of text into legal documents. Finally, a third aspect was certainly significant, possibly even crucial.

This aspect was presented in an article by ECJ judge Joliet outlining the law against unfair competition and the free movement of goods in the discussions of the ECJ's jurisprudence. Judge Joliet picks up an interesting aspect in his concluding remarks[16]. First, he notes that the differences between the national legal provisions of member states in the area of unfair competition are rooted in their respective traditions. He then moves on to discuss the question as to whether a consistent application of Article 30 would not entail the risk of encroaching upon an area where decisions can only be made by the legislator. He illustrates his point by slightly changing the facts of the case in the *Yves Rocher* ruling. Anticipating the adoption of the Directive on comparative advertising, he changed the Yves Rocher advertising in such a way that a price comparison with different competitors was shown, instead of a cost price comparison. This kind of advertising, Joliet noted, was in line with the French legislation at the time but was incompatible with German law. He then asked whether it was the task of the judge in this case to make a choice between a system which permits comparative advertising and one which prohibits it, if the opposing national provisions reflect radically different understandings.

The question put by judge Joliet has been answered by an act of law i.e. by the present adoption of the Directive on comparative advertising. However, the fundamental question underlying it remains unanswered: if it is decided that a certain law is incompatible with Article 30 of the EU

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[12] Thus clearly in the *Yves Rocher* ruling on Article § 6e UWG, ruling on 18.5.1993 Rs C 126/91; ',However this provision must, as has been stated by the Court repeatedly, ... be appropriate in relation to the objective pursued'.

[13] ECJ, footnote 9 above.

[14] cf. the presentation by Joliet, 'The law on unfair competition and the free movement of goods - the case law of the European Court of Justice', GRUR int. 1994, pp. 1 ff.

[15] ECJ, EuZW 1993, p. 770.

[16] Joliet, idem, p. 14.

Treaty then it can continue to apply nationally, although it may no longer be applied to cross-border campaigns. The law is thus partially repealed.

What are the reasons? The only reason is that the national legislator was unable to prove the existence of an imperative and comprehensible reason of public interest why the national law in question is stricter than that of another member state. The ECJ therefore simply replaces the political decision by member state B with the political decision by member state A. The reasons why one decision is stricter than another is ultimately also a consequence of different legal systems. Where advertising law falls within the criminal law, for example as in France, it is consequently designed and updated in a very different way from advertising law which falls within civil law (as is the case in Germany). Judge Joliet thus refers back to Montesquieu and the insights of the Renaissance i.e. that court decisions cannot be a substitute for political decisions, even though it seems sometimes quite convenient for politicians to pass the buck to the Federal Court of Justice in Karlsruhe or to another body and let them have the last word. In this respect, too, the further development of European advertising law can only be derived from a central harmonisation approach.

Is the consumer to be viewed as a mature adult or as someone who needs to be afforded a high level of protection?

The Green Paper on commercial communications bears the signs of such an approach. Endeavours at national level, partial adjustments through legislation relating to Article 30, or disparate harmonisation attempts made in specific sections of individual Directives - none of these seems the right approach to resolving the issue.

The economic unit represented by the EU single market continues to grow. It will gain substantial further momentum through the introduction of the euro. The electronic media are outstripping legal reality. The ground rules of the EU single market concerning the free movement of goods have to be harmonised. Grand words indeed, but what actions will follow? In the opinion of the author - who would like to stress he is not a utopian - the Green Paper on commercial communications would constitute an opportunity to make a first step. Fundamental questions - or, to use the current term, cornerstones - would have to be discussed by the EU member states as part of this first step. The Commission's excellent paper also outlines alternative approaches to the fundamental questions:

- To which field of law should EU advertising law be allocated? Does advertising law only include provisions protecting the consumer, or does it also cover the protection of industrial property rights, or the rules governing the conduct of business people amongst themselves, as used to be the case in Germany, for example?
- What consumer model is to be the basis of this advertising law? Many treatises have already been drafted at national level. An international discussion has been missing so far. Is the consumer to be viewed as a mature adult or as someone who needs to be afforded a high level of protection?
- What mechanism of legal consequences should advertising law have? Is advertising law to be part of criminal law (following the French example), should it remain in the area of civil law (following the German example), or should preference be given to arbitration proceedings with ombudsmen (as is the case in Northern European countries)?
- What procedural provisions would need to be made? Should those concerned with ensuring competition have a right to action? This path has been followed by the Commission, although it has not also dealt with the other questions. It now demands access to the law for all. The question is, what law?

The minimal Directive on misleading advertising required more than 15 years of discussions, similar to the recently adopted Directive on comparative advertising. There will not be this much time in the future.