In 1911, the New York attorney Harry D. Nims drafted a model statute which defined prohibited practices of advertising which, by 1913, had been enacted into legislation in 15 states of the United States and, subsequently, 43. However, the law is still unsettled on the other side of the Atlantic Ocean. MacBride Report on international communication of practices of advertising which, by 1913, had been enacted into legislation in 15 states of the United States and in the jurisdictions of the European Court of Justice relating to the application of the directives and the Treaty on European Union. There are also proposed directives which concern comparative advertising, an amendment of the Television Without Frontiers Directive and the protection of consumers in respect of distance contracts. There are non-binding acts such as the Commission Recommendation on codes of practice for the protection of consumers negotiated at a distance, the Council Resolution on products presented as being beneficial to health, ('miracle products') and Council Resolutions concerning the indication of prices. There are some regulations of advertising relating to particular sectors of the advertising industry, for example the Directive concerning the harmonisation of the indications of prices of food and non-food products, the Council Directive relating to door-to-door selling the Council Directive amending Council Directive 89/552 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, document COM(95) 86 final.


7 Council Resolution on products presented as being beneficial to health, ('miracle products'), of 9 November 1995, not yet published.


This article is based on an address given at the New York State Bar Association conference, 'The Falling of the Wall and the Raising of the Curtain on Practice in the European Union' on 22 September 1995.


7 Council Resolution on products presented as being beneficial to health, ('miracle products'), of 9 November 1995, not yet published.


A comprehensive European regulation of advertising had been discussed for 30 years before the Directive concerning misleading advertising was issued in 1984 as a compromise.\textsuperscript{15} It may be hoped that the establishment of the new DG XXIV of the European Commission which was set up last year will benefit the co-ordination of as many aspects of advertising as possible within the competence of one directorate so that the Commission's policy with regard to advertising issues can be developed coherently.

Difficulties for a harmonised Community-wide regulation of advertising derive from the following facts:

(1) The national advertising laws are often contained in a large number of laws and bylaws (for example concerning the advertising of drugs or television advertising).\textsuperscript{16}

(2) The core of national advertising laws is often contained in the laws concerning injurious falsehood and unfair competition which differ considerably from country to country. (In England the common law actions of passing off and injurious falsehood are available, in France and in Italy the civil codes provide the basis for legal protection whereas other Member States of the European Union such as Germany deal with reprehensible practices of advertising in laws concerning unfair trade practices.)

(3) In some Member States criminal law provisions protect against misleading or deceptive advertising.

(4) National jurisprudences of Member States differ considerably, in particular, concerning the interpretation of the term 'misleading advertising'.

(5) The consumer protection laws are not comprehensively regulated on a Community basis so that different national legal concepts affect the advertising law.

(6) The European nations have different standards concerning health, environmental issues, alcoholic drinks, tobacco products.

(7) There is no unanimity about the aims of a European regulation concerning advertising (for example in relation to the issues of the consumer protection, the protection against unfair competition, the scope of the freedom of speech and writing).

(8) There are differing degrees of the protection of minors in Member States.

(9) The system of the self-regulation of advertising is differently organised in Member States.

(10) The advertising industry has a preference for self-regulation.


The Vice-President of the Committee of the European Parliament for the environment, health and consumer protection\textsuperscript{17} criticised in 1994:

What is discussed presently on the European level as rules for advertising cannot be said to be characteristic of the thinking in categories of market economy. From the Directive for the protection of personal data and the envisaged regulation of advertising for food to the envisaged general prohibition of advertising for tobacco products there results the impression of a conceptionless advertising policy of the European Union. It is prone to the proliferation of subtle restraints of trade, to suggestions undermining the market economy and pretentious arguments in favour of health ... The wrangling for prohibitions of advertising and de-regulation led to legal insecurity in the economy, and it caused damage to the development of the internal market.

Taking into account the problems of state interventionism in the advertising industry, it may be recommendable to leave the matter totally to self-regulation. The role of the Community would be limited to the regulation of advertising insofar as necessary for the establishment of the internal market and, according to the principle of subsidiarity, to cases in which national regulations and their mutual recognition are insufficient.\textsuperscript{18} However, the differences in national regulations of advertising may restrain the Community-wide marketing of a product and thus affect the free trade in goods. Examples are advertising campaigns contained in journals which are distributed internationally and television advertising which is transmitted to several states.


\textsuperscript{14} Amended proposal for a Council Directive on advertising for tobacco products, document COM(91) 111 final, OJ 1991 C 167/3; 1992 C 129/5 which met with critique by reason of the limitations of the advertising for tobacco products and the conditions concerning warnings relating to health, so that the proposals were not adopted, see Gerhard Schrick, \textit{Richt der Werbung in Europa, Einführung in das Recht der Werbung, Internationales und Europäisches Recht}, Nomos, Baden-Baden 1995, at 102, no. 192.

\textsuperscript{15} See Ursula Schleicher, 'Werbeordnung', in \textit{Streitfrage Werbung, Nationale oder europäische Lösung}, Bonn 1994, 3 to 8 at 5.

\textsuperscript{16} Some Member States, for example Portugal, have an Advertising Code.

\textsuperscript{17} Ursula Schleicher, Note 15 above at 5 and 6.

\textsuperscript{18} See for example, Volker Nickel, 'Staatskontrolle?', in \textit{Streitfrage Werbung, Nationale oder europäische Lösung}, Note 15 above at 12.
The Advertising Law Applicable in the Internal Market

Which law is applicable to an advertising activity in Europe? In general, it may be said that advertising is subject to the laws applicable at the place where the advertising activity occurs. An advertising activity which is not directly aimed at consumers of a foreign country may be subject to that state's laws only if the advertising activity is substantial. In practice, however, German journals containing advertising for cigarettes are available for Germans in Portugal where advertising for tobacco products is prohibited.

It would appear logical that an internal market should have unitary advertising laws applicable in all Member States. Such a unitary system could be guided by the principle of the freedom of advertising activity, in correspondence with the principles of the free movement of goods and of providing of services, Articles 30 to 36 and 59 and onwards of the Treaty on European Union and Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. It seems that the Community does move into this direction, taking into account that the proposed Directive concerning comparative advertising is the first measure which does not restrain the freedom of the advertising industry but rather obligates those Member States which up to now prohibit comparative advertising to amend their laws in order to permit this kind of publicity.

A factor which favours the need for a Community-wide regulation of the advertising law is the development of supranational means of communication, in particular in the fields of telecommunications, broadcasting and television. Also the fact that means of transport facilitate the speedy distribution of goods in international markets and within the internal market of the Community causes a need for simple rules applicable to advertising activities within the whole European Union. The transmission of global marketing concepts via satellite and cable television offer considerable possibilities of savings – the Coca Cola company expected a reduction of expenses of some $50 million if it could synchronise its US advertising spots within the internal market of the European Union.

As an illustration of the difficulties which a supranational advertising campaign for the internal market may have, a brief reference may be made to the controversial advertising campaign of the Benetton company. On advertising posters the company used to combine its name which appeared at the lower edge of the images with shocking pictures, for example showing an oil polluted dying duck or the backside of a human being, stamped 'HIV positive'. Whereas the advertising campaign was carried through in Italy, it was halted in the United Kingdom within the procedure of self control and in Germany it led to lawsuits, some of which came before the Federal Supreme Court. Accordingly, the differences in the national laws concerning advertising can create a barrier to an advertising strategy for the marketing of goods within the whole internal market, unless the advertiser complies with the strictest standards of any Member State.

The Competence of the European Union Concerning the Regulation of Advertising

The Treaty on European Union does not contain a reference to advertising. As a basis for legal activities of the Community may serve Article 100a of the Treaty on European Union which authorises the Council to issue measures on the proposal of the Commission for the approximation of national laws and bylaws with the object of the establishment of the internal market within the Community.

Available as a basis for the regulation of advertising are also Articles 59 and onwards of the Treaty on European Union which concern the principle of the...
free providing of services, however, with the proviso that the Community's powers relate to the regulation of the exercise of the professional activity. In this respect it may be observed that prohibitions or limitations of advertising activities do not liberalise the market but destroy this partial market for the advertising industry.

The issue of the competence of the Community with regard to television advertising was the subject-matter of a judgment of the German Constitutional Court of 22 March 1995 which was concerned with a lawsuit brought by the German provinces which asserted that the activities of the Community concerning the approximation of the laws of broadcasting and television in Europe exceeded the competence of the Community, because television and broadcasting related to cultural activities, a field in which the Treaty on European Union allegedly did not endorse the Community with the power to harmonise the law. The German Federal government pointed out that according to the jurisprudence of the European Court of Justice broadcasts are services in the sense of Articles 59 and onwards of the Treaty, and it shared the view of the Commission that the different regulations of advertising in broadcasting and television in the Member States could violate the freedom of the providing of services of the Treaty on European Union.

The Federal Constitutional Court sustained the Federal government's view that the Community had the power with regard to the regulation of advertising in the case of broadcasting on the basis of Article 59 and onwards of the Treaty. The court held that the government could lawfully assume that the competence for the establishment of the internal market included the power to create the conditions for the free trans-border distribution of television broadcasts and the free reception in all Member States so that the approximation of the laws would be required at least in relation to the national laws regulating advertising.


The attempts to harmonise the national laws and bylaws concerning unfair competition and advertising with the aim to facilitate the trans-border exchange of goods and to eliminate distortions of competition date back to the 1960s; the Directive concerning misleading advertising of 1984 constituted a compromise which was agreed on in order to avoid a complete failure of the harmonisation project. In the Directive the Council justifies the need for harmonisation with the reasoning that misleading competition is likely to lead to distortions of competition in the common market, because differences in national legislations of Member States would impede Community-wide advertising campaigns and thus affect the principles of the free movement of goods and providing of services. Also the consumer may benefit from harmonised rules concerning misleading competition.

Article 2(2) of the Directive defines the term 'misleading advertising' as meaning any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor. It is alleged that the definition comprises the situation where an advertising campaign contains a reference to another person's trade mark, goodwill or name, leading to a confusion, but that cases of injurious falsehood and unobjective advertising are not caught by it. From the definition of the term it results that the Directive is addressed to any cases of misleading advertising, irrespective of the media by means of which it is transmitted and the manner in which it is communicated, provided that it affects the economic behaviour of purchasers and causes injury to competitors.

The Directive met with criticism, because the definition of the term 'misleading advertising' lacks a binding description of the circumstances in the presence of which the subsistence of a deception may be assumed. The European Court of Justice held that in application of the Directive national courts would have to decide whether an advertising activity misleads and is susceptible to deceive a substantial number of consumers. However, with this respect, the standards applied by national courts differ considerably so that there is no unitary jurisprudence within the internal market.

The term 'misleading advertising'

To illustrate the differences in approach between national jurisprudences of different Member States this article will now briefly refer to the relevant rules applicable in Germany and Italy which constitute the 'extreme poles' of the understanding of misleading advertising of European countries.

The prohibition of publicity by misleading indications in Article 3 of the Act concerning Unfair Trade Practices is the most important element of the regulation of advertising in German law. An indication is misleading if it is susceptible to evoking an error. Article 3 of the Act does not only envisage the
protection of competitors against misleading advertising but the protection of the general public and in particular of prospective purchasers. In the words of the German Imperial Court\(^\text{34}\) of 1939 'exaggerations in advertising are not admissible if the public cannot understand them otherwise, that is to say as not being serious'. Today courts assume a more generous position. However, as impermissible exaggerations were considered by jurisprudence assertions like: 'prices as never before', 'ever lasting strength', 'radical price reduction', 'everybody buys at …', 'the most beautiful flowers in the world'.\(^\text{35}\) It has been held that saying 'mum always gives me the best' in relation to an instant pap is constitutive of an inadmissible exaggeration.\(^\text{36}\)

Article 2598(3) of the Italian Civil Code prohibits as a general clause practices of unfair competition. Italian jurisprudence has developed certain categories of unlawful competitive activities. To one of these categories belong the wrong indications of the origin of products or cases of the unjustified assertion concerning the award of medals. The action of unfair competition according to Article 2598 of the Italian Civil Code presupposes the existence of a relation of competition - a violation of rights can only be claimed by a competitor who suffered or is likely to suffer a damage by reason of a diverting of customers. The law does not protect the public or the customers but the maintenance of a fair competition. The Italian jurisprudence proceeds on the assumption that the public is aware of exaggerations in the publicity and is used to not taking advertising too seriously,\(^\text{37}\) because the different advertising campaigns of competing undertakings will neutralise each other and become inoffensive.\(^\text{38}\) The Italian legislator sustained this liberal attitude also during the negotiations for Article 10bis of the Paris Convention for the Protection of Industrial Property where Italy did not agree with France and Germany who wanted to include the prohibition of deceptive publicity in the Convention. The ministerial report for the Italian Senate noted that this liberal attitude was necessary by reason of the particularities of the Italian industry and also by reason of principle, because any error should not be unlawful. Finally, it was feared that the advertising industry would lose a large part of its justification if it should always be true.\(^\text{39}\)

The Italian Law 74 of 25 January 1992, which implemented the Directive concerning misleading advertising into Italian law modified this approach. Article 2(1)(b) of the Law defined the term 'misleading advertising' as any advertising which, by whatever means, including its presentation, induces an error or is susceptible to induce an error in physical or legal persons to which it is addressed or which it reaches and which, by reason of its misleading nature, may prejudice their economic activities or which, for this reason damages or is susceptible to damage a competitor. According to Article 3(1) of the Law the assessment whether the advertising is misleading shall take into account any circumstances with particular regard to the following factors:

1. the nature of the goods or services, their availability, quality, making, the method and the date of manufacture, their susceptibility to serve for the purpose of the contract, the quantity, description, geographical or commercial origin, the results obtained by their use, or the results and features obtained from tests or controls made with respect to the goods or services;
2. the price or the method by means of which it is calculated, and the conditions to which the goods or services are supplied;
3. the categories, the qualifications and rights of the advertiser such as the identity, the company assets and capacities, the intellectual and industrial property rights and any rights concerning the undertaking and awards or premiums.

The Law further establishes\(^\text{40}\) the conditions for the transparency of advertising: the publicity must be clearly recognisable as such; in particular the advertising in the press must be distinguishable by simple graphical means which are obvious for the spectator or reader from other informations directed to the public.

These differences of national jurisprudences concerning misleading advertising render doubtful the value of the Directive as a guideline for the practitioner. The term 'misleading advertising' is not defined in clear terms. As mentioned above, Italian courts tend to understand the word 'misleading' in a narrow sense, whereas according to German jurisprudence this condition is met if there is proof that only 10 or 15 per cent of the consumers are misled. Another weakness of the Directive is that Member States are, in general, free in the choice of the measures for the prevention of misleading advertising.


The critique of the Directive concerning misleading advertising induced the Commission to propose

\(^{34}\) German Imperial Court of 30 October 1939, GRUR 1940/379.


\(^{36}\) German Federal Supreme Court of 15 January 1965, Pomp instant pap, GRUR 1965/363.

\(^{37}\) Gerhard Schrickcr, La Répression de la Concurrence Déloyale, Italie, Dalloz, Paris 1975, at 231.

\(^{38}\) See Tribunale di Genova of 21 April 1958, Riv. dir. ind. 1958 II 134.

\(^{39}\) See Gerhard Schrickcr, Note 37 above, at 232.


amendments. Also the amended proposal is based on Article 100a of the Treaty on European Union which authorises the Council to issue measures on the proposal of the Commission for the approximation of national laws and bylaws with the object of the establishment of the internal market. The amended proposal of the Directive defines the term 'comparative advertising' as meaning any advertising which explicitly or by implication identifies a competitor or goods or services of the same kind offered by a competitor. 42

Article 3a of the amended proposal explains under which circumstances comparative advertising is admissible:

(1) Comparative advertising shall be allowed only provided that it objectively compares the material, relevant, always verifiable, fairly chosen and representative features of competing goods and services and that it (a) does not mislead;
(b) does not create the risk of confusion in the market place between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services of those of a competitor;
(c) does not discredit, denigrate or bring contempt on the trade marks, trade names, goods, services or activities of a competitor and does not principally capitalise on the reputation of a trade mark or trade name of a competitor;
(d) does not refer to the personality or personal situation of a competitor.

(2) Comparative advertising must indicate the length of time during which the characteristics of the goods or services compared shall be maintained where these are the subject of a special or limited-duration offer.

Comparative advertising will necessarily involve references to a competitor's trade marks. The amended proposal of the Directive does not refer to the Council Regulation on the Community Trade Mark. 43 but it contains in Recital 9 a reference to the Council Directive on the approximation of the laws of Member States relating to trade marks. 44 The Community Trade Mark Regulation prohibits the infringing use of signs for advertising purposes. 45 however, it follows from the Minutes to the Regulation that 'use in advertising' of a trade mark by a third person does not include use in comparative advertising. 46 Also the Directive concerning the approximation of trade mark laws prohibits the use of another person's trade mark in advertising (Article 5(3)(d)). Yet, since the object of the Directive is the protection of the exclusive rights of the trade mark owner in relation to his goods or services, there will be no conflict arising from the use of a competitor's trade mark for comparative advertising, if a reference to this trade mark is made in a fair and competitive manner — in correspondence with the amended proposal. 47 According to Recital 11 of the amended proposal for the Directive concerning comparative advertising the use of another person's trade mark does not breach his exclusive right in cases where the use complies with the conditions on comparative advertising laid down in the Directive and does not capitalise on the reputation of another trade mark, but is intended solely to distinguish between them and thus objectively highlight differences. The dichotomy between the infringing utilisation of a trade mark and the permission of comparative advertising has been solved by reference to the criterion whether the use was made with the advertiser's sole intention to distinguish between products or services and that its use does not bring into disrepute the trade mark. 48 However, in practice the application of this principle may permit diverging views. 49 In particular, the criterion of the objective comparability of the competing goods or services may pose problems, because in particular comparisons of prices can be manipulated so that jurisprudence will have to apply strict standards which in turn may have a negative effect on practice. 50 The opinions whether comparative advertising should be admitted in the interest of the consumers and industry are still controversial, nevertheless, it appears that the amended proposal for the Directive is a step into the right direction — towards a comprehensive regulation of advertising within the internal market and towards an increased liberalisation of the freedom of advertising.

Television Advertising

Advertising in European television broadcasting services has assumed an important role. The increase in the number of national and cross-border television channels has led to a very large increase in advertising investment in television. Income from television advertising increased by 50 per cent between 1989 and 1992. The television advertising expenditure of the 100 leading pan-European brands rose by 21 per cent between 1990 and 1991 and by 28 per cent between 1991 and 1992. 51

In May 1995 the Commission of the European Communities published its report on the application of

45 Article 9(2)(d) of the Community Trade Mark Regulation.
the 'Television Without Frontiers' Directive and its proposal for an amendment of this Directive. In the report the Commission described the experiences with the application of the Directive and, taking into account the technological changes, it suggested the issuing of a revised Directive.

The 'Television Without Frontiers' Directive contains the following rules concerning advertising:
- advertising shall be recognisable as such,
- the Directive arranges for advertising breaks,
- the Directive contains rules on ethical matters,
- the protection of minors, advertising for tobacco products, medicinal products and alcohol.

The general problem with the 'Television Without Frontiers' Directive concerned the establishment of the applicable law. The Directive applies the principle that the broadcasting activity must comply with the laws of the country in which it originates, that is to say the Member State where the originating body is established, whereas broadcasts from non-Member States would have to comply with the laws of the receiving Member States. According to the proposed Directive the broadcasters under the jurisdiction of a Member State are those established in the territory of that Member State in which they must have a fixed establishment and actually pursue an economic activity. Also broadcasters established outside the territory of the Community shall be subject to the jurisdiction of a Member State if they use a frequency or a satellite capacity granted by that State or if they use a satellite up-link situated in that State.

The definition of the term 'television advertising'

The proposal for an amendment of the Directive contains a revised definition of advertising: "television advertising" means any form of announcement broadcast in return for payment or for similar consideration by a public or private undertaking in connection with a trade business, craft or profession in order to promote the supply of goods or services including immovable property or rights and obligations in return for payment. It does not include teleshopping.

Teleshopping is defined as meaning television programmes and spots containing direct offers to the public with a view to the sale, purchase or rental of products or with a view to the supply of services in return for payment. Teleshopping is, in general, considered as advertising. However, its exclusion from the concept of television advertising is justified in the cases in which it is not included in television broadcasting programmes. Accordingly, teleshopping channels are not subject to the time limits applicable to television advertising. With respect to telepromotion, promotion of products or services by means of games or studio shows, the Commission observed that this form of programme should be treated as a form of advertising which is lawful in principle and therefore subject to any provisions on advertising contained in the Directive. In the view of the Commission the Directive will be applicable to other new forms of communication such as pay-per-view or near video-on-demand. The Commission thus seems to assert a broader view of the term 'broadcasting' in the law of telecommunications than in the law of copyright where it excludes the applicability of the concept of 'broadcasting' to any point-to-point services. Whereas it is unanimous that the term 'television broadcasting' includes transmissions through the intermediary of cable operators, it is not yet clear whether the Directive or the proposal for an amendment of the Directive would be applicable to advertising on the Internet or interactive computer services. The Commission suggested in its Admedia project report - the future of media and advertising - that advertisers will have a period of five years for experimentation with the new media since interactive technologies are unlikely to reach mass audiences before ten or more years.

54 Article 10 of the 'Television Without Frontiers' Directive.
55 Articles 11 and 18 of the 'Television Without Frontiers' Directive.
56 Article 12 of the 'Television Without Frontiers' Directive.
57 Article 16 of the 'Television Without Frontiers' Directive.
58 Article 13 of the 'Television Without Frontiers' Directive.
59 Article 14 of the 'Television Without Frontiers' Directive.
60 Article 15 of the 'Television Without Frontiers' Directive.
61 Article 2(2) of the proposal for an amendment of the 'Television Without Frontiers' Directive.
62 Article 2(3) of the proposal for an amendment of the 'Television Without Frontiers' Directive.
63 Article 1 of the proposal for an amendment of the 'Television Without Frontiers' Directive.
64 See, for example, Werner Schroeder, 'Teleshopping und Rundfunkfreiheit', ZUM 1994/471, 474; Rupert Stettner and Wolfgang Tresenteiter, 'Sperrstunde im Teleshopping', ZUM 1994/669, 674.
68 Judgments of the European Court of Justice, Case 155/73 Sacchi v. Gadea and Case 52/79 Procureur du Roi v Debaene (both at Note 26 above).
70 The Commission is more careful in approach than US authorities. The statement of the Attorney General of the US state Minnesota, last modified on 30 September 1995, said 'Persons outside of Minnesota who transmit information via the
The advertising time

Providing for the advertising time, the proposal establishes that the amount of advertising time may not exceed 15 per cent of the daily transmission time. However, it may be increased to 20% if it includes forms of advertising other than television spots and/or teleshopping spots inserted in a service that is not exclusively devoted to teleshopping, on condition that the amount of spot advertising does not exceed 15%. The amount of spot advertising within a given clock hour shall not exceed 20 per cent. Yet Member States are free to lay down stricter rules for programming time.

The Commission specified that the calculation of the one-hour period should be counted from the beginning of the clock hour to simplify monitoring programmed duration of audio-visual works for the purposes of advertising breaks. The hour-period should be counted in 'gross' time that is to say including advertising and sponsorship.

Advertisements shall be inserted in a manner not to prejudice the programme and in sports programmes advertisements shall only be inserted between the parts of the intervals. The transmission of feature films may be interrupted for each complete period of 45 minutes. Thus the proposed amendment takes account of the fact that films made for television can, from time to time and different from films made for the cinema, have natural breaks built in allowing advertising spots to be inserted without detracting from the integrity of the work. The Commission also points out that the phrase 'for each complete period of 45 minutes' in the third paragraph of Article 11 of the proposal should be interpreted as allowing a broadcaster to interrupt a feature film once per period without having to wait for the 45th minute, provided, of course, that the other provisions of the same Article are complied with such as, for example, the 20-minute period.

The 'Television Without Frontiers' Directive concerns also sponsored television programmes. The content of such programmes shall not be influenced by the sponsor, and the sponsor must be clearly identified at the beginning and/or the end of the programme. Promotional references to the goods or services of the sponsor are not permitted. The Commission concludes, however, that the sponsor's name and/or logo can be mentioned during the programme. The proposal lifts the ban on the prohibition of sponsorship by companies whose main activity is the manufacture or sale of pharmaceutical products available only on prescription in order to avoid disadvantages for those companies.

Advertising and Distance Contracts

Since 1992 the bodies of the European Community are concerned with the harmonisation of the laws of Member States in relation to distance contracts. Whereas the original proposal of the Directive aimed at 'the protection of consumers in respect of contracts negotiated at a distance (distance selling)', the latter drafts used the term 'distance contracts'. This contractual type is characterised by three basic features: first, the solicitation by a technique of communication at a distance, second, the answer by such a technique and, third, the absence of any physical contact between the parties. This means contracts concerning goods or services concluded between a supplier and a consumer as a consequence of an organised distance sales or service-provision scheme of the supplier, using, for this contract, exclusively one or more means of communication at a distance up to the conclusion of

79 Article 17 of the 'Television Without Frontiers' Directive and of the proposal for an amendment.
the contract and including the conclusion on the contract itself. The European Parliament specified that in the case of contracts which are to be fulfilled by successive acts of performance or a series of separate operations over a period of time, they shall only be subject to the provisions of the Directive if they were negotiated at a distance.

The relevance of the project for advertising is considerable, since the technological progress facilitates this form of publicity. The proposed Directive will thus be applicable to advertising via interactive computer services or the Internet. The Commission considered that at the same time the ephemeral character of the technology imparts disadvantages for the consumer which necessitate the regulation on a Community basis in order to establish the internal market. Article 15 point 1 of the draft Directive provides that Member States shall take the measures in order to comply with the Directive within two years after it enters into force.

The means of communication covered by the Directive are unaddressed and addressed printed matter, standard letters, press advertising with order form, catalogues, telephone with or without human intervention (automatic calling machine and audio-text), radio, videophone, videotex, electronic mail, fax and teleshopping. The use of automated calling systems machines and fax requires the prior consent of the consumer, and other means of communication at a distance shall only be used where there is no clear objection from the consumer. The European Parliament specified that also the use of a telephone by the supplier requires the consumer’s prior consent, here the ‘prior consent’ is defined as the statement of identity and objective by the vendor at the beginning of any telephone conversation with the consumer. This means that ‘cold calling’ will not be prohibited and that suppliers may use this practice which will deemed to be accepted by the consumer if, at the beginning of the telephone conversation, the supplier explains his name or the name of his company and the purpose of the telephone call. But in the case where consumers have indicated that they do not wish to be solicited, Member States shall take the necessary measures to protect them without prejudice to the safeguards available to the consumer under Community legislation concerning the protection of personal data and privacy. It appears that this obligation on Member States would impose high demands on the legislative abilities of national legislators. First, it has to be established which kind of indication will suffice to make evident that the consumer does not want to be solicited. Second, it seems that the legislators’ duty to take legislative measures in order to protect consumers can be fulfilled by a wide range different initiatives or steps which may be more or less effective. The European Parliament’s vote which will certainly meet the approval by consumer protectionists leaves the national legislators holding the baby. In the end the different measures adopted by Member States will not necessarily culminate in the approximation of national laws so that it might have been helpful had the European Parliament indicated to the Member States a non-exclusive list of measures. Yet it may be conceded that the European Parliament’s task was not to provide for the unification of the laws of Member States and the Parliament’s approach seems perfectly in line with the principle of subsidiarity of Community action.

According to the draft of the Directive the supplier of goods or services has the obligation to provide, prior to the conclusion of the distance contract, information on his identity and the main characteristics of the goods or services, the price and the arrangements for payment, delivery or performance; contracts of an indefinite duration shall indicate the conditions under which the contract can be annulled. The information must be provided in a clear and comprehensible language, taking into account the principles of good faith in commercial transactions, the principles governing the protection of minors and those who are unable, pursuant to the legislation of Member States, to give their consent. Some of this information must be confirmed in writing and received by the consumer at the latest at the time of delivery.

In the case of distance contracts the consumer has a right of withdrawal which he may exercise within seven working days after he has received the goods or, in the case of services, after the conclusion of the contract or from the day on which he has received the written confirmation of information, however, if the information was received after the conclusion of the contract, on condition that this period does not exceed a three-month period. The right of withdrawal may be exercised without a penalty and without giving any reason. The only costs payable shall be the direct return charges, where appropriate. If the consumer did not receive the written confirmation of information, the period during which the consumer may exercise the right of withdrawal shall be three months, beginning, where the contract relates to goods, with the day of receipt by the consumer and, where the contract relates to services, with the day of conclusion of the contract. In the case of a withdrawal from the contract, the supplier shall reimburse the sums paid by the consumer free of charges except for direct return charges within a period of 30 days. The consumer shall have no right of withdrawal in those cases where the contract relates to services and the performance has begun with the consumer’s agreement before the end of the seven working-day period, or if the price is influenced by fluctuations in the financial market which cannot be controlled by the

82 Article 2 point 1 of the draft Directive concerning distance contracts, OJ 1995 C288/1.
84 Note 83 above, Annex I to Article 2 point 4.
85 Note 83 above, Article 10.
86 Note 83 above, Article 7a.
87 Note 83 above, Article 10 point 2.
88 Note 83 above, Article 4.
89 Note 83 above, Article 5.
90 Note 83 above, Article 6 point 1.
91 Note 83 above, Article 6 point 2.
The supplier, if the goods are specially made or deteriorate rapidly, in the case of contracts relating to unsealed audio or video recordings and records or computer software, CD-Roms or CD-Is, to newspapers, periodicals and magazines, to gaming and lottery services or where books supplied were taken out of their original wrapping. Also any credit agreement in relation to the distance contract shall be subject to the right of withdrawal. However, the right of withdrawal shall not affect any other rights which consumers customarily have. In the case of payment by card the consumer has the right to request cancellation of a payment where fraudulent use has been made of his payment.

The supplier must, in general, execute the order within 30 days or inform the consumer if the performance is not possible and refund any sums paid by the consumer also within 30 days. But the parties may stipulate that the supplier may provide the consumer with different goods or services of equivalent quality and price if the supplier reserved this right in the contract or when the consumer was informed of the unavailability of his order. The new Article 7a of the draft obligates Member States to observe the provisions of the Council 'Television Without Frontiers' Directive which contains special rules concerning advertising, in particular in relation to advertising time.

Also inertia selling shall be prohibited and the consumer shall be exempted from any obligation of payment in the cases of unsolicited supply, the absence of response not constituting consent. The draft Directive provides for a limitation on forum shopping, since Member States shall take measures to prevent the parties from choosing the law of a non-Member country in the case where the contract has a close connection with the territory of a Member State. According to Article 14 of the draft Directive, Member States may introduce more stringent provisions than those contained in the Directive for the purposes of consumer protection. The European Parliament was more confident in self-regulation than the Commission or the Council. The amendment of the draft Directive provides for a complaints system which Member States and professional organisations shall draw up on a self-regulatory basis. It may be hoped that the efficiency of such a system of self-regulation will prevail over an excessively regulated system of advertising in distance contracts and another inroad to the freedom of contract.

The Principles of the Free Movement of Goods and of the providing of Services

Within the internal market of the European Union Article 30 of the Treaty on European Union prohibits quantitative restrictions on imports and all measures having equivalent effect. Articles 59 and 61 of the Treaty establish the principle of the freedom of the providing of services within the Union. National laws which violate these provisions are invalid. In the case in which a field of law is regulated by secondary law, for example by a Directive, Articles 30 or 59 of the Treaty will only be applicable if the harmonisation of the national laws by secondary law did not comprise all legal aspects.

The principle of the free movement of goods.

According to the jurisprudence of the European Court of Justice, Article 30 of the Treaty prohibits any measures of Member States which are liable to restrict the trans-border trade in the internal market either directly or indirectly, factually or potentially. By reason of Article 36 of the Treaty such measures are permissible if they can be based on grounds of public policy, the protection of life and health of humans, animals or plants or the protection of industrial and commercial property. According to the jurisprudence of the European Court of Justice limitations of the interstate trade of the Community have to be accepted for reasons of the maintenance of fairness of trade and consumer protection. Article 30 of the Treaty does not only prohibit national measures which are directed against the importation of goods but also limitations which are applicable to goods of that Member State. The European Court of Justice held that national rules concerning advertising may be subject to the prohibition of Article 30, insofar as they can indirectly reduce the number of sales of foreign goods, because in such a case they would force the foreign producer to adapt the marketing of his goods to the stricter advertising laws of the importing State. However, the European Court of Justice held also that the prohibition of Article 30 of the Treaty is not applicable if the national rules which limit certain forms of marketing restrain the sale of national products similar to those which are imported from other Member States.

92 Note 83 above, Article 6 point 3 which refers to a price which is influenced by fluctuations in the financial market and/or exchange rates and/or prices derived from them which cannot be controlled by the supplier.
93 Note 83 above, Article 6 point 3.
94 Note 83 above, Article 6 point 4.
95 Note 83 above, Article 6a.
96 Note 83 above, Article 8.
97 Note 83 above, Article 7 points 1 and 2.
98 Note 83 above, Article 7 point 3.
99 Council Directive 89/552, as amended, on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, Television Without Frontiers.
100 Note 83 above, Article 9.
101 Note 83 above, Article 12.
102 Note 83 above, Article 15a.
103 Gerhard Schricker, Note 14 above, at 103, no. 194.
104 European Court of Justice of 11 July 1974, Case 8/74, Scotch Whisky, GRUR Int. 1974/467, 468.
105 European Court of Justice of 20 February 1979, Case 120/78, Cassis de Dijon, GRUR Int. 1979/468, 471.
106 Ibid.
107 European Court of Justice of 10 July 1980, Publicity for alcohol, GRUR Int. 1981/190, 391, point 11.
The jurisprudence of the European Court of Justice may be illustrated by the following cases.

(1) In the case *Prohibition of free gifts* different types of reference books should, together with free small dictionaries and atlases, be exported from Belgium to the Netherlands where free gifts were prohibited. The European Court of Justice held that the prohibition of free gifts in the Netherlands was liable to limit the volume of the import of goods, because it affects the possibility for the marketing of the imported articles. In this case the limitation was however, justified by the requirements of consumer protection and the fairness of trade.

(2) In the case *GB/Inno* a Belgian retail trader distributed in Luxembourg advertising brochures which contained comparative indications of prices of competing articles. This form of advertising was prohibited in Luxembourg. The Court held that by reason of Article 30 of the Treaty the national law could not be applied to the sales campaign of the Belgian trader, because the law could not be justified by consumer protection.

(3) Concerning the advertising campaign 'Buy Irish' the European Court of Justice held that a campaign for the promotion of the sale and the purchase of national products was promoted within the framework of a programme which was established and financed by the government of the Republic.

(4) The German Government was held to have violated its obligations arising from Article 30 of the Treaty, when it prohibited the marketing of beer which was lawfully produced in another Member State, but which did not correspond with the German purity laws which stated that beer must be made with water, malt and hops. The European Court of Justice indicated, *obiter dictum*, point 35, that the German Government could have regulated the issue by ordering labelling which would have to indicate the basic ingredients of the drink.

(5) In the case *Lecler* the European Court of Justice held that neither the Treaty on European Union nor the 'Television Without Frontiers' Directive would enjoin a Member State from prohibiting within its territory by laws or bylaws the broadcasting of advertisements concerning the economic sector of the distribution of petrol. The French Decree 92-280 of 27 March 1992 prohibits within the territory of the French Republic the broadcasting of advertising in the economic sector of the distribution of goods. The plaintiff brought an action against the defendants who, relying on the Decree, refused to broadcast the plaintiff's advertising spots concerning the sale of petrol at the stations of his supermarkets. The plaintiff argued that the Decree violated the principle of the freedom of the movement of goods in the Community (Articles 30 and 36 of the Treaty on European Union) and the 'Television Without Frontiers' Directive. Asked for a decision on the construction of the Treaty and on the interpretation of Community law the court held that any measure which is susceptible to affect the trade in goods between Member States either directly or indirectly, really or potentially, has to be considered subject to the prohibition by Article 30 of the Treaty. The court specified that the French Decree related to the modalities of the sale, because it prohibited a certain type of the promotion of the distribution of goods. However, the court explained that national regulations concerning sales or the distribution of goods will, in general, not affect the trade between Member States if these regulations are applicable to all participants of the trade in the Member State and if the regulations concern similarly the distribution of goods of the Member State and of other Member States so that the application of the regulations to the sale of goods originating from other Member States does not concern these goods differently than they concern the goods originating from the Member State. Accordingly, it was held that Article 30 of the Treaty on European Union does not prohibit the restriction of the broadcasting of advertising relating to the distribution of goods by a Member State.

Also the 'Television Without Frontiers' Directive does not suggest the unlawfulness of the French Decree according to Community law. The Court pointed out that the aim of the Directive is the achievement of the free broadcasting of television programmes, but that the regulation of sponsoring and advertising in Article 19 of the Directive would not enjoin Member States from adopting more severe measures.

The principle of the free providing of services

With respect to advertising, Articles 59 and onwards of the Treaty on European Union were applied by jurisprudence in the case of broadcasting services. The principles of this jurisprudence may also be applicable to advertising by means of other telecommunication services such as on-line databases.

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115 Note 52 above.
117 Ibid, point 24, EWS 1995/120, 121.
118 Note 116 above, point 28, EWS 1995/120, 121.
119 Ibid, point 44, EWS 1995/120, 121; Recital 27 of the Directive.
or video-on-demand. Companies may avail themselves of the principle of the free providing of services if they are established according to the laws of a Member State, and if they have their registered office, their main office or the central administration within the Community. There must be a trans-border service. The provisions concerning the free providing of services are directly applicable; however, limitations of the freedom contained in national laws should be repealed by a process of harmonisation of the laws.

The European Court of Justice held that the transmission of broadcasting programmes, including advertising, is a service in the sense of the Treaty provisions concerning the freedom of services. In the case Debaune the Court had specified that national limitations of television advertising cannot be considered as limitations of the principle of the free providing of services, insofar as these regulations are applicable to all television advertising in that state, and based on reasons of public interest.

The European Self-regulation of Advertising

The European Advertising Standards Alliance (EASA) was established in 1991. Its purpose is to bring together the organisations which operate self-regulation in European countries. The organisation represents the interests of its members — the national self-regulatory bodies of European countries — so that it does not serve as a supranational European authority of self-regulation. One of the aims of the Alliance is to promote a system whereby complaints received against advertising in foreign media can be speedily and effectively dealt with by reference to the relevant self-regulatory body in the country of origin of the advertising action. The Alliance is developing a convergence of the principles of self-regulation in the face of a growing number of proposed directives emanating from the Commission of the European Communities in order to promote the role of national bodies of self-regulation.

The Alliance encourages that in the states of its members rules for advertising and self-regulation are adopted which, on practical experience, suit best the needs of the parties concerned, and it co-ordinates the policies of its members if this is desired. The Alliance also facilitates the settlement of cross-border complaints. The principle should be that the advertising is subject to the laws and regulations of that state where the medium which carried the advertising action originates, that is to say where the broadcasting was emitted or where the journal was published. However, some codes of self-regulation apply the principle that the rules of the country shall be applicable to the nationals of which the advertising action was addressed. Beyond, the Alliance offers a place for the discussion of any issues of self-regulation in Europe, whether it involves the advertising industry, consumer bodies or lawmakers.

In the view of the Alliance the aim of the creation of a unitary European code of self-regulation is secondary due to the substantial differences in the concepts of the regulation of advertising in the European countries. The Alliance's vice chairman said: "Viewed in this way, the principle of subsidiarity (which means that Community measures may only be taken if necessary) can be seen as highly relevant to Europe, as it demonstrates that regulatory intervention at Community level, especially where it involves not just broad principles but detailed provisions, is not only less effective than national self-regulatory systems, but also creates problems by attempting to enforce conformity on nations with deeply-rooted differences of culture, tradition and custom'. Beyond this, the Alliance provides a useful service because a lawyer can obtain from its Brussels office the information on national regulations of European countries concerning advertising.

The Outlook

The differences in the national regulations of advertising lead to considerable uncertainties for any company which wants to launch a Community-wide advertising campaign. Particularities of the advertising law in one Member State of the Union may endanger the carrying through of a campaign for the whole internal market. This is a regrettable result, because there is no reason why the standards applicable in the law of consumer protection or of unfair competition or injurious falsehood should differ in the Member States of the European Union. It seems that the Commission has understood this concern. The Commission's Green Paper on Commercial Communication, to be published in the end of March 1996, will hopefully address the need to regulate the law of advertising more comprehensively in order to achieve a full harmonisation of the national laws and bylaws for the purpose of the establishment of the internal market. The term 'commercial communication' is similar to the term 'commercial speech' which was developed by reference to Article 10 of the Convention for the Protection of

120 Gerhard Schröck, Note 14 above, at 104, no. 195.
121 Articles 66 and 58 of the Treaty on European Union.
122 European Court of Justice of 30 April 1974, Case 155/73 Sacchi, GRUR Int. 1974/297; of 18 March 1980, Case 52/79, Debaune, GRUR Int. 1980/608, 609, point 13; also from the Alpine Properties case, European Court of Justice of 10 May 1995, Case C384-93 ([1996] 1 EIPR D—31), it may be inferred that advertising services fall within Article 59 of the Treaty, but may be regulated on public interest grounds.
125 Cross-border complaints concern complaints against advertising which originate from another state, for example in the case in which journals or television programmes which are made and broadcast in one country contain advertising which is also distributed or received in another country and meets with complaints.
126 For example, in the case of the Swiss Code of Self-regulation, see Alliance Director-General's Activity Report 6, March 1995 to May 1995.
128 Alliance of European Advertising Standards, 10 rue de la Pépinière, B-1000 Brussels, Belgium, Tel. (0032) 2-213.78.06, Fax: (0032) 2-513.28.61.
Human Rights and Fundamental Freedoms which is also applicable to communications in commercial relations and accordingly to advertising. The use of the term 'commercial communication' permits the avoidance of the utilisation of the terms 'unfair competition' or 'passing off' and suggests the introduction of a legal concept which will facilitate the necessary legislative measures of the Member States in order to achieve the harmonisation of national laws. It may be expected that the Commission will discuss different categories of commercial communication.

It can be expected that the law of the European Union concerning advertising will be much discussed in the months to come.

129 The view of the Commission is, however, not yet confirmed by the European Court of Justice, see Council of Europe, 'Short Guide to the European Convention on Human Rights', Council of Europe Publishing and Documentation Service, reprint, Strasbourg 1995, at 75 and 76. However, Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms should not be interpreted as permitting a state, in granting a licence, to exclude certain specified categories of advertisements, see X v United Kingdom, 12 July 1971, Yearbook of the European Convention on Human Rights, no. XIV, at § 2.

130 The term 'commercial communication may comprise advertising activities in all its different forms, and a regulation of commercial communications may concern injurious falsehood, personal and comparative advertising, misleading advertising, undue influencing of customers such as hidden advertising, gambling, pyramid selling, unobjective advertising and the protection of minors, predatory pricing and rebates, presents, free gifts, tying sales and particular sales campaigns.