

Commercial Communications in the Internal Market

Green paper from the Commission.

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Working Document of the Services.

A working document of the Services is provided separately. This sets out in detail the research findings on which this Green paper is based. It is in two parts. The first assesses how regulatory impacts on the European Market for Commercial Communications can be evaluated and the second consists of a set of national regulatory tables for each of the Member States.

EXECUTIVE SUMMARY

Objective.

In November 1992 the Commission decided to review its future policy approach in the field of commercial communications. The Commission decided that this review should be made public in the form of a Green Paper. Its aim is to seek the views of the European Parliament, the Member States and interested circles on proposals which have the objective first, of ensuring that any future initiative undertaken at the Community level is coherent with other Community policies or actions and secondly, of developing an approach which will help the Commission to evaluate possible problems of compatibility of certain national measures with Community Law.

Scope.

The term commercial communications covers all forms of advertising, direct marketing, sponsorship, sales promotions and public relations promoting products and services (packaging is not included for the reasons outlined in the introductory section). As the Information Society evolves, new forms of commercial communications will undoubtedly assume greater importance in this field.

Preliminary key findings.

As preparation for this Green Paper, a comprehensive review of the relevant legislation in each Member State, a full market analysis and surveys have been undertaken. The detailed results of these reviews are included in an associated Working document.¹ Five principal conclusions can be drawn from these analyses.

- (1) Cross-border commercial communication services in the Internal Market are a growing phenomenon.*
- (2) At present, differing national regulations could create obstacles for companies wanting to offer such services across national borders and also create problems for consumers seeking redress against unlawful cross-border commercial communication services.*
- (3) For the future some of these divergences between the regulatory frameworks of Member States could give rise to barriers as more commercial communication services will circulate across borders.*
- (4) The risk of such regulatory differences giving rise to barriers may be accentuated with the advent of the new services developed in the Information Society.*
- (5) The availability of information about regulatory measures and market developments is becoming increasingly important at national and Community level.*

A new approach towards Commercial Communications policy.

Based on these preliminary results the Green Paper outlines certain basic policy orientations on which reactions from interested parties are sought.

(1) Existing regulations may have to be reviewed where they are shown to hamper cross frontier activity.

Differences in national regulations could give rise to problems of offering commercial communication services across national borders. Indeed, a number of potential regulatory barriers to trade of such services between Member States were identified in the surveys. The principle of freedom to provide services guarantees that a Member State cannot restrict services emanating from another Member State unless such restrictions fulfil certain specific conditions. A restriction may arise as a result of the additional application of national rules to persons providing services established in the territory of another Member State who already have to satisfy the requirements of that State's legislation. Such restrictions could be justified under Article 59 only if the application of the national legislation is justified by overriding reasons relating to the public interest and if it is proportionate to these or if the requirements embodied in that legislation are not already satisfied by the rules imposed on those persons in the Member State in which they are established (mutual recognition). Therefore, in this legal context it has to be examined to which extent the potential barriers to trade in commercial communication services are admissible under Community law and in particular whether they fulfil the condition of proportionality.

Part III of the Green Paper defines three categories of potential barriers to cross frontier commercial communication services identified from the responses to the preliminary review resulting from the survey:

Category (a) Restrictions that involve an absolute ban on certain types of marketing activity.

Category (b) Restrictions that limit marketing activities but without going as far as to ban their use.

Category (c) Restrictions that relate to certain specific product categories or types of service.

The detailed review launched by this Green Paper may eventually lead to the dismantling of national measures for which it can be demonstrated that they are incompatible with Community law. It may also allow for proposals for secondary Community legislation where necessary.

(2) The potential development of new barriers within the Internal Market needs to be tackled.

New regulatory problems could emerge as the market in cross frontier commercial communication grows. The challenge is therefore to ensure that a high quality, appropriate and coherent legal framework can develop in a changing environment. Over-regulation and an over-reliance on infringement procedures (Article 169) must be avoided. This could be achieved by introducing an early warning system to identify new regulatory developments. In addition increased co-operation between the regulatory authorities in the Member States and with the Commission may prevent new barriers to occur.

(3) Future National and Community measures must be developed in conformity with both Internal Market and other Community objectives.

Any policy designed to meet particular public interest concerns needs to be defined with great precision so that any proposed regulatory measures can be precisely targeted to achieve their underlying policy objectives. Failure to do so could result in potentially counterproductive effects.

Proposals for consultation.

Based on the results of the surveys and on the orientations above the Commission invites comments from all interested parties on the following proposals.

I. To improve the proportionality assessment of any future regulatory action in the field of commercial communications, the Commission proposes a methodology.

With such an assessment methodology, Community initiatives could be precisely targeted at specific public interest objectives: any potential spill-over into other policy fields could be identified and minimised at an early stage. At the national level the methodology could be useful to assess the legality of possible barriers to commercial communications activities..

II. Better co-ordination and information at a European level is needed.

The Commission proposes to establish a committee of representatives from the Member States to consider the activities that fall within the scope of commercial communications. The committee will examine broad issues which should assist the transparency of the Commission's approach. The Committee could help safeguard the coherence of future national initiatives in the field of commercial communications allowing for solutions to be found which would help ensure compatibility with Community law. In its early meetings particular attention will be paid to sales promotions and sponsorship as commercial communications' activities that were identified in the surveys as causing the most difficulties.

The majority of respondents to the survey called on the Commission to provide better information regarding the regulatory picture throughout the Community. The Commission proposes that a central contact point be established within the Commission responsible for particular enquiries about its Commercial Communications policies. In addition the contact point will collect and make available information about the Commission's overall approach through the co-ordination and development of improved policy information communications channels in this domain.

NOTICE TO THE READER

The Commission wishes to hold an open consultation: in addition to the European Parliament and the Member States, any individual, firm, body or authority may comment on the analysis and proposals presented in this Green paper. This is a twin-track consultation process whereby, not only European federations and associations representing consumers and industry, but also individual interested parties and national associations can make their views known.

The Commission wishes to receive comments on the analysis and the proposals made in this Green paper by the 30th October 1996.ⁱⁱ

INTRODUCTION.

In November 1992 the Commission decided that it should prepare a Green Paper to consider its overall appraisal of policy making in the field of Commercial Communications.

The Commission's strategic programme "Making the Most of the Internal Market" ⁱⁱⁱ recognised the specific role that commercial communications play in the development of the European area without internal frontiers. The Commission's policy on the Information Society ^{iv} brought out the importance of developing a coherent policy for the European Information Society service industries.

Commercial communications can be defined as: "*All forms of communication seeking to promote either products, services or the image of a company or organisation to final consumers and/or distributors.*" The term includes all forms of advertising, direct marketing, sponsorship, sales promotions and public relations. It also covers the use of such commercial communication services by all goods and service industries as well as public and semi-public bodies, charities and political organisations ^v. Packaging is not included. ^{vi} This does not imply that problems do not arise in this field and does not therefore preclude consideration by the Commission of the regulatory framework existing in this domain.

Within this service sector, the following two general types of service may be identified:

- (i) The range of services offered by the commercial communications industry ("**suppliers**"). Suppliers include *advertising agencies, direct marketing companies* (all forms), *sales promotion designers, media buyers, sponsorship agents, public relations companies*. Other services are supplied by "specialised suppliers" such as *market research companies, advertising film producers, mailing list brokers*. The services of both kinds of supplier are provided to clients ("**users**") interested in making such communications to the public or to a part thereof.
- (ii) The range of delivery services offered by "**carriers**" of commercial communications. The providers of these services cover a wide range of organisations including the *media* (TV, radio and printed word), *organisers of sports and cultural events, postal and telecommunication service providers, billboard site operators* etc., and may work for both suppliers and users.

The Commercial Communications Sector

It is not possible to put precise figures on the operations of the whole commercial communications service sector. Its importance, on the other hand, is manifest. Limited data are available for a number of activities: in 1993 advertising expenditure reached ECU 45,557 million in the European Union; the market for direct marketing was worth ECU 26,760 million ^{vii}; and the total turnover for public relations companies was ECU 1,800 million ^{viii}. The total number of employees in the sector is again difficult to estimate, not only because it

is a highly fragmented sector, but also because many involved in this field work on an independent or freelance basis. Figures advanced range between 155,000 and 250,000 for the Union as a whole.^{ix} In addition to the employment generated within the various parts of the sector itself, many more jobs within the marketing departments of users should be added to this total. The economic importance of the sector in terms of both output and employment is therefore considerable.

In the modern industrial and service economies of the Union, commercial communications serve the role of *promoting brand identities* and *informing potential clients*, by strengthening the market presence and the desired 'positioning' of the brand or company, and providing in appropriate detail, information on the product or service offered.

Commercial communications can be a powerful factor in the integration of national markets. Successful trans-border branding strategies within the Internal Market underpin international trade by ensuring consumers in export markets are kept informed of products and services being offered by suppliers in the exporting Member State. At present, in a number of areas, the marketing of goods and services is handled exclusively by local agents or subsidiaries of the brand owner. But, in future, as existing trans-border media expand, and new, more effective trans-border communication channels are opened, it seems highly probable that more and more brand owners will seek to communicate directly across borders with their consumers.

It should be remembered that commercial communications are not, as is often implied, the only means by which goods and services are marketed. They are in fact one of the four elements in a company's set of marketing tools - its "marketing mix". (The others are: the product or service itself, its distribution and its price). The marketing mix is determined by the branding strategy, which in turn reflects the type of market in which the manufacturer or service provider operates. Six types of branding markets have been identified^x, each with its typical marketing mix and combination of commercial communication tools adapted to the relevant competitive environment. The relative need for targeting, the competitive power of distributors, and the types of consumer values attached to the brand all help to shape the mix of commercial communications used.

The Commission's Study programme.

Given the wide scope of commercial communications, the Commission decided to launch two analyses during 1993 and 1994. The first was a *comparative study of national regulations in the field of commercial communications*^{xi}. The second was an *economic/market analysis of commercial communications and branding strategies*.^{xii} In addition to these two studies, in order to check whether regulatory divergences were creating barriers in the Internal Market, the Commission undertook *two further surveys* in which the views of interested parties were canvassed^{xiii}. One of these^{xiv} was aimed at the collection of detailed written information on the effects of the Internal Market on companies' commercial

communication activities and on any obstacles that the companies could identify.^{xv} This also canvassed the views of consumer associations on problems that consumers had or might be expected to experience with the growth of cross-border commercial communication services. More than 300 detailed replies were received, and the evidence they provide has been extensively drawn on in Parts I and III of this Green paper.

The second^{xvi} survey was carried out by MRB International Ltd and was conducted by fax/telephone. This was done with the express purpose of avoiding a situation in which the only respondents to the "call for written comment" were companies committed to achieving an Internal Market for commercial communications or consumer associations focusing on European rather than national or regional issues^{xvii}.

During this period another independent study unrelated to the current Green paper was launched by the Commission on the "Future of Media and Advertising". This concluded that the development of new media would require a review of the existing European regulatory framework in the field of advertising.

Organisation of the Green paper.

This Green Paper is organised in four parts. Part I sets out the role of the Community in the field of commercial communications. In Part II the Commission argues the need for action. Part III provides a preliminary review of specific areas where that action could be taken. Part IV draws certain conclusions on which comment is invited.

The accompanying 'Working Document of the Services' supplies the detailed analysis on which the proposals made in the Green Paper are based. Part I of the Working Document uses economic and business principles to explain the role of commercial communications in the Internal Market in the framing of a reliable impact analysis. Part II of the Document provides a detailed comparative review, in tabular form, of national laws and the objectives they seek to meet.

PART I. COMMERCIAL COMMUNICATIONS IN THE EUROPEAN COMMUNITY.

Summary

Commercial communication services fall within the scope of Internal Market law, notably that concerning the free movement of services. An evaluation of how they will develop in the Internal Market and a review of the survey results show that benefits of the Internal Market are not being fully enjoyed as a result of regulatory differences across the Member States. Moreover, the advent of the Information Society will result in an increase in cross border commercial communications. Since the Community's role is not limited to the Internal Market but has other policy objectives, there is a brief description of these and their bearing on commercial communications. Respondents are asked to give their views on each of these points.

INTERNAL MARKET OBJECTIVES

Internal Market law.

Commercial communications and the free movement of goods

In certain circumstances commercial communication activities could benefit from the application of Article 30 of the EC Treaty relating to the free movement of goods. The Court's recognition of the indirect economic link between commercial communication services and the sale of goods is clearly explained in the Oosthoek's Uitgeversmaatschappij judgement concerning the restriction of a sales promotion by a Belgium firm into the Dutch market. The Court stated that this measure led to a measure equivalent to a quantitative restriction as follows:

" Legislation which restricts or prohibits certain forms of advertising and certain means of sales promotion may, although it does not directly affect imports, be such as to restrict their volume because it affects marketing opportunities for the imported products. The possibility cannot be ruled out that to compel a producer either to adopt advertising or sales promotion schemes which differ from one Member State to another or to discontinue a scheme which he considers to be particularly effective may constitute an obstacle to imports even if the legislation in question applies to domestic products and imported products without distinction. "^{xviii}.

In GB-INNO^{xix} where the restriction bore on the content of advertising leaflets distributed in Luxembourg by a Belgian retailer, the Court made the link to Article 30 by way of the reminder that the free movement of goods across frontiers also depended upon the free movement of people. Since the banning of advertising directed at individuals from a neighbouring State would deprive them of the incentive to cross the border it would therefore limit the possibilities for the goods to cross the same border. This judgement shows that the informational role of commercial communications is recognised in law. It also shows that restrictions in advertising related to goods are to be assessed under Article 30.

This informational benefit was stressed in the "Yves Rocher" judgement^{xx}. In deciding that price comparisons were not misleading, the Court remarked that such advertising practices could be considered as:

"...*extremely useful to enable the consumer to make his choice in full knowledge of the facts.*"

Restrictions on commercial communications may therefore be open to challenge under Article 30 of the Treaty. In Keck and Mithouard^{xxi} the Court imposed certain limits on the application of Article 30, in that it held that Article 30 would not apply to national measures prohibiting or restricting "certain selling arrangements"^{xxii} provided such measures apply to all relevant traders operating within the national area and so long as they affect in the same manner, in law or in fact, the marketing of domestic products and of those from other Member States. This case has been followed by a number of other cases in which the same line has been taken by the Court.^{xxiii} In order to decide whether Article 30 applies, an examination of restrictions on commercial communications should therefore be undertaken on a case by case basis.

Commercial communications and free movement of services

The freedom to provide services is guaranteed by Articles 59 and 60 of the EC Treaty. Within the meaning of these articles as interpreted by the Court^{xxiv}, commercial communication activities involve the provision of different "services" which can be classified according to whether they are provided by the suppliers (e.g. advertising agencies), the carriers (e.g. media) or the specialist suppliers (e.g. list brokers). All these services could be provided on a trans-border basis and against remuneration.

The Court has already held that advertising is a service^{xxv}. For example, in a recent judgement, concerning "cold-calling" (unsolicited telephone advertising),^{xxvi} it ruled that the prohibition of this practise: "*deprives the operators concerned of a rapid and direct technique for marketing and for contacting potential clients in other Member States. It can therefore constitute a restriction on the freedom to provide cross-border services.*"^{xxvii}

The principle of freedom to provide services guarantees that a Member State cannot restrict services emanating from another Member State unless such restrictions fulfil certain specific conditions. Therefore, if these conditions are not fulfilled, such services only fall under the legislation of the Member State from where the provider of services is established (country of origin legislation).^{xxviii} However, restrictions on the freedom to provide services can, subject to certain conditions, be justified. Here, the Court draws a clear distinction between discriminatory and non-discriminatory measures.

Discriminatory measures are compatible with Community law only if they can be brought within the scope of the exemptions contained in Article 56 of the Treaty, namely; public policy, public security, or public health; and if they comply with the principle of proportionality.

Non-discriminatory measures may arise as a result of the additional application of national rules to persons providing services established in the territory of another Member State who already have to satisfy the requirements of that State's legislation. Such restrictions could be justified under Article 59 only if they are justified by overriding reasons relating to the public interest and if the requirements embodied in the restrictive measures are not already satisfied by the rules imposed on those persons in the Member State in which they are established (mutual recognition).^{xxxix} 'Overriding reasons relating to the public interest' (henceforth referred to as "public interest objectives") include: the protection of workers^{xxx}; the protection of consumers^{xxxi}; the protection of intellectual property^{xxxii}; the protection of fair trading; the conservation of the national historic and artistic heritage; the widest possible dissemination of knowledge of the artistic and cultural heritage of a country^{xxxiii}; professional rules designed to protect recipients of services^{xxxiv}; the protection of pluralism^{xxxv} and linguistic policy^{xxxvi}. In addition restrictions on the free movement of services cannot be imposed merely because of the existence of such public interest objectives: in order to be justified under Community law they must furthermore be proportionate to these pursued objectives. The Court has specified the meaning of proportionality: "it is settled case law that requirements imposed on the providers of services must be appropriate to ensure achievement of the intended aim and must not go beyond that which is necessary in order to achieve that objective"^{xxxvii}. In other words, it must not be possible to obtain the same result by less restrictive rules.^{xxxviii} It cannot be excluded that the ECJ will extend its reasoning in the Keck case (see above) to Article 59. At this stage, it is not possible, however, to state in general terms what would be the precise impact of such an extension, since much will depend on the type of service involved.

Commercial communications and freedom of expression.

Commercial communications could benefit from the principle of freedom of expression as enshrined in Article 10(1) of the European Convention of Human Rights (ECHR) and in Article 19 of the International Covenant on Civil and Political Rights (henceforth referred to as the UN Covenant). Indeed, commercial communication services include opinions, information or ideas and therefore may benefit from the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. Interference by public authorities can be justified if it complies with the conditions set out in paragraph 2 of Article 10 of the ECHR or Article 19 of the UN "Covenant". In this context the specific nature of commercial communications is accounted for through the application of the principle of proportionality.

The European Commission and Court of Human Rights and the United Nations Human Rights Committee^{xxxix} have recognised that commercial communications can benefit from freedom of expression as thus defined^{xl}.

As regards the links between, on the one hand Article 10 ECHR and Article 19 of the UN Covenant and, on the other hand, the EC Treaty, restrictions on the free movement of services should be interpreted in the light of Article 10 of the ECHR^{xli} and Article 19 of the UN Covenant^{xlii}.

Internal Market secondary legislation.

Wherever the application of the principles of free movement enshrined in the Treaty is not sufficient to remove restrictive barriers (e.g. where national restrictive measures are justified under Community law,) secondary legislation is necessary. The aim of this legislation is to establish an equivalent level of protection of the relevant public interest objectives (e.g. consumer protection, protection of minors, protection of public health) in order to remove the legal barriers resulting from disparities between national regulations. A certain number of existing directives are relevant to commercial communications. They concern inter alia misleading advertising^{xliii}, foodstuffs^{xliv}, financial services^{xlv}, medicinal products^{xlvi}, data protection^{xlvii} and television broadcasts^{xlviii}.

Potential Internal Market benefits.

The Internal Market offers a significant potential for individuals and organisations involved in commercial communications. However, the Commission's surveys^{xlix} indicated that these opportunities could not always be fully exploited in practice. Five categories of benefits are identified from these surveys : those to the suppliers, to the users, to the carriers, to the consumers and to the self-regulatory bodies.

For the suppliers of commercial communication services, the very nature of the Internal Market implies that any service lawfully provided in the country of establishment, should in principle be freely available to other users in other Member States, without the need to verify in each instance whether it is compatible with the regulatory provisions of these host countries. The likely reduction that this would bring about in the costs of complying should assist service providers in extending their activities beyond their national borders. In so doing, they increase competition within the Internal Market, stimulating yet more efficient provision of commercial communication services. The increased efficiencies may come from exploiting new economies of scale or scope, that become attainable because of the increase in market size, or, simply by re-organising and reviewing existing methods revealed as inefficient in the light of the new competition.

Given that there are scarce *creative services* at the core of advertising and direct marketing services; suppliers trading in more than one country appear to have an interest in drawing on centrally based creative teams.

The survey¹ results.

The survey results show that service suppliers are seeking to operate across the Internal Market but are confronted by a significant number of barriers (other than those of a cultural nature). 23% of respondents, when asked to respond spontaneously about problems in

providing trans-border services, placed regulatory problems high on their list of "very serious" barriers (30 % cultural and 13% economic). Moreover, when prompted, 99% of respondents identified specific regulatory difficulties. 40% of respondents noted that the only way to tackle the problem was either to adapt at the local level, or undertake totally different campaigns in each country. Respondents were unanimous in considering that it is far less costly to offer effective large scale commercial communications services in the U.S.A. than in Europe.

The users of commercial communications (whether manufacturers of major branded goods or services or small or medium sized enterprises trying to break into new markets) could benefit from efficiencies achieved in the commercial communications business, the extent varying according to the type of marketing mix which they use.

Branding strategies will inevitably be sector -but not country- specific. This explains why, in principle, users seek to apply the same branding strategies and mixes of commercial communications when they trade in a new national market. Although the way of applying the strategy might have to be adapted to local culture, its underlying core values, messages and commercial communication tools should preferably be similar and consistent, and its planning needs to remain centralised at the headquarters of the company. For this reason, users are likely to be keen to develop trans-border campaigns within the Internal Market and will benefit from a greater choice of service providers. This choice can help them to achieve a *better quality of service at a more reasonable price* and, perhaps to grow sufficiently to benefit from economies of scale or scope. In addition, three types of *cost savings* could result;

- (i) First, legal search costs are reduced. The lesser the regulatory divergence, the less need there will be for the user to check each set of national regulations. Another reason why legal costs can be significant is that branding investments are vulnerable to any adverse publicity that might arise as a result of legal actions.
- (ii) Secondly, marketing costs are reduced as firms are allowed to standardise campaigns across markets.
- (iii) Third, distribution costs will fall. Commercial Communications are used as competitive weapons between manufacturers and retailers. If regulatory divergence prevents manufacturers from effectively using this competitive tool in their negotiations with importing retailers then they will have to pay relatively more to access the relevant retail chain. The efficient operation of the Internal Market would redress such an imbalance.

Planning and overall strategy for the Internal Market are increasingly co-ordinated centrally. This is for two reasons: *Efficiency*: planning, designing and executing different national campaigns push up costs cutting competitiveness since potential synergies of a co-ordinated trans-border campaign are lost. *The need to maintain brand credibility throughout Europe*: the increasing ease with which information flows freely across national borders means that

differing national campaigns conveying potentially conflicting messages could undermine the company's competitive position.

The survey results.

There are a multitude of trans-border commercial communication services across a number of borders rather than across the whole Union. Subject to cultural and regulatory limitations, companies are increasingly attempting to use similar strategies for their non-domestic markets.

When users were asked which of the three types of problems (cultural, regulatory or economic) were the most serious in impeding trade, 24% named cultural and 19% regulatory, while a further 11% mentioned structural economic problems. (Only 13% stated they had no problems, and 23% said that it was not possible to identify which of the three was the most significant.) When prompted to consider a whole range of such difficulties, 92% felt that they had encountered cultural difficulties (a heading which, for them, covered issues such as business ethics or distribution techniques including regulatory restrictions.)

In addition to tackling these cultural differences, when prompted, 88% of the users (with no differences from one Member State to another) claimed that regulatory differences and restrictions were adding to their difficulties in conducting cross-border commercial communication services.

Regulatory problems were associated with all forms of commercial communications, the most serious relating to sales promotions, direct marketing and sponsorship.

The media and other carriers (including cultural and sports events organisers) also benefit from the Internal Market. Improved efficiency in the European commercial communications business should allow for growth of this media sales business, particularly across borders.

The survey results.

When carriers were asked to respond spontaneously, culture was deemed to be the key concern in terms of Internal Market problems. Nevertheless, 45% highlighted the existence of regulatory barriers and 30% believed such barriers to be the most serious. 35% thought that the differences directly affected the level of their businesses but 60% recognised that they affected that of their clients.

Interestingly, although the users and suppliers indicated reliance on the Press when communicating abroad, it was the TV and radio operators who stated they received the most "imports" of trans-border commercial communications. (This probably reflects the Press's tendency to rely on national media buyers; this could be indicative of their underestimating the amount of advertising revenues that originate from non-domestic markets). 80% of respondents sold advertising space to users of commercial communications in other Member States and 60% carried advertisements that had been launched in other Member States. Most of the operators expected more trans-border commercial communications in the future but especially in "non-classical advertising" and particularly in "below the line activities." ^{li}

Consumers stand to gain as intra-Community trade increases and fragmentation effects are reduced. Lower marketing costs and a more competitive business environment are likely to be passed on to consumers in greater choice and more competitive pricing. Individuals, businesses or other professionals should be able to make better informed decisions over a wider choice of promoted goods and services. The Internal Market regulatory approach should lead to more effective direct redress from the country where the service originated when such communications infringe laws and codes.

The survey results.

For *consumer associations* (of which ten responded), although cultural problems were not deemed to be insignificant, the key concerns related to inaccurate translations that could mislead consumers in the non-domestic market. Consumer associations recognise the opportunities of an Internal Market, but are clearly concerned that it is not operating effectively as a result of differences in regulation which prevent effective redress for consumers in host countries and, as a consequence, call for stricter harmonisation. The call for tighter regulations stemmed from a feeling that it was impossible for consumers to achieve protection from harmful commercial communication services originating abroad. This again confirmed their view that the Internal Market is not currently offering the benefits they would expect to see.

Community law does not affect the distribution of competences between authorities and **self-regulatory bodies**. It allows self-regulators to continue their regulatory function at the national level but it also implies that like public authorities they need to account for Internal Market principles when seeking to control commercial communication services coming from other Member States.

The survey results.

The views expressed by *self-regulatory authorities* differed from all other respondents. Ten responded indicating that trans-border problems arose particularly in the area of direct mail (where it was not always clear to them where action should be taken) and also with pan-European TV and Press campaigns. Here it was felt that a lack of understanding of "culture" tended to be the key problem. Unlike the other respondents (who tended to highlight the differences in regulations, rather than their restrictive nature) these respondents felt that laws were generally too restrictive, and that more should be left to self-regulation. However, most felt that advertisers should be better "educated" about cultural divergence, and tended to believe that there was no need to standardise codes across the Community.

The advent of the Information Society.

Broadly, the advent of the Information Society has four implications for commercial communication services.

First, the new digital communication infrastructures represent *a new carrier* for such services, which allows for the fusion of direct marketing techniques with creative advertising skills.

Forecasts of current marketing activity over the Internet vary widely but they all predict significant growth.ⁱⁱⁱ Users will certainly use these new carriers and commercial communication tools to complement their existing methods.

Secondly, speed of transmission and targeting possibilities will *greatly facilitate trans-border commercial communications*. All these services will be offered point to point, in principle on a transfrontier basis. Unlike postal direct marketing, such interactivity is practically instantaneous. In comparison with existing video text or teleshopping services, the creative potential of multimedia tools is highly promising, if still expensive to run. Cultural resistance is likely to be relatively low because the communication will be of a totally new international form.

Thirdly, they will lead to an *integration of commercial communication services with distance retailing*, allowing for interactive distance shopping, which is likely to revolutionise the whole concept of teleshoppingⁱⁱⁱⁱ; indeed suppliers are already investing in such concepts as interactive on-line sales catalogues and shopping malls.

Finally, the operators of other new Information Society services will seek out certain new commercial communication (e.g. interactive advertising) services to offer in order to *make their services affordable* (in practice, commercial communications will underwrite the other new services).

These new developments in commercial communications will sharpen the need to resolve existing trans-border regulatory problems. The nature of these new networks increases the need for a regulatory framework based on Internal Market principles and, more specifically, where possible and appropriate, based on country of origin control. This can best be demonstrated with the example of the Internet. Once a message has been sent on the Internet it can be received instantaneously anywhere in the world. A regulation based on country of origin control will enhance the possibility of tracking down offenders.

The existing regulatory approach could prove to be increasingly ineffective for consumers as well as providing insufficient security for users, who realise that branding investments are the most vulnerable to adverse publicity. Both factors would reduce the potential demand and supply of new on-line interactive commercial communication services. Not only would this weaken the competitiveness of European business, it could undermine the development of the European Information Society infrastructures.

Although they are clearly of importance to this activity both now and in the future, the Internal Market principles are not the only Community objectives that could be applied in the field of commercial communications.

MEETING OTHER COMMUNITY OBJECTIVES.

Other objectives established by the EC Treaty, notably public health (Article 129) and consumer protection (Article 129a) can influence commercial communications. In the

remainder of this Part of the Green Paper these and other relevant Community objectives are briefly reviewed.

Consumer protection policy

Article 129A of the Treaty clearly requires the Community to deal with the whole range of consumer issues, not just those related to the Internal Market. Such an obligation implies careful consideration of subsidiarity at all stages so that appropriate solutions are adopted. With the advent of the Information Society, it is possible that effective consumer protection may require increased trans-national regulatory co-operation. For those regulatory areas that fall beyond the remit of the Internal Market the globalisation of supply which the information society heralds calls for a comparable adjustment of the regulatory system. This adaptation will be of crucial importance to consumers' willingness to participate: the Commission and the Member States must address these issues. In this context, attention should be drawn to the fact that all measures based on Article 129A can take a minimal nature, i.e. such that Member States may adopt stricter provisions to ensure a higher level of consumer protection.

Industrial Policy

The EC Treaty incorporates legal bases for implementing industrial policy to "ensure that the conditions necessary for the competitiveness of the Community's industry" exist (Article 130(1)). Article 130(2) adds that in order to attain these objectives the Member States "shall consult each other in liaison with the Commission and, where necessary, shall co-ordinate their action". The Commission is assigned the specific duty to "take any useful initiative to promote such co-ordination".

To support their national action, the Community will generally help to achieve this objective of improving competitiveness by taking horizontal measures under a series of common policies (on research, cohesion, vocational training, networks and foreign trade). The Council may also, ruling unanimously on a proposal from the Commission, "decide specific measures destined to support actions taken by Member States in order to attain stated objectives" according to Article 130, paragraph 1 of the Treaty.^{liv}

Since efficient commercial communication services would generally, by improving marketing efficiency, assist industry in meeting these competitive goals, they could be covered by initiatives in this field.

Competition Policy.

In general commercial communication "suppliers", "users" and "carriers" activities are all covered by the competition rules of the EC Treaty. Given the competitive role of commercial communications in the Internal Market, anticompetitive agreements in the meaning of Article 85(1) of the Treaty, which restrict the freedom of the parties to supply, to carry, to use or to buy such communications are prohibited.

Nevertheless, anticompetitive agreements on commercial communications can be granted an exemption if they satisfy the conditions set out in Article 85(3) of the Treaty. An example, which also illustrates the direct relevance of commercial communications in the market relationship between manufacturers and distributors, is clause 8(b) of Article 3 of the Commission regulation on the application of Article 85(3) of the Treaty to certain categories of motor distribution and servicing agreements. This clause allows manufacturers to prohibit dealers from soliciting customers for contract goods or corresponding goods, outside their territory, by personalised advertising.

Protection of Public Health.

Article 129 of the Treaty calls upon the Community to contribute to a high level of health protection, particularly by preventive action. It is to address the major health scourges and particularly mentions the fight against drugs.

The Treaty stipulates that health protection requirements shall be an integral part of other Community policies. This obligation is also valid for Community action in the field of commercial communications.

Central to the Commission's role in the implementation of Article 129 is the obligation to liaise with the Member States in the co-ordination of their policies and programmes concerning prevention, including drug prevention, investigation and analysis of causes and modes of transmission of health scourges, health information and health education. In its Framework of Action in public health, the Commission has foreseen eight programme proposals, of which three on

- Cancer
- AIDS and other Communicable Diseases, and
- Health promotion

have already been adopted. Two proposals currently under discussion in the Council and the European Parliament, on

- drugs, and
- health monitoring.

The Commission intends to put forward three further proposals shortly on:

- pollution-related diseases,
- rare diseases,
- accidents and injuries.

In addition, the Commission publishes annual reports on the integration of health requirements in other Community policies on the Health status in the Community. It has also put forward a Communication on Surveillance Network for Communicable Diseases.

General public health policy, particularly concerning health information and promotion, generates a number of commercial communication-related measures, particularly in Member States. The Commission has put forward a draft Directive on tobacco which proposed to ban

advertising for tobacco and tobacco products under certain circumstances. In the framework of the public health programmes, major Community-wide campaigns such as European Cancer Week are organised. On Member State level, there are numerous other public health campaigns. Although funded by the State these are commissioned from commercial communication service providers. Likewise, public health considerations have lead Member States to require health warnings to be placed on commercial communications that promote certain products. The use of commercial communication related measures in this area can be expected given the key role of health information and education.

Audiovisual Policy.

The Community's Audiovisual Policy has two main goals:

- to put in place and ensure the working of a true "European Audiovisual Area", in particular by ensuring the free movement of broadcast services; and
- to strengthen the competitiveness of the European film and television production industries.

Both objectives are pursued taking full account of the specific cultural aspects of the audiovisual sector.

Audiovisual Policy is implemented through two types of Community instrument. These are, on the one hand, legal measures such as the "Television without frontiers" Directive and on the other, financial support initiatives such as the MEDIA II programme.

The "Television without frontiers" Directive (Council Directive 89/552/EEC "on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities") is the cornerstone of the legal arrangements for the "European Audiovisual Area". Its primary objective is to create the legal framework conditions needed to ensure the free movement of broadcast services and thereby to encourage their development throughout the Community^{iv}.

Free movement is ensured through the following mechanisms:

- Each broadcaster can only be subject to the law of the Member State under whose jurisdiction it comes (that of the place where it is established) and must comply with a minimum set of common rules (the "co-ordinated fields"),
- Member States must ensure freedom of reception and may not hinder the retransmission of broadcasts from other Member States for reasons that fall within the co-ordinated fields.

As one of the co-ordinated fields is television advertising and sponsorship, this Directive is of particular relevance to the area of commercial communications. Advertising and sponsorship are integral parts of, and constitute the main source of funding for, many television broadcasts whether they emanate from public or private broadcasters. The full implementation of this Directive, based as it is on the "country of origin" principle which is the only workable way in which transnational broadcasting can be developed, is therefore of fundamental importance

for the development of commercial communications. In turn, the maximisation of the resources broadcasters earn through advertising and sponsorship revenues will contribute significantly to the attaining of Audiovisual Policy's other main goal i.e. the development of the film and TV programme production industries. The economic inter-linking of these sectors- broadcasting, commercial communications and programme production - means that the development of effective Audiovisual and Commercial Communication policy instruments is in the interest of all three of them.

The Directive is currently being up-dated and clarified. In the Commercial Communications services sector, one of the main objectives of this review is to liberalise the rules that apply to teleshopping. Otherwise the 1989 rules on advertising and sponsorship have proved robust and have provided a suitable framework for the development of television advertising and sponsorship while providing a satisfactory level of consumer protection. The Commission has therefore proposed to leave them largely unchanged. It has also proposed to strengthen the "country of origin" principle established by the Directive by clarifying the rules on how jurisdiction is determined.

Cultural Policy.

In the area of cultural policy, the Commission has recognised how commercial communications can act as an important additional source of revenue to State funds and therefore again, cultural policy could have an impact on such services. In its 1992 Communication^{lvi} the Commission made clear that although the basic responsibility for culture and its main source of financing remain with the authorities in the Member States, the complementary role of sponsorship must not be neglected. The Community has looked with interest at the question of sponsorship and initial attempts have been made to try out the network approach^{lvii}. More generally, and with an eye to the frontier-free area, the Community might: improve information on incentives to finance the arts in the Member States, given their diversity and complexity; promote the exchange of information and the highlighting of original initiatives for making optimum use of cultural resources (structural, economic or human) in the Member States and encourage sponsorship and promote meetings between creative artists, project promoters and sponsors without in any way interfering with respective individual freedoms.

Invitation to comment.

Internal Market objectives:

The Commission would welcome views on the role, both now and in the future, of Internal Market principles in the field of commercial communications. In particular, further information is sought on the nature of any Internal Market barriers, actual or potential, that respondents have encountered or identified. Given the expected increase in cross-frontier commercial communications, the Commission is interested in hearing of new commercial communication services (in pilot or commercialised form) and any new kinds of Internal Market barrier that may be appearing.

Other Policy Objectives.

The Community's role could clearly develop over time as trans-border commercial communications assume greater prominence, following the advent of the Information Society. Given the need to apply the principle of subsidiarity^{lviii}, the Commission welcomes views on the implications of this expected growth in cross border communications which could give rise to increased Community involvement in relation to the other policy objectives enshrined in the Treaty of the Union.

i Reference to be inserted when this document will have been registered.

ii *Confidentiality:* Unless they clearly specify otherwise, replies to this consultation received by the Commission will not be treated in confidence and may therefore be disseminated outside the Commission.

Persons to contact: Further information should be requested from and/or responses should be sent to Ms Margot Fröhlinger, Head of Unit E/5 (The Media, Commercial Communication and Unfair Competition) in Directorate General DGXV (Internal Market and Financial Services) on (+ 32-2) 295 93 50 or 296 01 10, or Mr Jean Bergevin, on (+32-2) 295 16 39 or 296 01 10. Fax: 295 77 12. The postal address is: European Commission, DGXV E-5, C-107 8/59, 200 rue de la Loi, B-1049 Brussels. The E-mail address is : E5@ dg15.cec.be

If you wish to receive another language version of the Green Paper please fax your request to Ms Lauter, Ms Van de Vorle or Ms Volon on 295 77 12 or write or e-mail to the above addresses specifying the language you would prefer.

iii "Making the most of the Internal Market": Strategic Programme. Communication from the Commission to the Council 22.12.93 COM(93) 632 final.

iv Europe's way to the Information Society. An Action Plan. Communication from the Commission; 9.8.94 COM(94) 347 final.

v This definition covers all forms of remunerated commercial communication services irrespective of the nature of the paying company or organisation. Thus, for example, a political advertising campaign would be included whereas party TV political broadcasts imposed by law and for which political parties or organisations do not pay would be excluded.

vi This is because (i) packaging and labelling regulations should be kept separate from non-pack commercial communication regulations and (ii) the pack is typically part of the in-house manufacturing process rather than a part of that element of the marketing mix which is sub-contracted to a specialist service provider as is the case for the commercial communication activities covered by

this Green Paper. In the same manner, sales representatives have also been excluded from the scope of this review.

vii EAAA: European Advertising Agencies' Association.

viii CERP: Comité européen des relations publiques.

ix For 1991, the EAAA estimated 155,000 were employed in the European Community. Other sources mention a figure of 266,088 employed in advertising and direct marketing in the same year in only eight of the Member States (B, DK, D, E(1990), F, Eir(1988), Lux, NL) (Eurostat, Mercure). For Belgium and Germany this figure includes only the number of employees. A Eurostat study of 1994 on the advertising sector reports that in 1993 the 15 largest European agency networks together employed around 40,000 people in the whole of Europe. CERP estimates 6,282 employees and 13,670 freelance consultants were active in the public relations sector in 1993.

x See Part 1 of the accompanying Working document.

xi The Max Planck Institute was commissioned to provide the Commission with detailed country reports for all fifteen Member States. These examined the source and nature of national restrictive measures. They were then summarised in a comparative study by the consultants. This comparative report (in German) is available from the Commission's services. (The national regulatory tables provided in Part II of the Working document are based on this study. These tables classify and compare existing national measures according to their national policy objectives and the Community general interest objectives that they seek to safeguard).

xii This was undertaken by the Commission's services and is reproduced in Part I of the Working document.

xiii The results of these are summarised in a publication available from the Commission's services.

xiv This was an open postal "call for comment" sent out by the services of the Commission.

xv Five questionnaires were sent out to the five groups of interested parties, viz.: "users" of commercial communications, "suppliers" of commercial communications, "carriers" (media and other carriers of such services), consumer associations and relevant self-regulatory bodies. A detailed analysis of the breakdown of these responses has been provided in the first issue of a Journal sponsored by the Commission entitled "Commercial Communications" which is available on request from the Commission's services. Some 2,785 questionnaires were issued directly by the Commission: in addition numerous Trade Associations duplicated copies to send to their members.

xvi The detailed results of these surveys (in English) are available on request from the Commission.

xvii 5,200 users, 530 suppliers, 47 carriers, 15 national self-regulatory bodies and 27 consumer associations were contacted. Of these 532 users, 132 suppliers, 20 carriers, 10 self-regulatory bodies and 10 consumer associations responded.

xviii C-286/81 Re Oosthoek's Uitgeversmaatschappij 1982 (4) ECR 4575 of 15.12.82.

xix C-362/88 GB-INNO-BM v Confederation du commerce Luxembourgeois 1990 (2) ECR I-667 of 7.3.1990.

xx C-126/91 Scutzverband gegen Unwesen in de Wirtschaft e.V. v Yves Rocher GmbH 1991 (3) I - 2361 of 18.5.93.

xxi Case C-267 and C-268/91 Re Bernard Keck and Daniel Mithouard 1993 (7) ECR I-6097 of 24.11.93.

xxii C-267 and C-268/91 of 24.11.93, Paragraph 16 cited above.

xxiii For example: C-292/92 Ruth Hünermunde e.a. v Landesapothekerkammer Baden-Württemberg 1993 (8) ECR I-6787 of 15.12.93 ; Societe d'Importation Edouard Leclerc-Siplec v TF1 Publicité S.A. and M6 Publicité 1995 ECR I-179 of 9.02.95.

xxiv C-352/85 Bond van Adverteerders (vereniging) v The Netherlands 1988 (2) ECR 2085 of 26.04.1988 In this case the Court explained that for the application of free movement of services it is

necessary first to identify the services in question, secondly to consider whether the services are transfrontier in nature for the purposes of Article 59 of the Treaty and lastly, to establish whether the services in question are services normally provided for remuneration within the meaning of Article 60 of the Treaty. (Paragraph 12).

^{xxv} See, for example; C-155/73 Re Guisepe Sacchi 1974 (1) ECR 409 of 30.04.1974, C-52/79 Procureur du Roi v. Marc JVC Debauee and Others 1980 ECR 833 of 18.03.1980.

^{xxvi} C-384/93 Alpine Investments BV v. Minister van Financiën ECR 833 of 10.05.95.

^{xxvii} Op cit, Paragraph 28.

^{xxviii} See "Commission interpretative Communication concerning the free movement of services across frontiers" OJC 334, 9.12.93.

^{xxix} C-288/89 Stichting Collectieve Antennevoorziening Gouda and Others v Commissariat voor de Media. "Mediawet Case" 1991 (1) ECR 4007, paragraph 13.

^{xxx} C-279/80 Re Alfred John Webb 1981 ECR 3305, paragraph 19; Joined Cases 62/81, 63/81 Seco SA and Desquenne and Giral SA v Etablissement d'Assurance contre la Vieillesse et l'Invalidité 1982 (1) ECR 223, paragraph 14; C-113/89 Rush Portuguesa Lda v Office National d'Immigration 1990 (2) ECR I-1417, paragraph 18.

^{xxxi} C-220/83 Commission v France 1986 (4) ECR 3663, paragraph 20.

^{xxxii} C- 62/79 S.A. Compagnie Generale pour la Diffusion de la Television Coditel and Others (1980) ECR 881, paragraph 15.

^{xxxiii} Case C-180/89 Commission v Italy 1991 (2) ECR I-709, paragraph 20; Case C-154/89 Commission v France 1991 (2) ECR I-659, paragraph 17; Case C-198/89 Commission v Greece 1991 (2) ECR I-727, paragraph 21.

^{xxxiv} Joined Cases 110 , 111/78 Ministere Public and Chambre Syndicale des Agents Artistiques et Impresarii de Belgique, A.S.B.L. v Willy van Wesemael and Others "Van Wesemael Case" 1979 (1) ECR 35, paragraph 28.

^{xxxv} C-288/89, cited above, in note 29 paragraph 23.

^{xxxvi} C-379/87 Anita Groener v Minister for Education and City of Dublin Vocational Committee 1989 (4) ECR 3967 (28.11.1989).

^{xxxvii} C-384/93 Alpine Investments BV, para 45, cited above in note 15.

^{xxxviii} C-288/89 cited above in note 29, paragraph 15.

^{xxxix} Communications Nos 359/1989 and 385/1989 Ballantyne Davidson McIntyre, decision of 31.3.93. CCPR/C/47/D/359/1989 and 385/1989/Rev.1.

^{xl} See cases markt intern Veralg GmbH and Klaus Beerman, Series A No165, 20.11.89 and Groppera Radio AG and others V. Switzerland - Series A no. 173 of 28.03.90 In recent case law, it appears that the European Commission of Human Rights considers that there is no doubt that advertising is protected by Article 10. In two recent decisions on the admissibility of Applications to the European Court of Human Rights, under the ECHR, the Commission took the view that a restriction on advertising would fall under Article 10 ECHR (Decision of September 5 1991 re Application no.16632/90 (Colman v. UK) and Decision of December 2 1991 re Application no.15450/89 (Cosado Coca v. Spain)).

^{xli} C-260/89 Elleniki Radiophonia Tiléorassi AE v Dimotiki Etaireia Pliroforissis and Sotiros Kouvelas 1991 ECR I-2925 of 18.06.91, Paragraphs 41-44.

^{xlii} In the light of C 4/73 J.Nold, Kohlen v BaustoffgroBhandlung v Commission "The Nold Case" 1974 (1) ECR 491 paragraph 13.

^{xliii} Council directive 84/450/EEC of 10.9.84 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising.

xliv Council directive 79/112/EEC, of 18.12.78, on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, OJ No L 33, 1979.

xlv Council Directive 92/96/EEC of 10.11.92, on the co-ordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance Directive), OJ No L 360, 1992. Council Directive 92/49/EEC of 18.6.1992, on the co-ordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive), OJ No L 228, 1992. Council directive 85/611/EEC of 20.12.85 on the co-ordination of laws, regulations and administrative provisions relating to the undertakings for collective investment in transferable securities, OJ No L 375, 1985. Second Council Directive of 15.12.89, on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC. OJ No L 386, 1989.

xlvi Council directive 92/28/EEC, of 31.3.92, on the advertising of medicinal products for human use, OJ No L 113, 1992.

xlvii Directive of the European Parliament and the Council 95/46/EEC of 24.10.95 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

xlviii Council directive 89/552/EEC of 3.10.89, on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. OJ No L 298, 1989.

xlix MRB International were asked to approach a representative sample of each of the five audiences that were mailed the "call for comment." All the "users" covered by this survey were offices of companies who traded across borders and who had control over a significant proportion of marketing budgets for commercial communications in their non-domestic markets.

¹ This and following summaries are drawn from the results of both surveys described in the introduction; more extensive summaries of the results are provided in a separate document available from the Commission.

li "Below the line" refers to commercial communication services that do not involve the purchase of media space. Thus, the term covers all forms of commercial communications except for advertising.

lii As an example Forrester Research expects purchases over the Internet to grow from \$240 million in 1994 to \$6.9 billion by 2000.

liii See Part 1 of the Working document.

liv For further information, see COM(94) 319 final.

lv Other Directives are complementary and pursue the same basic aims, such as the "cable and satellite" copyright Directive adopted in 1993 and the transmission standards Directive adopted in 1985.

lvi "New prospects for Community cultural action" Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, COM(92) 149 final of 29.4.92.

lvii European Committee on business, the arts and culture (CEREC) (operational since March 1991).

lviii The principle does not apply to Internal Market measures because the Community has exclusive powers under Article 100A, so only the issue of proportionality arises (Article 3B(3)).