# COMMERCIAL COMMUNICATIONS

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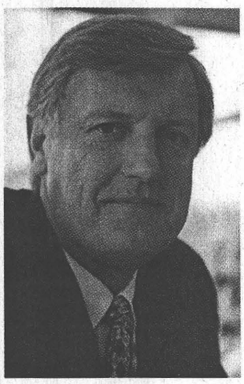
**May 1998**
Issue 12


## Commercial Communications Expert Group is launched - the need for information from interested parties

***John Mogg, Director General, DG XV***



*John Mogg*

The Commission's Communication on commercial communications was adopted on 4th March (*see previous Issue*). It stressed that the assessment methodology and the Expert Group would not meet their objective of ensuring the smooth functioning of the Internal Market without accurate objective information from interested parties. Facts are essential to drive the process forward.

The Communication therefore announced a number of actions, including the continuation of this newsletter, which launched the information network on which the success of the policy will rely. This newsletter will henceforth have an insert dedicated to information on the work of the Expert Group providing interested parties with its agenda, updates on its work and its opinions.

The Commission is also working on the establishment of the announced Commercial Communications Web site where information on agendas and opinions will be posted. For the present, as an interim measure, we have opened an electronic mail box (comcom@dg15.cec.be) for your comments.

We need your input. Readers should submit their written submissions (based on the application of the assessment methodology) either electronically at the e-mail address noted above or via fax (to DGXV E-5 Fax: 00 32 2 2957712) or to the postal address DG XV, E-5, Cort 100 (3/112), Commission of the European Communities, rue de la Loi 200, 1049 Brussels, Belgium.

Please indicate whether your response should be treated in confidence.

The first meeting of the Expert Group takes place on 27th May and will deal with the issue of discounts. Are there any problems arising from the differences between national regulations? Do they undermine the protection afforded to consumers in the context of cross-border trade or lead to legal uncertainty requiring marketing campaigns to be



IN THIS ISSUE

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adapted for one or more Member States?

We are interested in receiving your views (whether via the newsletter or directly to us) on the issues listed in the Communication. Please help us to identify:

(i) which of the areas of commercial communications regulations should be given priority and

(ii) other issues that should be considered in future meetings of the Expert Group.

We look forward to hearing from you.

**COMMERCIAL COMMUNICATIONS**

## EXPERT GROUP

**Date of first Meeting: May 27**

**Issue to be discussed: Regulations pertaining to discounts**
(price promotions,
promotions of the same product - e.g. 20% free,
3 for 2 offers and the like)
Written submissions are invited to :

**DGXV E-5**
**CORT 100 3/112**
**Commission of the European Communities**
**200 rue de la Loi**
**B-1049 Brussels,**
**Belgium**

or send by e-mail to:
**comcom@dg15.cec.be**

or send by fax to:
**00 32 2 2957712**

# Editorial

This issue marks a new phase for the *Commercial Communications* newsletter. We will continue to provide a forum for discussion of those issues that provide cause for concern to interested parties and also continue to publish articles of more direct interest to marketing practitioners. However, in addition, the newsletter will now be advising readers of the issues to be considered by the Expert Group and reporting on those issues which have already been considered.

It is clearly important that the issues going before the Expert Group should get the most extensive publicity possible. The wide readership of this publication amongst all the interested parties involved will no doubt make a significant contribution to this process. It would be of great value, however, if the issues were to be raised and discussed at national level within Member States. The policy debate needs to be as public as possible for a proper discipline to be brought to the process.

This issue contains two articles on marketing on the Internet. Whilst they provide some insight into the regulatory problems posed by this activity, they also reaffirm the extent to which this activity is set to grow. For good policy to be framed in this important area good information is essential. Readers are urged to complete the questionnaire which is distributed with this edition of the newsletter.

There may well be occasions when it would be helpful to be able to contact interested parties at relatively short notice. To this end, we would suggest readers send an e-mail to the mailbox established by the Commission as one of the contact points for commercial communications (comcom@dg15.cec.be). You are also requested, if you have not already done so, to fill out the details below if you wish to continue receiving your copy of *Commercial Communications*. Again, your e-mail address would be helpful.

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**If you have not already done so, please copy, complete and return this form to the address on page 2 to ensure you continue to receive your copy of *Commercial Communications*. You may also indicate whether you wish to receive the publication in French, German or English.**

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# FEDMA approach to electronic commerce

**Alastair Tempest**
**Director General**
**Public Affairs and**
**Self-Regulation,**
**FEDMA**

## Direct marketing and electronic trading

On the threshold of the 21st century, we have the continuing development of new computer-based technologies and the emergence of on-line media. For marketing communications, these services offer new opportunities because they are:-

- not access limited;
- the information is globally disseminated;
- they are based on the principle of immediate interactivity.

We can therefore expect that electronic trading will lead to the continued development and the liberalisation of European and international trade and will help marketers to develop cross-border activities and new marketing strategies.

At present, most experts estimate that by the year 2005, business to consumer communications will have experienced exponential growth. Reliable sources estimate that there are 50 million Internet access points at present around the world, and some forecast growth to 500 million by the end of the millenium. From July '96 to July '97, the number of websites on the Internet quadrupled. In July '97, 68 million pages were available on-line.

It is at present difficult to measure the influence of the new media on the conventional mass media, but we believe that the development of new technologies will encourage a shift in the use of the carriers of direct marketing. This influence is already noticeable in the more mature market of the USA where direct response mechanisms appearing in the printed press and broadcasting are shared between the post and the telephone on a ratio of 15:85.

We are, however, convinced that electronic trading will take some years to develop. The most popular products to purchase on-line (e.g. via the Internet) are known brands with real cost benefits, such as computer software and hardware, compact discs, books and travel/holidays.

However, FEDMA also believes that local on-line services, which offer the user the opportunity to purchase household shopping and other local goods and services, will be the spearhead of the use of electronic trading by consumers. Despite its relative ancientness, Minitel in France has achieved great success in offering the consumer access to local services. In the Netherlands, Belgium and elsewhere large and small retailers are experimenting with such services, so far with successful results.

## Getting credibility on the Net

Even if the notion of 'electronic commerce' is new, it is clearly based on the traditional direct marketing principles, which can be defined as a series of marketing strategies designed to provide the receiver with information and/or the opportunity to buy at a distance. Whether the marketer sells a product at a distance by mail or on-line, the principles and logistics pursued remain the same, the only major difference being the carrier used and the question of the security of the transactions.

At present, customers need to gain confidence in electronic trading. They need to feel secure about the methods of payments, the collection and the use of their data (which is perceived to be easier on-line than off-line), and the identity of the correspondent behind the screen.

At the European Union level, there is no legal vacuum. The directive on misleading and comparative advertising and the directives on distance selling and on data protection already cover most issues related to direct marketing activities.

These instruments apply irrespective of the carrier that brings the message to the recipient and, therefore, also apply to on-line services. The distance selling directive provides a regulatory framework

for contracts negotiated at distance; the data protection directive sets down rules on the processing (collection, use, transfer) of personal data; and the misleading and comparative advertising directive covers content of commercial messages.

In the field of media, priority has traditionally been given to a self-regulatory approach since self-regulatory rules have the advantage of being flexible, quickly reviewed, cheap for the consumer and easy to implement. They constitute an efficient way to protect the consumer without hindering the principle of freedom of speech.

## FEDMA study on codes of practice, direct marketing and on-line services

Last November, FEDMA completed a study on 'Codes of practice, direct marketing and on-line services'. In this survey, we collected, described and made a comparative analysis of 40 codes and guidelines world-wide. Most of these can be found on-line.

We found three types of code:

- general codes, which do not only target on-line services;
- specific codes, which target on-line services exclusively and have been adopted by associations and other relevant organisations ( such as Direct Marketing Associations, Better Business Bureau; International Chamber of Commerce);
- policies that have been adopted by individual companies operating in cyberspace ( such as Time Warner, Reader's Digest; Décathlon...)

The companies' notices inform the customer of the data protection and/or the marketing practices that they follow. They are usually short and easy to understand.

However, we found that some of these policies are not easy to find; even when accessing the frequently asked questions (FAQ), the statements 'about...', 'terms and conditions', or the 'home page', there is no guarantee as to whether the on-line user will find the company's policy. The policies on privacy are more accessible as they are often indicated from the first on-line page by a specific icon. Usually, the marketing practices can be found under 'customer service' or 'shopping information'.

Most of the companies give the user a postal and/or e-mail address allowing him/her to ask any information on the use of his/her personal data and/or the marketing practices and customer services (delivery time, returns, payment rules, etc.). These contact details are located either in the privacy or the marketing practices notice.

The associations' codes are sometimes very detailed. Even though there are sometimes great differences in their structure and content, they address the following issues:

**Need to identify the marketer**

The consumer should be given the possibility to contact the marketer and to send any enquiries via mail, e-mail or by telephone.

**Data protection policy**

The data protection notices should be read before or at the time of the collection, and give information (when appropriate) as to the kind of data collected; the purpose of the collection; the use and disclosure of the information; whether the consumer can refuse disclosure and by which means (i.e., right to opt out); whether there is a possibility not to receive unsolicited e-mails, to access and correct the information; the consequences of a failure to reply; the kind of companies to whom disclosure of data may be made.

The right to opt out from disclosure and/or from receiving unsolicited commercial e-mails is one of the key elements of self-regulatory codes for the direct marketing industry. In the context of on-line trading, this right can be exercised very easily by electronic means, e.g.: the operator can provide a tick box on-line or an e-mail address allowing the user to object.

**Marketing practices**
Companies are encouraged to make sure that prior to the conclusion of the contract, the customer is provided with specific information on their marketing practices: certain information must be given on the price, charges, delivery period, conditions for the return of products and methods of payment.

**Children**
The Better Business Bureau and United States Direct Marketing Association in particular provide information on the way to protect children in the on-line world. Even though they recognise that there is no real means in cyberspace to ensure that parental permission is given, they encourage parental supervision and give information about the possibility of using technical tools.

A number of codes stress the importance of applying codes to their audience so that they can be easily understood from a child's perspective.

**Reference to new technologies**
Most of the codes make reference to the development of software such as the Platform for Privacy Preferences (P3) and the Platform for Internet Content Selection (PICS). These techniques, developed by the World Wide Web Consortium (W3C), and other similar systems will obviously help companies to implement their privacy policies, and we can expect that in the next few years new techniques will become available.

**E-mail Preference Services**
In order to provide for individuals who do not wish to be approached by direct marketers' offers, the direct marketing associations have developed 'preference' services (also known as Robinson Lists) for mail and telephone (MPS/TPS). Work is now on-going to create e-mail preference services (EPS) in a number of countries, for example the USA, France and the UK. Given the global aspects of e-mail, FEDMA is encouraging its members and colleagues world-wide to develop an international EPS.

**Enforcement of the codes and responsibilities**
Some of the associations' codes provide for the setting up of specific self-regulatory bodies; others make reference to existing bodies.

## Conclusions

The FEDMA study shows that great progress has already been achieved on self-regulation and that the work conducted in different countries and by companies is becoming coherent. The survey highlights the willingness of professionals to develop flexible and transparent standards, and gives good reason to be optimistic.

The development of specific software to protect the consumer, and the use of trust-marks and other guarantees of high-quality will further protect the consumer. FEDMA believes strongly that additional legislation is likely to be a disincentive for these developments, and is therefore inappropriate at present. When specific abuses can be identified and quantified it is likely that existing laws, such as those against fraud, can be used.

It is very important to recognise the principle of country-of-origin control is an essential pillar to promote electronic trading. Some companies have already taken the initiative to inform the customer of the applicable law, expressly, on their on-line notice, in order to avoid confusion over the contract, liability, guarantee/after sales service or advertising law which applies to the on-line services they are offering.

Finally, FEDMA would like to see better cooperation between the global community to educate both users and content suppliers on how best to use electronic trading and benefit from it. As the OECD, for example, has recognised, greater cooperation between national judiciaries and enforcement is much more important and effective than producing new laws.

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# Marketing on the Internet
## and international competition law

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*First published in an article in Neue Juristische Wochenschrift, Number 22*

Increasingly, goods and services are marketed via the Internet. The market volume of Internet transactions is expected to total as much as USD 100 billion by the year 2000[1]. The commercialisation of the Internet does not just raise questions in connection with contract law, copyright and data protection legislation[2], but more especially problems relating to competition law.

The legislation against unfair competition imposes limits on marketing via the Internet. Due to the international character of the Internet, cross-border advertising and sales activities are increasing. Breaches of unfair competition law on the Internet often affect a large number of countries at the same time. The question therefore is, which law should be used to determine whether or not an on-line marketing practice is anti-competitive? After a survey of the problems of on-line marketing from a competition law perspective (I), the present contribution will deal with conflict of law issues concerning marketing on the Internet (II).

## I On-line marketing and the law against unfair competition

One of the main attractive features of the Internet as a marketing tool lies in the many possibilities of multimedia applications that it offers. As more and more efficient telecommunications infrastructures are becoming increasingly wide-spread, the currently prevailing fixed images will soon be supplemented by audio and video presentations. As a result, advertising on the Internet will acquire a quality which is very different from that in other media. However, it is above all the interactive nature of this medium that is of significance for commercial users of the Internet. Users are not limited to selecting a predetermined programme. Instead, pages on the World Wide Web have to be downloaded individually. Using integrated 'links', a mouse click can bring up other pages of the same web site or even pages on another web site. The on-line medium has an ability to promote dialogue which is further enhanced by the possibility of sending electronic mail messages. E-mail enables companies and customers to communicate with each other without a change of medium. This is of significance both for the on-line mail order business[3] and for the marketing of services. Many services can be provided directly via the net, such as the services provided by financial institutions or insurance companies, or even virtual professional advice from doctors[4], lawyers[5] and tax consultants[6]. Digitalised goods such as software or electronic publications can even be supplied on-line[7].

These characteristics of the Internet require - and at the same time enable - on-line advertising to be designed in particular ways. Whereas in traditional media, such as print or broadcasting, the design of advertisements is merely aimed at keeping consumers switched on, advertising in data networks generally has to be designed in such a way that it is actively sought after by users. This constitutes a new challenge for advertisers: they have to provide special incentives for Internet users to make them download an advertising page. This brings with it an increased risk of liability under competition law[8].

One such incentive might consist in linking advertising up with other pages which users can normally only access against payment. A widespread example is the linking up of advertising with telegames. Often, there is also the possibility to download new software. If such advantages are granted in connection with the main transaction, then this may constitute a breach of the Federal Gifts Regulation[9]. By contrast, if advantages are only granted in the hope that a business

[1] Frankfurter Allgemeine Zeitung dated 26.11.1997, p. 17.

[2] See *Müller-Hengstenberg*, NJW 1996, pp. 1782ff.

[3] Improvements to the safety of payment transactions - which can so far only be made by credit card - can be expected as a result of the development of new methods of payment over the Internet. See also Handelsblatt dated 8.7.1997, p. 41; *Stolberg*, Abrechnungssysteme im On-line-Verkehr, in: *Schwarz* (Ed.), Recht im Internet (1997), Marginal Note 6-4.1.

[4] On the admissibility of Internet advertising by a dentist from a competition law perspective, see LG Trier, WRP 1996, 1231, and OLG Koblenz, NJW 1997, 1932; now also LG Trier - 7 HO 100/97 (unpublished).

[5] On Internet advertising for legal services, see *Ebbing*, NJW-CoR 1996, 242ff.; *Schopen/Gumpp/Schopen*, NJW-CoR 1996, 112-116; *Scheuerl*, NJW 1997, 1291ff.; *Westerwelle*, WiB 1997, 297ff.; *Sagawe*, Kammerreport Hanseatische Rechtsanwaltskammer Hamburg 4/1996, 6ff.; *Flechsig*, ZUM 1997, 98ff. See also LG München, CR 1996, 736.

[6] LG Nürnberg/Fürth, NJW-CoR 1997, 229.

[7] Finally, on-line advertising can be targeted more effectively, as the effectiveness of advertising can be measured using pageviews and visits as criteria, which are recorded using the access protocols of Internet servers. For further details on computation methods, see Frankfurter Allgemeine Zeitung dated 13.9.1996, p. 18, and Handelsblatt dated 12.8.1997, p. 34.

[8] As the ruling by LG München, CR 1997, 155 on the anti-competitiveness of disparaging criticism via the Internet shows, trading activities on the Internet also raise the problems generally encountered in competition law.

[9] For a broad interpretation of the term 'accessoriety', see *Baumbach/Hefermehl*, Wettbewerbsrecht, 19th edition (1997), Art. 1 of the Federal Gifts Regulation, Marginal Note 35.

transaction may be concluded, then the promoted products or services may either be samples or original goods[10]. Companies distributing their goods or services via data networks may particularly depend on their being supplied on-line - due to the 'virtuality' and novelty of many products - so that they can be sampled by users. At the same time, however, the transparency of the market means that there is a particularly great danger of counterfeits being created of these goods or services, which is significant from a competition law perspective.

Often, the gratuities granted as part of on-line advertising are not connected with the product or service being advertised. When considering when such give-aways constitute an excessive enticement (and are therefore unfair) because they might distract consumers from examining the main product or service on the merits of its quality and price competitiveness[11], the particularities of the on-line medium have to be taken into account: its interactive nature dictates that it depends to a far greater extent than other media on enticing consumers in this way. However, it could be objectionable from a competition law perspective if users are paid for watching advertisements[12].

The appeal of advertising on the Internet is often also increased by prize competitions or lotteries. The incentive provided by them is sometimes substantially greater than that of prize draws or competitions in the print media, as users can take part directly via the data network and often have an immediate chance to win something. New guidelines therefore need to be established in this area, stipulating the conditions under which lotteries or prize competitions on the Internet are anti-competitive because they do not just provide the incentive of a random win, but also contain an element of unfair trading[13]. This might include, for example, deception of the public, a link between the chance to win and product sales, and above all, excessive enticement.

On-line marketing further raises questions concerning the Federal Rebates Act. Advertising on the Internet is frequently linked with the possibility of a rebate. For example, users can print off code-marked rebate coupons to be used for a purchase in the real world - in the case of targeted low-price offers these coupons are sometimes only valid for one day[14]. Often, substantial rebates are also granted for on-line purchases themselves[15].

The increasingly wide distribution of the on-line press raises new problems in connection with competition law. Electronic publishing has made it possible to publish books and periodicals without a production site and to make them available to a large readership without the need for a distribution system. Numerous publications exist only on the data network. At the same time, part or full editions of daily and weekly national and international newspapers with wide circulation, on the one hand, and regional papers, on the other, are increasingly also available in electronic form. These electronic media contain a growing amount of commercial advertising. They may either be ads such as those found in the print media, or hyperlinks to the homepage of the company in question, which may be downloaded with a mouse click. In these cases, the 'Trennungsgebot' (i.e. the obligation to separate the editorial content from any contents of a commercial nature) provided by both the Federal Press Act and the Federal Competition Law apply[16]. Advertising has to be identifiable as such; a mere reference to an Internet address is not sufficient[17]. Rather, there has to be an explicit reference to the promotional nature of the ad. In view of the Trennungsgebot, the linking up of an editorial with advertising pages on a different web site is particularly problematic[18].

[10] For the criteria used for an assessment of the distribution of free samples and original goods from a competition law perspective, see *Baumbach/Hefermehl* (cf. footnote 9 above), Art. 1 of the Federal Law against Unfair Competition, Marginal Notes 119ff.

[11] On give-aways, see *Baumbach/Hefermehl* (cf. footnote 9 above), Art. 1 of the Federal Law against Unfair Competition, Marginal Notes 93ff.

[12] See, for example, http://www.cybergold.com.

[13] For general information on the unfair competition criteria used for assessing competitions, see *Baumbach/Hefermehl* (cf. footnote 9 above), Art. 1 of the Federal Law against Unfair Competition, Marginal Notes 152ff.

[14] Handelsblatt dated 8.7.1997, p. 39.

[15] See the price competition with discounts of 30-40% in the Internet book trade, in Frankfurter Allgemeine Zeitung dated 29.3.1997, p. 20.

[16] Possibly are a violation of Articles 1 or 3 of the Federal Law against Unfair Competition, or against Article 1 of the Federal Gifts Regulation; see also *Baumbach/Hefermehl* (cf. footnote 9 above), Art. 1 of the Federal Law against Unfair Competition, Marginal Notes 37f.

[17] It is only for US web sites that the top level domain, i.e. the last part of the Internet address, indicates with »com« that the sender is a company; by contrast, the top level domain of German suppliers is usually »de« (for Germany). Moreover, domain descriptions by no means always include the company name of the supplier.

[18] On the admissibility of such hyperlinks of an advertising nature - possibly by interposing an information page -, see *Gummig*, ZUM 1996, 573 (582); a.A. *Hoeren*, Internationale Netze und das Wettbewerbsrecht, in: *Becker* (Ed.), Rechtsprobleme internationaler Datennetze (1995) p. 35 (52).

E-mail has enabled a new form of direct marketing. Personalised business letters in electronic format can be sent to individual addresses, or to a large target group. This form of direct marketing makes it possible to send promotional literature to a large number of recipients at a low cost. It is particularly effective because persons or groups of people can be selected according to particular criteria and are therefore targeted much more precisely.

From a competition law perspective, the unsolicited dispatch of e-mails with a commercial content is not entirely without its problems. Even though advertising by e-mail is not equivalent to unsolicited advertising by phone[19], telex[20], teletext[21] or fax[22] in all respects, due to the fact that a different medium is used, it is to be expected that the courts will rule advertising by e-mail to be incompatible with Article 1 of the Federal Law against Unfair Competition, too, given that it places a similar strain on consumers - at least given the present level of technology[23]. However, the recently adopted Telesales Directive[24] does not cover the unsolicited dispatch of e-mails with a commercial content. Whereas the directive proposal in 1993[25] called for prior consent for both telephone and e-mail advertising, the Community legislator in Article 10 Paragraph 1 merely prohibits unsolicited advertising by fax and voice mail[26].

Finally, new questions in respect of competition law arise as regards third-party liability[27]. Not only the advertising companies, but also the service providers may incur liability under competition law. The Federal Teleservices Law (TDG) - which forms part of the Federal Information and Communication Services Law - limits the liability for suppliers of individually usable services[28].

Article 5 Paragraph 1 of the Teleservices Law states clearly that service providers are liable for their own contents which they provide to users, in accordance with general laws. However, according to Paragraph 2 providers are only liable for third-party contents if they have knowledge thereof and if the technology to prevent its use is available and can reasonably be expected to be used by them. Of particular importance is the exemption from liability in Article 5 Paragraph 3 of the Teleservices Law which applies in cases where suppliers merely provide access to the use of third-party contents[29]. The question as to who is liable for anti-competitive on-line advertising depends crucially on whether the expression 'providing access' only refers to the provision of access to the Internet by access providers such as EuNet and on-line services such as AOL or T-Online, or whether it also includes other forms of providing access to contents.

In the case of a broad interpretation, the exemption from liability would also include the operators of search engines who provide users with web site addresses and enable them to download their contents with a mouse click[30]. The same applies in relation to the liability for hyperlinks[31] to the anti-competitive homepages of other companies. The Federal Media Services Treaty contains a liability exemption clause for services addressed to the general public[32]. However, this clause primarily governs the liability under Federal press and broadcasting laws, but not liability under competition law, as this is an area for which the Federal states lack legislative authority. The Federal law concerning liability is therefore twin-tracked, revealing the questionable nature of making a distinction between individual and mass communication[33].

[19] On the anti-competitiveness of telephone advertising in the private sector, see BGHZ 54, 188 = NJW 1970, 1738 - telephone advertising I; BGH, NJW 1989, 2820 - telephone advertising II; BGH, NJW-RR 1990, 359 - telephone advertising III; in the business sector, see BGHZ 113, 282 = NJW 1991, 2087 - telephone advertising IV.

[20] BGHZ 59, 317 = NJW 1973, 42 - telex advertising.

[21] BGHZ 103, 203 = NJW 1988, 1670 - teletext advertising.

[22] BGH, NJW 1996, 660 - telefax advertising.

[23] Also *Hoeren* (see footnote 18 above), pp. 43ff.; *Waltl*, On-line-Netzwerke und Multimedia, in: *Lehmann* (Ed.), Internet - und Multimediarecht (Cyberlaw) (1997), pp. 185, 193f.; now also LG Traunstein 14.10.1997 - 2 HK O 3755/97 (unpublished); a.A. *Reichelsdorfer*, GRUR 1997, 191 (197f.).

[24] Directive 97/7/EC on Consumer Protection for Telesales Agreements, OJEC No. L 144 dated 4.6.1997, p. 19.

[25] Amended proposal for a Council Directive on Consumer Protection for Telesales Agreements, OJEC No. C 308 dated 15.11.1993, p. 18.

[26] According to Article 14, it is a minimum harmonisation. For a specific definition of the term 'public interest', probably with a view to a complete harmonisation through Article 10, see *Reich*, EuZW 1997, 581 (586).

[27] For tort liability on the Internet, see *Spindler*, ZUM 1996, 533ff.; *Flechsig*, AfP 1996, 333 (340f.); *Koch*, CR 1997, 193 (196ff.); for criminal responsibility, see *Sieber*, JZ 1996, 429ff., 494ff.

[28] These include notably telebanking, data exchange, offers for the use of the Internet or of telegrams and offers of goods and services in electronically downloadable data bases with interactive access, Article 2 Paragraph 2 of the Federal Teleservices Law.

[29] According to Article 5 Paragraph 3 Sentence 2 of the Federal Teleservices Law, this is equivalent to the automatic, short-term presentation of third-party contents follow-

ing a user search. Exemption from liability thus also applies to proxy downloads on so-called proxy servers. They are used for proxy downloads of pages downloaded particularly frequently, in order to ensure that the server on which the page is originally filed and which is usually quite remote does not have to be accessed via the Internet for every single download of the page in question.

[30] On the liability by operators of search engines according to the general law of torts, see already *Spindler* (see footnote 27 above) p. 555; for their exemption from liability in accordance with Article 5 Paragraph 3 of the Federal Teleservices Law, see *Koch* (see footnote 27 above) pp. 200f. For the liability of companies for entries in search engines which were not caused by them themselves, see LG Mannheim 1.8.1997 - 7 O 291/97 (unpublished).

[31] A hyperlink is a cross-referral to another web site.

[32] For further details, see Article 2 Paragraph 2 of the Federal Media Services Treaty.

[33] On on-line law between telecommunications and media law, see *Scherer*, AfP 1996, 213ff.; *Kröger/Moos*, AfP 1997, 675ff.

[34] On the importance of private international law for controlling contents on the Internet, see *Engel*, AfP 1996, 220 (225f.).

[35] On responsibility for actions on the Internet, see *Kuner*, CR 1996, 453 (455f.).

[36] BGHZ 35, 329, 336 - feeding bottles; cf. also the prevailing opinion, MünchKomm/*Kreuzer*, BGB, IPR, 2nd Edition (1990) Art. 38 Marginal Note 234 with further references. The draft law for an amendment of International Private Law (non-contractual obligations and property) by the Federal Ministry for Justice dated 1.12.1993, reprinted in *Kropholler*, Internationales Privatrecht, 3rd Edition (1997) p. 575 (Appendix), restricts itself to a general rule for the International Law of Tort. Even without a particular conflict of law rule for unfair competition, it should be possible to establish a connection in line with the current principles, reason on p. 21

## II Conflict of law rules in competition law

### 1) Principle

Trading on the Internet generally involves a foreign element. On-line marketing is to an increasing extent also directed at consumers in other countries. Above all, advertising on the Internet can ultimately be downloaded in all countries that provide access to the Internet, i.e. in virtually all countries world-wide. Which competition law rules apply to marketing measures on the Internet depends on the conflict of law rules of the applicable *lex fori,* i.e. the domestic law of the courts in which the case is tried[34]. If German courts have international jurisdiction[35], the German conflict of law rules in competition law determine which law against unfair trading prevails. Under German law, the large majority of cross-border violations of competition rules are qualified as unlawful acts. In these cases, the place where the offence was committed is determined according to the circumstances[36]. Generally, the place where the offence was committed is related to the place where the conflict of interests under competition law occurred, i.e. to the place of business[37]. More precisely, therefore, it is the place where the impact on the business counterpart occurred.

Trading on the Internet can have an impact on the markets in several other countries. In order to determine the place of business in multistate sales activities of this kind, it is necessary to have a closer look at the different kinds of on-line trading. A distinction has to be made between advertising on the World Wide Web, which is addressed to all users (see 2), e-mail advertising directed at specific individual users (see 3), and on-line sales activities (see 4). If there are places of business in several different countries, the competition rules of all these countries apply (see 5).

### 2) Advertising on the World Wide Web

If a company has its own homepage on the World Wide Web or advertises its products or services on third-party pages or in electronic media, then these trading activities are directed at the general public, similar to advertising in the print media or radio broadcasts[38]. The question therefore is the following: can the principles for establishing a connecting factor indicating the legal system to which the factual situation under consideration is related and which are used by the legislator in the case of advertisements in print media, be applied to advertising on the World Wide Web by analogy[39]? In the *Tampax* case[40], the Federal Court of Justice ruled the place where the conflict of interests under competition law occurred to be the area where the publication is distributed in substantial amounts and as intended. If the area of distribution of advertising on the World Wide Web is taken as a starting point, then the problem in respect of the data network medium is that no embodiments of the advertising exist. The place of impact cannot therefore generally be considered to be the place of physical distribution, as in the case of the print media.

Equally, the virtual place of business is not simply any place where users have access to the data network. Whereas the area of reception can always be used as a starting point in the case of trading activities in radio broadcasts, the same is not true of advertising on the Internet. A radio broadcast constitutes - at least to date - a unidirectional form of mass communication which is broadcast or disseminated at the recipient's location. As a result, advertising on TV or radio generally impacts on the business counterpart in the area of reception.

By contrast, data networks open up the possibility of interactive individualised communication. Even if users have access

to the Internet, they first have to download the pages that the supplier has put on the Internet. It could be argued that the same applies to radio broadcasts, too, as they only provide an opportunity to take notice of a broadcast, hence their impact is only a possibility. However, with the possible exception of marginal areas in other countries that are also located within the area of reception[41] it can generally be assumed that the programmes broadcast - and hence also the advertising contained therein - are indeed taken notice of within the area of reception. This is not the case for data networks, where the possibility to receive or access advertising allows no conclusions as to the actual impact of all downloadable advertisements, as it is quite possible or even likely that many pages which can in theory be downloaded are not actually downloaded in other countries. Hence the area of distribution of data networks in the case of trading activities - unlike that of trading activities in other media - cannot be used as a starting point. The mere fact that an advertisement can be downloaded from practically every country in the world, i.e. the mere fact of its presence on the Internet, does not therefore mean that the legal systems of all these countries are to be applied.

The scenario of a customer downloading a page from the Internet can be viewed in two ways: first, as a virtual visit by the supplier to the customer i.e. the advertising impacts on the customer at the customer's location; alternatively, as a virtual visit by the customer to the supplier's place of business. The place of business is deemed to be the location of the customer only if an analysis of the actual sales activity shows that it is apt to have a noticeable influence on competition there. In order to be able to establish a link to the law against unfair competition, a noticeable influence of this kind on the market in the sense of a quantitative threshold is not just required if the principle of effect is applied, due to the concordant protective purposes of the Federal law against unfair trading practices and the Federal anti-cartel law; this principle is also applied in the international fair trading rules[42]. Due to the broad meaning of the term 'effect', it needs to be circumscribed. Even if - as is largely held - the impact is used as a connecting factor[43], the connection might have to be further narrowed down using the noticeability criterion[44]. This is the case in multi-state trading activities, which might lack the finality generally found in binational sales activities, i.e. the impact on the business counterpart might only be minimal. If the impact on the market of a country is only minimal, the relevant national law does not need to be applied, neither to protect market participants nor to protect the market as an institution.

Generally, a measure can be considered as having a noticeable market influence if it is specifically also targeted at customers in the relevant foreign markets[45]. The design of the contents of the trading activity can serve as an indication that this is the case. Thus some offers are expressly also addressed to potential buyers abroad for whom different pages in their respective national language have been provided on the Internet and can be downloaded with a mouse click. Other circumstances might also be an indicator that the trading activity targets foreign markets. For example, the inclusion of different telephone numbers for orders in different countries or different currencies allows the conclusion that the offer is addressed to customers in other countries. Finally, the market for a product or service may be explicitly limited to particular countries.

Moreover, the location of an on-line advertisement on the Internet can indicate that a trading activity in a data network is

(unpublished).

[37] According to the *steel export* ruling of the Federal Court of Justice, however, in the case of foreign competition between nationals the joint place of establishment i.e. Germany is to be used as connecting factor if the competitors on a foreign market are all German nationals or if the sales activity specifically targets a German national who is thereby unduly obstructed, see BGHZ 40, 391 = NJW 1964, 969.

[38] The same also applies to news groups due to the indefinite number of participants, to the extent that they are used for commercial activities.

[39] Thus KG Berlin (25.3.1997 - 5 U 659/97, unpublished) explained that it had international and local jurisdiction because i.a. the attacked domain name of the US company could also be downloaded in Berlin, thereby establishing the applicability of German law without difficulty.

[40] BGH, GRUR 1971, 153.

[41] In the case of a spillover, it has to be examined in particular whether the relevant programme - particularly because of the language used - does indeed impact on consumers in the country of reception. The larger the distribution in satellite broadcasting becomes, the more likely this is to be the case. For details on cross-border TV commercials, see *Schricker*, GRUR Int. 1982, 720ff.; *Kort*, GRUR Int. 1994, 594ff.

[42] See already *Wengler*, RabelsZ 19 (1954) 401 (415f.); also *Schricker* (cf. footnote 41 above) p. 724; *Sandrock*, GRUR Int. 1985, 507 (517f.). Although the use of the principle of effect as a connecting factor takes account of the fact that antitrust law and fair trading laws constitute a single law prevailing at the place of business, its application generally means that indirect effects have to be excluded; the use of the principle of impact as a connecting factor is therefore generally safer. A critical assessment of the principle of effect is already found in *Kreuzer*, Wettbewerbsverstöße und Beeinträchtigung geschäftlicher Interessen (einschl. der Verletzung kartellrechtlicher Schutzvorschriften), in: v. *Caemmerer* (Ed.), Vorschläge und Gutachten zur Reform des deutschen internationalen Privatrechts der außervertraglichen Schuldverhältnisse (1983) 232, 270ff. Details

of the - relatively rare - case where a narrow definition of the term 'effect' results in different results in *Bernhard*, Das Internationale Privatrecht des unlauteren Wettbewerbs in den Mitgliedstaaten der EG (1994) 261ff.

[43] See footnote 36 above.

[44] Also in *Sack*, GRUR Int. 1988, 320 (328f.).

[45] *Hoeren* (cf. footnote 18 above) p. 43 emphasises the target, if due to the required finite character of the impact the place of the conflict of competitive interests in the on-line area is found in the country where an e-mail was received as intended, or from which a WWW homepage can be downloaded as intended.

[46] To finance the development of expensive search systems for the Internet, the entering of key words in search engines is increasingly accompanied by spots; see Handelsblatt dated 24.6.1997 on the search engine fireball under http://www.fireball.de.

[47] Similar in *Hoeren*, Werberecht im Internet am Beispiel der ICC Guidelines on Interactive Marketing Communications, in: *Lehmann*, Internet- und Multimediarecht (Cyberlaw) (1997) p. 111 (113), who suggests the use of criteria to establish whether an offer is tailored to the German market.

addressed to buyers in foreign markets. Companies advertise not only on their own pages, but also on those of third parties. If an advertisement is placed on a page provided by a third party or if the homepage of another company is sponsored, the target group of the third-party page has to be taken into account as an advertising vehicle, too. If a page targets buyers in foreign markets specifically, this indicates that the relevant sales activity has a corresponding objective. The same applies generally in cases where a company's own pages can be accessed via hyperlinks on third-party pages. In these cases, one problem might be that hyperlinks are not necessarily placed with the knowledge and consent of the company in question but might have been put there illegally.

Which markets are targeted by advertising in electronic media using advertisements or hyperlinks depends, among others, on the distribution of the relevant electronic newspaper or periodical. Unlike with print media or radio broadcasts, however, the distribution of electronic publications cannot be established - as mentioned earlier - as the distribution of the data network merely gives users the possibility to download the relevant electronic newspaper or periodical which they might take notice of. However, if other circumstances show what the target group of the advertising vehicle is, some conclusions can at least be drawn as to the aim of the sales activity.

Finally, the registration by a company of its Internet address on foreign or international search engines or its inclusion on the hotlists of browser surfaces can serve as an indicator that the company purposefully targets consumers in foreign markets. The same applies if a company puts its address on pages which are frequently downloaded from abroad, such as directories, or weather and information services[46].

If a trading activity is targeted in this way, it will have an impact on its business counterpart at the place where users download the relevant page, as intended. Whether or not the page is actually downloaded, and by how many users, is not relevant for an application of the law of the place of business in question. It is enough for the page to be objectively suited to influence competition on the relevant market because it is targeted in this way.

Often, however, such an objective will not be recognisable for trading activities on international data networks. In such cases, whether an activity is apt to influence foreign markets can only be established with the help of relevant criteria[47]. In this context, the language used in the advertisement, and the product or service being promoted are of particular significance. If a particular language is virtually only spoken in one country, a page drafted in this language will only be able to influence the domestic market. Conversely, the more widespread the language used is in other countries, the stronger the impact of the relevant page will be on foreign markets. The English language, which is already used worldwide, has even become *the* language of the Internet. Where an Internet page is drafted in English, the choice of language therefore provides hardly any clues as to its suitability to influence the market. At any rate, if an American company promotes its products in English over the World Wide Web, it cannot automatically be assumed that it will only influence competition on the American market.

Where the language criterion fails, characteristic features of the relevant product or service might indicate whether a trading activity in data networks also impacts on business counterparts abroad. This can generally be denied where the territorial scope of the market is small. For example, on-line advertising for a pizza

delivery service[48] or a dentist[49] is not apt to have a marked impact on competition in other countries. By contrast, where products or services can be provided on-line, the market on international data network extends to practically all countries world-wide.

The same applies in cases where goods are distributed via the Internet using mail orders, or where services - such as expert opinions - can be provided without the need for the expert to be physically present, or services where the recipient of the service necessarily needs to travel abroad, such as in the tourism industry. In such cases, competition on a number of markets can be influenced to quite a substantial degree. This applies independently of whether the relevant products or services were previously distributed on the relevant market. The actual market shares are irrelevant when assessing the suitability of a product or service to influence a market[50].

**3) Direct advertising via e-mail**

Instead of just being addressed to the general public of users, advertising on the Internet can directly target potential customers if it is sent via e-mail. Similar to direct advertising by letter, fax or phone, e-mails with a business content generally impact on the addressee at the place where the relevant advertising is received. This might, however, not apply where the recipient has contacted the supplier. Such is the case not only when a recipient has requested information or promotional literature to be sent to him/her, but also where a recipient has asked to be put on a mailing list. The e-mail must, however, be relevant to the subject matter indicated by the recipient. Whether the supplying company in this case makes a virtual visit to the recipient's place of business depends on whether it has extended its sales efforts to the relevant market.

Although the global marketing of a company is often facilitated by a presence on the Internet, a homepage on the Internet in itself is not sufficient evidence of global sales activities. If the page clearly is not directed at sales on foreign markets, e-mails sent following a request by the recipient have to be judged in accordance with the law prevailing at the company's place of business. In this case therefore the insubstantial impact on individual market players does not result in the relevant competition law being applied. If, however, the on-line advertising of a company is also aimed at distribution on specific foreign markets or foreign markets in general, the law at the recipient's location prevails. This is because the measure shows the finality required to justify the application of the relevant law even where the impact *in concretio* is only marginal.

**4) On-line sales activities**

Finally, a look at how sales activities on the Internet are to be judged from a conflict of laws perspective. Generally, sales activities are governed by the law of the market in question. If goods are exported for distribution into other countries or if services are provided in other countries, the sales activity impacts on the business counterpart in the relevant country.

However, determining the place of business is more difficult when it comes to the supply of on-line digitalised goods or services via the Internet. Similar to cross-border services on demand[51], the place of business might be either the company's headquarters or the location of the customer in question. Again, the place of impact on the business counterpart depends on whether the company has extended its sales efforts to foreign markets. Whether or not previous marketing activities are apt to have a marked impact on competition on the relevant market is, however, even more difficult to establish than in the case of products or services

[48] See, for example, under http://www.mr-pizza.htm.

[49] Definitely in respect of advertising for general dentistry services, but not in respect of the distribution of dental hygiene products; cf. the facts of the case in LG Trier, WRP 1996, 1231; OLG Koblenz, NJW 1997, 1932.

[50] *Peschel*, Reichweite des deutschen Wettbewerbsrechts, in: *Schwarz* (Ed.), Recht im Internet (1997), Marginal Note 5-2.1, p. 14, probably disagrees, as he considers it possible to modify the noticeability threshold accordingly, with the result that the assessment of an advertising measure is made dependent on the objective sales situation on the relevant market.

[51] On the problems surrounding services on demand, see so far only *Sack* (cf. footnote 44 above) p. 324, who generally refers to the company's registered office.

provided outside the Internet. At any rate, due to the characteristics of the goods and services, their geographical market is not limited to the territory of one country, but generally comprises numerous or even all countries world-wide. If the way the offer is targeted or the language used does not indicate that the offer is restricted to the national market, the relevant sales activity is apt to influence competition in all these countries. Therefore the relevant on-line sales activities also have an impact on consumers in these countries.

**5) Applicability of the laws of several places of business**

It can be extremely difficult to determine the place of business for trading activities on the Internet. This is due firstly to the diversity of trading activities on data networks. Advertisements and sales activities directed at the general public or at specific individuals can be found there, as well as virtually all other forms of trading activities. Above all, however, trading activities on the Internet do not provide criteria such as distribution figures, which in other media make it easier to determine whether a trading activity is apt to have a noticeable effect on foreign markets. Therefore, its distribution can only be established by an analysis of the measure in question. Moreover, because trading activities on the Internet can be downloaded world-wide, the number of potentially affected markets is generally far greater than that of other media. It is therefore often difficult to assess on which of these markets a specific on-line sales activity has an impact. The liability of suppliers of goods and services on the Internet and third-party liability under competition law is often decided in accordance with a large number of legal systems.

The consequences of several competition law systems applying side by side appear highly problematical. When the laws of several places of business are authoritative, the legitimacy of sales activities on the Internet for the territory of each state is decided in accordance with the competition law of that state. Preconditions, such as the legal consequences of a breach of competition, have to be established separately.

As regards a typical feature of competition law, namely the right to refrain someone from acting, this territorial split means that a party can only be asked to refrain from acting on the territory of the state(s) where the relevant action is detrimental to competition. If the marketing measure consists of several actions (as is the case with sales activities or direct marketing in several countries, for example - including via the Internet) then the sale of the product or the advertisement may be banned on the territory of the state whose competition law is breached by the relevant measure.

Generally, a company wishing to market its products on a European or global scale is then faced with a choice: either it makes the trading activity concerned comply with the most stringent law, or it does without harmonised marketing but instead adapts its marketing on the relevant territory to the prevailing competition law, at an additional cost. However, given the large number of laws affected by on-line marketing it seems hardly practicable for companies to tailor their marketing to the laws of each country. Therefore the only option in most cases will be to make the marketing measure comply with the most stringent law, even in the case of individual trading activities.

Particular problems arise where a trading measure affecting several markets - such as advertising on the Internet - consists of *a single* natural action. In this case, the order to refrain could in theory be restricted territorially in such a way that the relevant party is ordered to refrain from the relevant measure on the territory of a

particular country. For example, an advertisement on the Internet is banned from being downloadable in that country but continues to be legal in all other countries. In reality, however, trading activities of this kind are indivisible, and the order to refrain can only apply to the activity *as a whole*.

It is true that on-line advertising can be individualised by using the right kind of software[52]. Given that different advertisements can be placed in on-line newspapers and on different pages, depending on the addressees or target groups, it seems conceivable only to include certain inserts or hyperlinks when these pages are downloaded from abroad, or downloaded from specific countries. However, it is currently not possible to make trading activities on data networks which are addressed to the general public unavailable to particular geographical areas, for example by encoding them. A ban that is limited to the territory of one country therefore in fact leads to a ban on the measure as a whole, i.e. it results in the most stringent law prevailing. This means that a claimant for an order to refrain can, in principle, base his claim on the law of a country of his choice, provided that the marketing measure has an impact on the market of that country. The claimant can thus have a ban imposed on the trading measure for the territory of the relevant state, thereby effectively also preventing its distribution in other markets[53].

The principle of territorial division also causes problems as far as claims for damages are concerned. In the case of indivisible trading activities, the total amount of damages is not calculated in accordance with *one* competition law; instead, the claim for damages is parcelled out[54]. Because damage to trading is characterised by the fact that it is difficult to ascertain, the ways in which individual legal systems grant damages vary; for example, when sales are adversely affected, when a company's good reputation or that of its products is harmed, or in the event of confusion being caused to the market.

To assess the damage caused on the territory of each country individually therefore results in much higher expenditure than if the damage on the different markets was established in accordance with just one legal system.

It might be argued that the calculation of damages is highly problematical even in the case of purely national breaches of competition. However, the fact that the judge often has to establish the damage caused by way of a judicial assessment of damages cannot result in the judge freely estimating the overall damage caused[55]. It is largely fictitious to think that foreign law can be applied when assessing the overall damage caused.

Objections to a territorial splitting also exist due to the large number of legal systems applying side by side. It is already a hardly manageable task for advertisers who have to align their competitive behaviour to multistate competition to ascertain the - in some cases - considerable number of competitive systems in force. Before a marketing measure is launched, all the legal systems in question have to be examined very carefully. This applies even more to the courts which under German law are responsible for establishing and applying foreign law[56].

In practice, therefore, there is a tendency to avoid the application of the laws of several places of business in different countries. In the *feeding bottles* ruling[57], the Federal Court of Justice accepted that the laws of all places of business were applicable; however, it referred the case back to the lower instance in order to establish the foreign law. That court, however, considered an examination of the

[52] Further details in Blick durch die Wirtschaft dated 1.2.1996.

[53] *Staudinger/v. Hoffmann*, BGB, 12th Edition (1992) Art. 38 Marginal Note 546; *Sack* (cf. footnote 44 above) p. 329.

[54] MünchKomm/*Kreuzer* (cf. footnote 36 above) Art. 38 Marginal Note 248; the same generally also applies to multistate offences *Kegel*, Internationales Privatrecht, 7th Edition (1995) Article 18 IV 1 a bb (p. 541).

[55] See, however, *Bär*, Internationales Kartellrecht und unlauterer Wettbewerb, in: FS *Moser* (1987) p. 143 (159); same in *Kort* (cf. footnote 41 above) p. 600.

[56] Foreign law is to be applied in the same way as in its own country, i.e. its interpretation and application in foreign legal practice have to be established, BGH, NJW 1991, 1418, 1419; NJW 1992, 3106f.; MünchKomm/*Prütting*, ZPO (1992) Article 293 Marginal Note 49, 58; *Stein/Jonas/Leipold*, ZPO II1, 20th Edition (1987) Art. 293 Marginal Note 58.

[57] BGHZ 35, 329 = NJW 1962, 37.

legal position in accordance with all eligible foreign laws in Central and South America to be impracticable[58].

The establishment and application of a large number of competition laws in proceedings for temporary relief has proven to be wholly impracticable, as these proceedings as well as the main proceedings entail the obligation to apply the governing law established in accordance with conflict of law rules[59]. The reason is that, generally, it is not possible to establish a large number of legal systems within the short time available[60]. Given that most lawsuits in the area of competition law are carried out by way of temporary relief[61], the application of the governing law established in accordance with conflict of law rules on trading activities on the Internet is becoming more and more fictitious.

In summary, an application of the principle of using the place of business as the connecting factor for trading activities over the Internet does not do justice to the principles for establishing the applicable legal system, which play an important role in international competition law. Their application cannot be sure to be either practical or predictable. The law's function of establishing rules of conduct, which is to the fore in terms of substantive law when comparing competition laws, is thereby adversely affected[62].

Moreover, the application of the law prevailing at the place of business to online marketing measures is also problematic because it ultimately means that the most stringent law will prevail in most cases. If it is enough for *any* legal system to be found to prohibit the measure in question, then this constitutes a considerable restriction for those who market goods and services and have to design their marketing accordingly.

## Outlook

The principle of applying the prevailing law at the place of business, which is currently in force, shows its limitations where marketing measures on the Internet are concerned. In view of the difficulties encountered in attempting to harmonise just some areas of substantive competition law within the European Union - for example the law of comparative advertising[63] - a comprehensive harmonisation of substantive competition law, which governs marketing on data networks, can hardly be expected at the present time, not even on a Europe-wide scale.

A solution to the problem therefore has to be sought primarily in the area of the conflict of law rules. Harmonisation - which might initially be conceivable for the European area - should result in a reorientation of the conflict of law rules, which would take the law of the country of origin into account more strongly. In addition, selective harmonisation measures in the area of substantive law could be introduced. Given that the expected convergence of different media[64] is likely to raise similar questions in relation to trading activities on cross-border media generally, the task ahead is to create comprehensive European conflict of law rules in competition law for the media.

[58] The parties did not pursue the lawsuit further but instead reached an out-of-court settlement, see BGH Note 9, IPRspr. 1960-1961 No. 155.

[59] MünchKomm/*Kreuzer* (cf. footnote 36 above) Art. 38 Marginal Note 253; GroßkommUWG/*Schricker* (1994) Introd. Marginal Note F 222.

[60] Legislation attempts to resolve the conflict between the need for speed in proceedings for temporary relief, on the one hand, and the time it takes to establish foreign law, on the other, by ultimately imposing the burden of furnishing prima facie evidence on the parties, see OLG Bremen, IPRspr. 1958 - 1959 No. 7 A; OLG Frankfurt, NJW 1969, 991; OLG Hamm, IPRspr. 1968 - 1969 No. 173; OLG Stuttgart, IPRspr. 1977 No. 107; OLG Hamburg, IPRax 1990, 400. Prevailing opinion, however, lex fori as substitute law, see *v. Bar*, Internationales Privatrecht I (1987) Marginal Note 375; MünchKomm/*Sonnenberger* (cf. footnote 36 above) Introd. Marginal Note 449; also in OLG Köln, GRUR 1994, 646. Further details on the possibilities of solving this conflict in *Dethloff*, RabelsZ 62 (1998) Issue 2.

[61] *Teplitzky*, Wettbewerbsrechtliche Ansprüche, 7th Edition (1997) Chapter 53 Marginal Note 1; see also *Ahrens*, Einstweiliger Rechtsschutz als Hauptsacheverfahren imWettbewerbsrecht, FS *Nakamura* (1996) pp. 1ff

[62] For a detailed discussion of the reference of the conflict of law rules in the law of torts to property law, see *Hohloch*, Das Deliktsstatut, p. 236ff.; *v. Bar*, JZ 1985, 961, 964ff.

[63] cf. Directive 97/55/EC which was adopted by the European Parliament and the Council on 6 October 1997 after years of work and numerous changes, amending Directive 84/450/EEC on misleading advertising in order to include comparative advertising, OJEC No. L 290 dated 23.10.1997, p. 18.

[64] For a detailed discussion, see *Bullinger/Mestmäcker*, Multimediadienste. Struktur und staatliche Aufgaben nach deutschem und europäischem Recht (1997) pp. 16ff.

# Developing international advertising campaigns

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## Make sure that the brand itself is equipped to travel

Understanding the personality of a brand is crucial, as it conditions every marketing activity and, if well understood and well communicated, will provide the coherence that brands need in order to survive intact around the world.

The problem is that brand attributes are commonly defined by words that are strongly linked to the brand's home culture: for example, a brand book for an American company might list personality attributes such as warm, human and authoritative, but the associations of these terms are neither straightforward nor universal, however easily translatable they may appear to be. Consider what *warm* implies to Latvians and to Greeks, what human implies to the Japanese and to the British, or authoritative to the Germans and to the Italians.

It is important to remember that, even when a word appears to have a direct equivalent in another language, the concept itself is unlikely to have the same associations - the labels may be classed as interchangeable, but the objects attached to them are different. Even a concept as simple and unambiguous as *coffee* is, arguably, untranslatable: in British English, the word suggests a large mug filled with warm water, instant coffee granules, milk and sugar. Yet in Italian, *un caffè* suggests a tiny cup with a small quantity of strong, black *espresso*. It's taken at different times, for different reasons, and in a different way. It tastes and smells different, and is marketed in a different way. And yet the dictionary tells us that these are exact equivalents.

Before a brand can be exported, a lot of groundwork into its basic attributes needs to be done in the cultural context of its export markets. In the end, the most usable internal communications tool is often an interactive brand CD which fully describes the brand personality, and is written (not translated) in the full range of relevant languages. And the exercise of developing this tool invariably serves to raise crucial questions about the brand itself and exactly what it stands for: it forces a company to look very hard at its brands, through foreign eyes, which is always a valuable exercise. If nothing else, it makes companies aware of just how intangible and inconstant brand issues really are.

## Research in the home market alone is not sufficient

This may sound obvious, but it is remarkable how many companies develop export marketing strategies on the basis of consumer research carried out in the home market. A company's product may well be perceived as a familiar national brand in the home market and a foreign invader abroad - and this fact alone is ample justification for two entirely different marketing and communications strategies. Likewise, the presence of different competitors in each market will affect the product's positioning quite dramatically.

Unless the agency is given a separate brief for each market, or at least a common brief with an appendix of special considerations for each market, somebody has either failed to do their homework or is indulging in some extremely wishful thinking.

## Make sure you have the right agency setup for your needs

In the past, exporting companies were obliged to choose between hiring one of the global ad agency networks, or using separate local agencies in each market. This is no longer the case, and many companies now develop quite sophisticated pan-European and even global campaigns with a single lead agency of their choice,

whose creative work is then localised: an option that offers the attraction of faster response, tighter central control over brand values, and lower costs.

The choice between network or independent agency depends largely on the level of local, tactical work that the business involves: a network or affiliation of agencies may well be useful when each country generates a significant amount of exclusively national work; but in contrast, there's not necessarily much point in paying for a network agency, with its fully-staffed, full-service ad agency in each market, if the advertising is exclusively pan-European.

***A common argument for retaining agencies in each market is that media buying is best handled by locals - but planning and buying media centrally through an international media independent is a well established and demonstrably effective alternative, which usually generates additional savings.***

It is worth remembering that one of the advantages of retaining a full agency in each market is that it tends to reduce the risk of running copy with typographical errors - if you're using a German agency to develop German copy, then every person in the building is a potential proofreader, and it is unlikely that any mistakes will get out of the building. A more centralised solution means depending on a smaller number of native speakers of each language, so it's important to build in reliable backup checks in each destination market before any copy is actually run.

A common argument for retaining agencies in each market is that media buying is best handled by locals, but planning and buying media centrally through an international media independent is a well established and demonstrably effective alternative, which usually generates additional savings.

When there is a significant element of direct marketing in a campaign, a local agency can often be better placed for obtaining lists, working with local fulfilment houses and coping with response - but there are cases where all of these issues have been quite successfully dealt with from a central point. Production of press advertisements from a central point is fairly straightforward, but central production on broadcast work must be treated with caution: casting and direction of voiceover talent can only be done by experienced people of the relevant mother tongue. And there is always bound to be a shortage of really experienced foreign-language voiceover artists in any given city, for the simple reason that they can get more work back home: but many recording studios now have ISDN links which enable sessions to take place in more than one country simultaneously.

Legal clearance for print and broadcast copy, as well as steering a path through the maze of European promotional legislation, may well be simpler to deal with at a local level: but again, with careful planning, it is perfectly possible to devise systems which control this part of the process from the centre.

And since it will usually be the local marketing or brand manager, or perhaps the distributor, who will be required to approve the copy for his or her market, proper presentation and discussion of the creative work is necessary, and always in the relevant language: it sounds like another obvious point, but discussing the subtleties of Norwegian copy in English is likely to be a frustrating experience for all parties. Again, the presence of a local agency with its own account handlers can make this simpler and more effective, but there are many cases of international campaigns that are successfully run with cen-

tral approval, or 'distance selling' by phone, fax, e-mail and teleconferencing.

It's also worth noting that account handling methods do differ from country to country, and the techniques used to gain approval of creative work need as much adaptation as the work itself, if the process is to be kept fast and friendly. What passes for self-confidence in Italy may seem like brazen impertinence in Germany; and English account handlers, who are used to delivering their pitch in complete silence, are often thrown off balance by the number of times they are interrupted during their presentations to French clients.

## International is not a post-production issue

Whichever type of agency is used, it is essential that they have the means to involve creatives from each target market right from the start of the creative process. Consumers have an uncanny ability to spot when a piece of communication was never really meant for them in the first place, and reject second-hand advertising without hesitation. Creative people are often quite bad at distinguishing between concepts which are striking because they sound good in their own language, and concepts which are striking because they are actually based on a more universal truth which will appeal to human beings on a profounder level, irrespective of language and culture.

The problem with advertising agencies is that this kind of international creative collaboration is very difficult to achieve, partly through simple logistics - getting the right people together in the same room at the same time - and partly because they are not accustomed to working as a team, and will always compete for ownership of the winning creative idea.

All agencies in these situations want to be lead agency, so universal approval of any concept is almost impossible to achieve. What usually happens is that the lead agencyship goes to the office that is local to the lead client, and the other offices aren't involved at all until the adaptation stage. And because adaptation is perceived as low-profile, non-creative, low-status production work, it will probably not be done either well or willingly.

On a purely practical level, involving locals at an early stage is essential simply to ensure that the creative idea is original in each market where it has to run. In many product areas, the chances of any agency thinking up a creative idea that nobody in that country has ever thought of are quite slight anyway - and the chances of that idea also happening to be original in a dozen other markets are even slimmer.

## A word against translation

The attraction of limiting the setup to a single, creative, independent lead agency is clear. But it is important not to put too much faith in the idea that the only important difference between one market and another is the language people speak, and that once the copy has been written in the lead agency's language, the creative part of the process is over. A glance at most American or Australian ads placed alongside their British equivalents - or French ads alongside Swiss, Canadian or Ghanaian ads, or Spanish ads alongside Chilean or Filipino ones - should suffice to show that differences in culture, promotional legislation, advertising traditions, humour, visual sense and market situation are vastly more significant than linguistic differences. It is the sight of obviously different words on the page that makes people assume that language is the only problem. It's not. It's merely the *first* problem.

There are no short cuts to making ads. You can't turn a British ad into a Spanish

ad simply by changing the English words into Spanish words; and translation, no matter how carefully or skilfully it's done, can only ever change the language of the text. It can't turn the complex and subtle marketing instrument that persuades a French consumer to buy a German product into a complex and subtle instrument that persuades a Finnish consumer to do the same.

Translation, even when it's expensively done by copywriters and called fancy names, never rings as true as free writing. It has a foreign flavour about it which alienates consumers, makes the advertiser look naive, and in the long term it damages sales and brands.

Translation is so incredibly difficult to do well that it's surely far simpler not to bother. Writing to a brief is easier to do, at least for an experienced copywriter, and if an ad is easy to write, then it's easy to read, and that's a vital element of successful advertising.

## A word against hierarchies

As we have seen, there is a strong natural tendency amongst marketers to behave according to a hierarchical model, where the lead culture, lead agency, lead language and lead creative work are that of the domestic market, and everything else is relegated to second place.

***The exercise of advertising a brand internationally is such a complex and difficult one that it's easy to lose sight of the benefits of the exercise.***

For example, when the lead agency's creative work is first presented to the marketing managers of each export market, it is almost invariably presented in English - quite naturally, because this is the language that the lead agency usually works in, it's the language that most people are likely to speak, and it saves the cost of writing copy in a number of other languages before the work is finally approved.

The problem is that those country managers are buying a different product from the one they will actually have to use - and it often happens that they wholeheartedly approve of the work when it's in English (something to do with the misty, glamourizing veil of partial comprehension, and perhaps also the instant appeal of English copy on English ads) but only really see what they're actually getting when it arrives, written in their own boring, familiar language, three weeks later.

The exercise of advertising a brand internationally is such a complex and difficult one that it's easy to lose sight of the benefits of the exercise. Companies often fall into the trap of seeing Europe as a series of cultural, logistical, legal and linguistic hurdles which simply have to be got over or sidled around at any cost - and they thus blind themselves to the fact that it is also an extremely rich and diverse source of inspiration for their brand and for its marketing. In other words, if companies can learn to celebrate and enjoy the diversity of the European market, and allow some of this variety to feed back into their brand, then they will benefit enormously from the experience. If, on the other hand, they become obsessed with the need to develop communications that merely manage to avoid offending anyone, then their brand will become impoverished, and will remain a foreign and charmless nonentity.

# Multi-level Direct Selling -

## A form of commercial communications denied access to the opportunities of the Single Market

**John Brown**
**Director of Worldwide Government Affairs**
**Amway Corporation**

In July last year in its resolution on the Commercial Communications Green Paper, the European Parliament called on the Commission to 'study the obstacles to Multi-level Marketing and to assess the need for legislation to guarantee the Single Market in this growing form of commercial communications'.

This resolution represented the first public recognition by a major European Union institution of the challenges facing this relatively new method of commercial communication. Multi-level Direct Selling, also known as Multi-level Marketing or Network Marketing, is a form of direct selling which has become a large and growing segment of the direct selling market. Multi-level Direct Selling is operated by an increasing number of companies in Europe and throughout the world, including my own company Amway. Unfortunately, attempts to develop Multi-level Direct Selling in Europe are hampered by an array of differing national laws which prevent companies from taking full advantage of the opportunities presented by the Single Market.

For those unfamiliar with the concept, direct selling is a process whereby independent business people, or distributors, market and sell products directly to the consumer without having to make significant investments in the infrastructure normally associated with the establishment of traditional retail outlets. Multi-level Direct Selling companies like Amway do not own retail shops, nor do their distributors. Instead distributors operate their own businesses and earn profits from their direct sales of Amway products to consumers, and from the sale of those products by other distributors whom they or others have introduced into the business and trained.

The Multi-level Direct Selling system is attractive to many consumers who appreciate the benefits of home delivery, and the opportunity to have the product explained and demonstrated in a familiar and comfortable environment. The distributors have the opportunity to develop a personal relationship with the customer which enables them to generate customer loyalty, and which also allows new products to be introduced and demonstrated on a regular basis. Many customers find this individual attention a refreshing departure from the impersonal nature of large retail stores.

***Unfortunately, attempts to develop Multi-level Direct Selling in Europe are hampered by an array of differing national laws which prevent companies from taking full advantage of the opportunities presented by the Single Market.***

Since Multi-level Direct Selling is carried out by independent distributors, it encourages entrepreneurial development and offers people a flexible alternative or supplement to traditional employment opportunities. Multi-level Direct Selling is usually carried out from the home, providing an opportunity for many people, such as women with small children, whose circumstances might otherwise preclude them from engaging in economic activity and supplementing their income. It is also an opportunity for individuals to learn first-hand the management and marketing skills necessary to operate a small business.

All types of products can be sold direct to consumers using the Multi-level Direct Selling method. In the case of my own

company, Amway's extensive branded product range includes home care and personal care products, cosmetics, cookware and nutrition items. Multi-level Direct Selling companies do not generally advertise their products or demonstrate the benefits of their product range in the traditional retail environment. In the case of Amway, direct contact with the consumer through Multi-level Direct Selling represents virtually the only form of commercial communication employed by the company. Last year, Amway Corporation reported U.S. $7.0 billion in estimated retail sales, operating in over 80 countries and territories worldwide.

According to the World Federation of Direct Selling Associations, 1.6 million people in the European Union were engaged in direct sales in 1996, generating revenues of ECU 10.4 billion. No specific sales figures exist for Multi-level Direct Selling Companies. It is reported in the United States, however, that Multi-level Direct Selling has grown to now represent 65% of direct sales in that country, and this trend is being reflected in Europe. For instance, in the UK, direct sales accounted for approximately ECU 1.2 billion in 1996, and it is estimated that approximately half of these sales were through Multi-level Direct Selling.

***The obstacles to Multi-level Direct Selling mentioned in the European Parliament's resolution refer to the fact that, at present, Amway and other Multi-level Direct Selling companies are prevented from developing a truly pan-European sales and marketing strategy because of the numerous disparities among national laws throughout the EU.***

The obstacles to Multi-level Direct Selling mentioned in the European Parliament's resolution refer to the fact that, at present, Amway and other Multi-level Direct Selling companies are prevented from developing a truly pan-European sales and marketing strategy because of the numerous disparities among national laws throughout the EU. Many of these obstacles at Member State level are the result of appropriate fears about the protection of both consumers and distributors. The success of legitimate Multi-level Direct Selling companies over the years has, unfortunately, encouraged a number of unscrupulous individuals to enter the market and to exploit citizens by offering fraudulent investment opportunities as a means of earning profits through what are in effect pyramid or snowball schemes. Reputable Multi-level Direct Selling companies are very anxious to outlaw fraudulent schemes which attempt to impersonate their own legitimate marketing and sales methods.

While illegal schemes may mimic some of the attributes of legitimate Multi-level Direct Selling opportunities, they are in fact fundamentally different. Thus, illegal schemes seek to make money from the participant in the scheme not with them. The illegal schemes usually rely on a large number of gullible people paying out large amounts of money to the promoters and the early participants. Sometimes fraudulent schemes will take the deception a step further and actually offer a line of products, but there is of course little or no attempt to distribute real products to real consumers. These schemes are doomed to collapse, with the majority of participants losing all or most of their investments.

Genuine Multi-level Direct Selling companies are concerned with selling quality products at competitive prices to real consumers. They do not require distributors to pay large entrance fees or to buy large amounts of stock. Like most commercial enterprises they naturally

wish to sell as many products as possible to maximise profits. Legitimate Multi-level Direct Selling companies permit distributors to leave the business at any time without penalty, and will undertake to buy back the distributors' unsold stock at reasonable terms.

In order to protect consumers and distributors, the Federation of European Direct Selling Associations (FEDSA) has adopted its own rigorous code of conduct to protect consumers and distributors which Amway helped to draft and supports. This single Code has been ratified by the Direct Selling Associations throughout Europe and serves as a common set of rules to protect and serve the public. Unfortunately, European Member states have adopted a diverse range of laws to do so. Some countries rely on general fraud provisions, while others rely on consumer protection laws (e.g. Italy and the Netherlands), and still others rely on unfair competition laws (e.g. Austria, Belgium, France, Germany and Spain).

The wide variety of divergent national rules ranging from outright prohibition of doorstep selling, as in Luxembourg for example, to detailed regulation of how legitimate Multi-level Direct Selling may be performed, means that companies in this sector must restructure their marketing plans and materials from one country to another to ensure compliance with the individual nuances of Member States' divergent rules. This impedes the ability of Multi-level Direct Selling companies to do business in a consistent manner throughout the EU.

The United Kingdom Trading Schemes regulations which entered into force in 1997 provide a good example of how national law may achieve a goal of prohibiting the practices of fraudulent trading schemes while allowing legitimate Multi-level Direct Selling businesses to benefit the market. By adopting a comprehensive regulatory approach, they make it difficult for unscrupulous operators to create exploitative schemes which evade control. These regulations are consistent with the FEDSA and World Federation of Direct Selling Associations (WFDSA) Codes of Conduct.

***Unfortunately, European Member states have adopted a diverse range of laws. Some countries rely on general fraud provisions, while others rely on consumer protection laws (e.g. Italy and the Netherlands), and still others rely on unfair competition laws (e.g. Austria, Belgium, France, Germany and Spain).***

Many in the Multi-level Direct Selling industry would like to see a similar approach at EU level, not only to protect consumers from illegal schemes, but also to clarify the legal position and thereby permit legitimate Multi-level Direct Selling operators to develop their businesses with confidence and take advantage of the benefits presented by the Single Market.

Multi-level Direct Selling is a relatively new and not always well understood selling method in Europe. Nonetheless, it has a great future and the potential to bring many benefits to consumers and to those of even modest means who wish to create and manage their own business. It would be tragic if that opportunity were to be frustrated by a myriad of well meaning but inaccurately targeted laws. The single market should apply to Multi-level Direct Selling as for other businesses, and Amway and other companies in the sector will be asking the European Commission to look carefully at this issue in the coming months.

# Alcohol advertising:
## a Swedish perspective

**Diane Luquiser**
**Consumer Affairs Editor**
***Commercial Communications***
**&**
**Maj-Lis Loow**
**MEP**

If some at the European Parliament talk of *excess* alcohol consumption, others do not accept this distinction because the danger, for them, is the consumption of alcohol altogether. Their opinion is based on surveys showing the harmful side effects of the absorption of this fluid by the human body.

For many of us, of course, certain therapeutic qualities of alcohol immediately spring to mind, just as, in fact, we talk of 'old wives' remedies'. Should we then not think of alcohol as a medical product? That is the way that MEP Maj-Lis Loow, head of the Swedish representatives on the socialist group at the European Parliament, sees it. This is a particularly interesting opinion when one considers that Sweden pays special attention to all issues relating to health, children and the family. As for the sponsorship of events, whatever they may be, by wine and spirit producers as well as by cigarette manufacturers, she considers this to be completely out of the question. In any event, according to the Swedish socialists, any product potentially able to harm, directly or indirectly, a person's health cannot be subject matter for commercial communication.

In an interview for *Commercial Communications*, Maj-Lis Loow discussed her point of view, which is close to that of the British MEP Bill Miller in relation to *'alcopops'*:

'In Sweden the question on alcohol has always been closely linked to health. Research shows that consumption of alcohol has negative effects on health. Further, alcohol abuse often without doubt leads to violence and social problems, accidents at work and in traffic. Our restrictive alcohol policy has been built on the "total consumption" model, where the aim is to reduce the total amount of consumed alcohol of the whole population and thereby limit severe damage.

Advertisements for alcohol work against the very idea of this fundemental concept. One corner-stone in reducing the total consumption is information about the risks of alcohol and the effects that it could have. Of course, one important target group in this respect is young people. Schools are often organising theme days upon alcohol and other drugs. Since advertisements often have a significant influence on young people, the allowance of alcohol advertising would ruin a great deal of the efforts made to impart such information.

It is a shame that the European Union, with all the knowledge there is in this area, has been incapable of prohibiting the marketing of alcohol products which are specifically directed towards young people. This shortcoming was very much highlighted when the so called "alcopops" were introduced to the market.

To my satisfaction, however, the discussion in Europe upon many issues concerning the impact of alcohol on the society as a whole has become more vocal recently. One example of this is the proposal on harmonising the permitted level of alcohol in the blood for car drivers.

It seems to me there is a growing consciousness on alcohol related problems throughout Europe. For obvious reasons, in the discussion parallels are often made to other drugs. A common reflection is that tobacco is dangerous for the health but alcohol on the other hand could in some cases be healthy. This perspective is sometimes twisted in a way which seeks to legitimise the advertising and marketing of alcohol products. This could not be more wrong. First of all, it is very unclear whether alcohol really has any positive effects on health whilst the negative aspects are unquestionable. There must be other ways to get some positive health effect without gambling with the risks of alcohol. Further, if it is medical aspects that are to be stressed, the products should be introduced to prospective consumers as medicine.'