COMMENTS

Claire Miskin and Arnold Vahrenwald

Commercial Communications in the Internal Market – At What Price?

Discussing the European Commission's Green Paper 'Commercial Communications in the Internal Market' the authors advocate that the European Commission adopts a spirited approach when tackling the harmonisation of the diverging national laws and by-laws in this field. The establishment of similar legal conditions for commercial communications will facilitate the development of marketing strategies for the whole internal market and benefit the interests of the industry and the consumer in Europe.

On 8 May 1996 the Commission of the European Communities issued the Green Paper 'Commercial Communications in the Internal Market'.[1] The preparation of the Paper took some time: by 1992 the Commission had already decided to review its policy with regard to commercial communications. The Commission's approach to this controversial subject may be characterised as careful. At that time there did not exist a generally accepted body of law which could be described as the law of commercial communications. The merit of this term is that it bridges a gap between common law systems and codified law systems by creating a new legal category. 'Commercial communications' are the Commission's newest invention. The term was not even mentioned in the indexes to the series of books which, on the initiative of the European Union, dealt with national laws concerning the restriction of acts of unfair competition in the Member States of the Community.[2]

What induced the Commission to create a new legal concept? Nothing in the Green Paper casts any light on the answer to this delicate question. There are, however, a number of advantages to the introduction of a new legal concept. It makes it possible to overcome different national legal traditions, which developed independently in neighbouring countries following the freeing of trade and industry from an economic system dominated by the guilds and which was tailored to meet the needs of national industries in the maintenance of fair competition within national markets. This means that the legal systems regulating what may be loosely described as commercial communications in European countries does not reflect the interests of a pan-European industry but rather the needs of national economies.

The Green Paper attempts a definition of the legal field of commercial communications by reference to the laws applicable in the various national legal systems. The Commission illustrates the importance of commercial communications with economic analysis and theory. The Paper thus provides the foundation on which the legal concepts of commercial communications may rest, so as to forestall criticism and avoid the challenges to which a ready-made proposal in a directive concerning commercial communications by the Commission was necessarily prone. The Paper therefore confines itself to an analysis of economic factors. For good reason the Commission did not indulge in an analysis of the relevant laws of the Member States. Based on economic analysis, the Commission develops the idea that the differences in the laws of Member States which regulate commercial communications may create barriers to transborder communications within the internal market.

The Paper is divided into four parts. Part 1 deals with commercial communications in the European Community. It explains the objectives of the internal market, including the law, potential market benefits and the advent of the information society. Other Community objectives are referred to, such as consumer protection policy, industrial policy, competition policy, protection of public health, audiovisual policy and cultural policy.

Part II of the Paper contains the evaluation of the need for community action. The Commission refers to internal market barriers which the differences in national laws may erect. The evaluation of specific areas for Community action is considered in the third part. The Commission carries out a preliminary review of the disparities between national laws. The final part of the Paper contains proposals for consultation, and discusses the methodology by means of which the measures to be taken are to be analysed. The Commission has attached to the Green Paper a Working Document which explains the economic matrix which underpins the field of commercial communications. National regulations are also referred to in the document, not, however, with the intention of providing an exhaustive overview, a task which overall is unnecessary because the Commission achieves its purpose by pointing out that differences exist. Only as a second step does the Commission suggest the proposal of rules with the aim of eliminating barriers,

1 Commission of the European Communities Green Paper 'Commercial Communications in the Internal Market', document COM (96) 192 final of 8 May 1996 and Working Document XV/9579/96.

2 *La Répression de la Concurrence Déloyale dans les Etats Membres de la Communauté Economique Européenne, Etude Effectuée sur Mandat de la Commission de la Communauté Economique Européenne par le Max-Planck-Institut für ausländisches und internationales Patent-, Urheber- und Wettbewerbsrecht à Munich*, Eugen Ulmer, 1964 (Italy), 1966 (France), 1968 (Germany).

the implementation of which remains a matter for the Member States.

What Are Commercial Communications?

The Commission uses the following definition of the term 'commercial communications': 'All forms of communication seeking to promote either products, services or the image of a company or organisation to final consumers and/or distributors'. This definition of the term appears to limit the scope of 'commercial communications', since it excludes any information by a company which is not related to the promotion of its own image. In this way communications whose purpose is trade libel or injurious falsehood are excluded. The Paper is not, however, concerned with the establishment of a precise set of legal rules governing different aspects of commercial communications. The Commission limits itself to a phenomenology of commercial communications which merely paves the way for further action in this field. Therefore the Paper does not discuss possible new laws; instead it explains the economic framework within which commercial communications occur, and it attempts to clarify whether different national legal systems may create barriers for commercial communications within the internal market.

Apart from advertising law in the narrow sense, the regulation of commercial communications at Community level affects the common law concept of passing off and the continental concepts of the prohibition of unfair competition.[3] The concept of the law of commercial communications will necessarily encompass these different concepts, but it is not the purpose of the Green Paper to suggest the replacement of such national legal concepts by a comprehensively developed new body of law. The Paper's aim is a discussion of the necessity for Community action in this field.

The result of the analysis which the Commission presents in the executive summary of the Green Paper is rather trite:

> – Cross-border commercial communications services in the internal market are a growing phenomenon.
> – 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.
> – 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.
> – 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.
> – The availability of information about regulatory measures and market developments is becoming increasingly important at national and Community level.

The Commission thus concludes that existing regulations may have to be reviewed where they are shown to hamper cross-frontier activity, that the potential development of new barriers within the internal market needs to be tackled and that future national and Community measures must be developed in conformity with both internal market and other Community objectives.[4]

Commercial communications which are developed for the internal market will necessarily have cross-frontier effects. Accordingly, advertising or marketing strategies necessarily will have to take into account the relevant laws of the countries of the European Union.[5] In this respect, a multiplicity of differences between national regulations will have the effect of hampering cross-frontier activities relating to commercial communications and the attempt to identify all the relevant national legal provisions which could create barriers for cross-frontier activities might be a Herculean task. Taking into account the principle of subsidiarity, the purpose of an efficient regulation of commercial communications within the European Union appears to be this: the identification of national regulations which adversely impede the establishment of the internal market, but careful definition of areas in which the laws should be harmonised and the provision of guiding principles which inform national lawmakers. Using the ground-breaking Directive 'Television without Frontiers',[6] the European Union should lay down certain minimum conditions with which companies or entities involved in commercial activities within the internal market should comply and in respect of which Member States should be obliged to legislate.

The Legal Framework for Commercial Communications

Which communications are commercial and which need to be regulated? In the Green Paper the Commission has drawn back from a comprehensive identification of the legal areas which might need harmonisation. Subjects which are at the heart of the laws which regulate commercial communications are:

- causing and repeating errors in information about commercial matters;
- defamation of a competitor;
- injurious falsehood;
- personal and comparative advertising;
- misleading advertising;

3 Arnold Vahrenwald, 'The Advertising Law of the European Union', [1996] 5 EIPR 279 to 291 at 291.

4 Green Paper, Note 1 above, at 1(c) and 1(d).

5 Concerning the advertising strategy of the Benetton company see, for example, Arnold Vahrenwald, Note 3 above, at 281.

6 Council Directive of 3 October 1989 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 (89/552), 'Television without Frontiers', OJ 1989 L298/23.

- undue influencing of customers, in particular:
  - hidden advertising;
  - harassing advertising;
  - psychological pressure or incitement to buy;
  - gambling;
  - pyramid selling;
  - unobjective advertising;
  - protection of minors;
- violation of basic values and dissocial behaviour in respect of principles of a fair business conduct;
- predatory pricing and rebates;
- presents, free gifts, tying sales;
- sales campaigns;
- rules for commercial communications in the media, in particular concerning:
  - the press;
  - radio broadcasting;
  - television broadcasting;
  - cable and satellite television broadcasting;
  - interactive media such as:
    - services on demand;
    - teleshopping;
  - sponsorship.

Obviously, differing national rules relating to all these subjects may create obstacles to a unitary strategy for commercial communications within the internal market. Taking into account that the law of commercial communications is not yet considered as a legal category in the Member States of the Community, it is not surprising that the relevant national laws and by-laws are scattered throughout the legislation. This in part explains why the Commission's approach is not so much directed towards an analysis of the different treatment of commercial communications by national laws in the internal market, but rather towards an evaluation of the economic factors. These factors point to an increase in the importance of transborder communications from which the Commission infers a trend towards a Community-wide market of commercial communications. The Commission explains that commercial communications are covered by a multitude of legal points of view and a wide range of public-interest objectives depending on the policy of the relevant Member State, and that, accordingly, these differing regulatory approaches will increasingly come into confrontation with each other, given the increasing transborder nature of commercial communications services.[7]

Because some of the benefits of the harmonisation of laws rules will be a reduction of legal search costs, marketing costs and distribution costs, the facilitation of commercial communications in the internal market may have the effect that companies are prepared to increase their related activities so that the expenditures for Community-wide campaigns will rise. Thus the harmonisation may have the beneficial consequences of a rise in advertising expenses per capita in the European Union to the level of countries such as Japan or the United States. This in turn could lead to an expansion beyond the borders of the internal market to global markets, resulting in an increase in wealth of the European Union.

7 Green Paper, Note 1 above, at 20.

The Internal Market and Commercial Communications

The figures presented in the Working Document show that the sums for advertising spent per capita in the European Union are only half of the amount spent in the United States and even the relevant figure concerning Japan is approximately 50 per cent higher than in the European Union.[8] This means that the European advertising industry still has the potential for growth, even if it is asserted that the harmonisation of the laws concerning advertising will lead to considerable savings by the industry in expenditure on advertising.[9] A company may be expected to increase its expenditure on commercial communications if it can be assured that its activities may be expanded beyond the national territory to the whole of the internal market. Accordingly, it is in the interest of the organisations involved in the provision of services relating to commercial communications to support the Commission's activities towards the elimination of barriers within the Community instead of seeking protection against competition behind national borders.

The infrastructure of commercial communications in Europe

In the course of preparing the Green Paper the Commission carried out surveys which showed that 99 per cent of respondents who were service suppliers and who were seeking to operate across the internal market identified specific regulatory difficulties, and 40 per cent 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'. The Commission noted that respondents were unanimous in considering that 'it is far less costly to offer effective large scale commercial communications services in the USA than in Europe'.[10] Thus promotional activities within the Community are often limited to the national territory of a Member State, taking into account the (legal) problems which a Community-wide campaign encounters. The increasing importance of interactive media for commercial communications will change this structure insofar as it facilitates transborder communications at low costs.[11] To benefit from the technical possibilities, the law should be adapted to favour the creation of a competitive industry of commercial communications in the internal market of the Community.

The need for the harmonisation of national laws

In the evaluation of specific areas for Community action, the Commission suggests that 'any Community

8 Working Document, Note 1 above, at 21 and 23; the statistics represent the relevant figures until 1989.

9 Arnold Vahrenwald, Note 3 above, at 281, referring to the Coca Cola company's expectation to save some US $50 million if it could synchronise its US advertising spots in the internal market.

10 Green Paper, Note 1 above, at 7.

11 Working Document, Note 1 above, at 39; Arnold Vahrenwald, 'The Law of On-line and Off-line Publishing', *Informatica e Diritto*, 1/1996, Advertising and Trade Marks in On-line Publishing.

action must be undertaken on a case-by-case basis following a thorough examination of the proportionality of measures', and it recommends the drawing up of a list of priority areas to prevent new barriers from being created. This is a cautious approach which needed a few examples to explain it. However, the Commission has not done this. Instead the reader of the Green Paper is fed with theoretic appraisals of assessment criteria. The Paper finds: 'For any proposed Community regulatory action the identification of objectives allows the appropriate legal basis to be determined and permits compliance with the principles of subsidiarity and proportionality to be checked'. Another statement which appears to be obvious on its face is: 'The specifications, definitions, distinctions, criteria, etc. that are used to determine the content of the proposed measure should be directly linked to its objective. If they were not, the measure could be presumed to be arbitrary'. Instead, the lawmaking process in the Community should be creative. This was certainly the position in the case of the Directive 'Television without Frontiers',[12] and it is suggested that the future activities by the Commission in the field of commercial communications should be guided by the slogan 'communications without frontiers'.

Conclusions

A Community policy concerning commercial communications in the internal market should be informed by the necessity to guarantee similar legal conditions for the operation of undertakings in the Member States. If a company can be assured that its national advertising or marketing strategy may, without risk of violating the law of other Member States, be extended to the whole of the internal market, it is likely that it would be prepared to infiltrate these markets based on a transborder strategy of commercial communications. The beneficiaries will be not only the company concerned but also the organisations providing commercial communications services, the consumer and the economy of the European Union.

CLAIRE MISKIN
CentreBar
London
ARNOLD VAHRENWALD
CentreBar
Munich

12 Note 6 above.

Pat Treacy and Justin Watts

Exhaustion of Rights Revisited

The Advocate General's Opinion in Merck v Primecrown[1]

This Opinion is given in the context of an Article 177 reference to the European Court of Justice ('ECJ') from the English High Court. The reference was made by Jacob J and arises in the context of two actions for patent infringement in the United Kingdom. The reference raises two issues relating to the free movement of pharmaceutical products between Spain and Portugal, on the one hand, and the rest of the European Community on the other. The first, and less interesting, issue relates to the precise date of expiry of the transitional provisions which remove pharmaceutical products coming from Spain and Portugal from the ambit of the rules on the free movement of goods. The second, and more fundamental, issue concerns the general rules which relate to parallel imports of pharmaceutical products. In essence, the ECJ was asked to review and revise its case law relating to the exhaustion of rights as laid down in *Merck v Stephar and Exler*.[2] The Advocate General's opinion is that the ECJ should reverse its previous case law; if adopted by the ECJ, this would mark a fundamental change in approach.

Factual Background

The facts in both referred cases are similar (both to each other and to the facts in *Merck v Stephar*). The applicants (Merck and Beecham) claimed that the defendants (Primecrown and Europharm) had infringed their respective patents for certain pharmaceutical products by parallel importing those products from Spain and/or Portugal and selling them in the United Kingdom. The pharmaceutical products in question are protected in the United Kingdom by patents.

Neither Spain nor Portugal permitted the patenting of pharmaceutical products prior to their accession to the European Communities. In view of that fact, when those countries joined the EC, the application of the normal rules on the free movement of goods was postponed in relation to pharmaceutical products. Thus patent holders were entitled to rely on their patent rights in other Member States to prevent the import of pharmaceutical products from Spain and Portugal. The period of postponement was stated to last 'until the end of the third year after [Spain/Portugal] has made these products patentable'.

Pharmaceutical products became patentable in principle in Spain on 7 October 1992 and in Portugal on 1 January 1992. However, many products (including those which are the subject of this case)

1 Joined Cases C–267/95 and 268/95: *Merck & Co. Inc and Others v Primecrown Ltd and Others; Beecham Group plc v Europharm of Worthing Ltd.* Opinion of Fennelly AG delivered 6 June 1996, not yet reported.
2 Case 187/80 [1981] ECR 2063.