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### **Commercial Communications as a Solution to Jurisdictional Problems in the European Information Society**

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#### **Abstract**

The Commission's Green Paper on Commercial Communications in the Internal Market (COM(96)192, May 1996) represents an attempt to rationalise the legal concepts necessary for the functioning of the European Information Society. By moving away from the constraints of restrictive technical definitions towards broader 'sui generis' concepts, progress can be made towards a more coherent commercial and legal environment. The alternative solution of harmonisation within the range of diverse national legal systems would retard the attainment of the single market. To a certain extent therefore, the Commission is engaging in a process of 'upwards harmonisation'. Rationalisation, by the articulation of concepts such as Commercial Communications, will circumvent some of the difficulties posed by harmonisation in relation to commercial transactions. In addition, it will begin to engineer concepts which are suitable for the post-national jurisdictional world of Information and Communications Technology.

The aims of the Green Paper on Commercial Communications will be considered in the light of the recently released Commission Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation (COM(97)623, December 1997). It is argued that to maintain convergence in these areas, an approach which takes on board the need for dynamic legal concepts will be necessary if jurisdictional uncertainty is to be avoided.

If the notion of Commercial Communications is an attempt to provide such a unifying concept, then such rationalisation will pave the way to the development of an effective solutions, which are not premised on outdated concepts. This paper will consider the implications of the design of new macro-legal concepts, for legal education and practitioners. It will attempt to assess the impact on other strategies for coping with the need to re-interpret the orthodox conception of jurisdiction.

The challenge of regulating ever developing cross-border industries is one known well to legislators. The Commission, in its recent Green Paper on Commercial Communications in the Internal Market, can be seen to have adopted a new approach to ensuring that cross-border provision of such services is unhampered by national regulation. This new approach involves 'upwards harmonisation' - a rationalisation of concepts, rather than the attempt at a difficult and possibly contentious harmonisation of existing national regulation. It will be argued that such a move towards the creation of over-arching legal concepts will prevent jurisdictional difficulties in the regulation of the emerging European Information Society.

In this paper, the term jurisdiction will not be limited to the narrow definition assigned to it by private international law, namely the court with competence to hear a case. With the emphasis on regulation rather

than *ex post facto* redress, it is more appropriate to consider jurisdiction as a wider issue concerning the means of regulation and the forum for regulation of the Commercial Communications sector.

It will be argued that the Green Paper must be seen as more than a just another step in the Commission's piecemeal approach to the regulation of the internal market. Instead, the approach adopted in the Paper demonstrates a new way of thinking by the Commission. It will be shown that the application of this approach across the regulation of information and communication technology, and in law generally, will pave the way to integrated, coherent and rational regulation of the European Information Society, and will avoid the jurisdictional problems which are emerging.

This paper will first outline the Commission's proposals for action in the area of Commercial Communications, before considering the implications of the approach adopted. Finally, the application of such an approach to the Green Paper on the Convergence of Technology will be considered.

### **The Green Paper on Commercial Communications in the Internal Market**

The Commission Green Paper on Commercial Communications in the Internal Market [1] was released for comment in May 1996. This followed a preliminary study undertaken by the Commission, based on market analysis and surveys, in November 1992. The Commission recognised a number of key points. These are:

- that cross-border Commercial Communications are becoming more common.
- that divergence between the national regulatory frameworks will create barriers to the free movement of Commercial Communications services, and that the risk will be increased in the development of new services and media in the Information Society.
- that differing national regulation of Commercial Communications will make consumer redress difficult in terms of jurisdiction and substance.
- that the importance of the provision of information concerning Commercial Communications regulation is growing. [2]

The Working Document [3] accompanying the Paper contains a detailed economic analysis of the need for regulation in this particular sector. In particular it points to the differing standards, mechanisms and aims of regulation in the jurisdictions of the European Union.

The economic importance of Commercial Communications is made clear in the Working Paper: in 1993, advertising and direct marketing were estimated to be worth over 70,000m ECU in the European Union, in addition to the added-worth and other associated economic benefits for business in Europe. The Commission also cites the fact that over a million Europeans work in the industry.

It was clear to the Commission that barriers to the provision of cross-border services were emerging in the areas of sales promotion generally. A review of the existing Member State regulation of this area led to the conclusion that the national laws were likely, from three aspects, to cause barriers to the cross-border provision of Commercial Communications' services. Firstly, it was seen that the methods used for regulating the relevant industries varied from one Member State to the next; secondly, the standards protected by regulation varied between jurisdictions; and thirdly, the rationale underlying the regulation of the sector differed between countries.

In Part II of the Paper, the Commission recognises that there are three separate aims which are being pursued by Member States in the regulation of this area. The first it describes as "Unfair competition Law", which represents the Member State's desire to "prevent abuses of the commercial and industrial freedom to compete". [4] Even this subdivides according to the methodology employed: Denmark, Finland and Sweden are found to regulate market behaviour generally, whereas Belgium controls more specific commercial practices. The Commission also recognises that in some countries (Spain and Portugal are given as examples) sections of law originally grounded in the regulation of unfair competition have become areas of action in their own right. The second rationale identified by the Commission is that of "Consumer Protection Law". This underlying rationale underpins areas of regulation in some Member States, with Sweden and Greece stated as examples. Thirdly, the Commission sees "the protection of the wider public interest" as an underlying rationale in some Member States. This wider public interest may serve to promote a number of public policy objectives. The Commission cites as examples human rights protection, public health and safety, protection of minors, protection from media domination and protection of culture, spiritual identity and

language.

The consequence of the disparity of the objectives pursued by Member States is to make harmonisation of regulation unfeasible without protracted negotiation and compromise. Economic analysis of the Commercial Communications sector shows that spending on advertising in Europe (in 1989) was only half that of the US, when measured on a comparable basis. The conclusion is that the sector is underdeveloped in Europe. [5] It must therefore be recognised that a regulatory framework which promotes growth of the sector is both necessary and urgent.

Given the recognition of such differing patterns of regulation throughout the Member States, it is apparent that an attempt at substantive harmonisation of the sectors involved would be contentious and would inevitably retard the adoption of a framework promoting the provision of cross-border services within the Internal Market. In order to make progress towards a rational system of regulation, the Commission has not attempted a detailed review of the existing national laws with a view to harmonisation. Instead, it undertakes an analysis of the economic situation underlying the Commercial Communications sector as a basis for Community action.

The Follow-up Communication to the Green Paper, [6] in which the Commission reviews the comments of the institutions, the Member States and other interested parties, has recently been released. It shows general acceptance of the approach of the Commission to regulation of Commercial Communications at the European level.

The remarkable point of the Green Paper is its scope. It would have been possible for the Commission to use standard, historical definitions of the areas under which it thought action may be necessary. The Community has already legislated in a number of related areas. [7] Instead, a new concept, 'Commercial Communications', was engineered by the Commission. The Green Paper defines this as

*"All forms of communication seeking to promote either products, services or the image of a company or organisation to final consumer and/or distributors".* [8]

The sector therefore includes advertising, direct marketing, sponsorship, sales promotions and public relations. Packaging was originally excluded in the Green Paper, but with the growth of 'on-pack' promotions, the Commission has in the Follow-up Communication accepted its inclusion. As a general point, it should be noted that the Commission have adopted an expansive definition of the scope of the proposed action, which allows sufficient flexibility to accommodate future development in both the techniques and media to be used in Commercial Communications. Also, the definition is neither method-specific, nor medium-dependent - the Green Paper proposes a regulatory regime which is independent of the type of promotion and the method of delivery. With the convergence and combination of both techniques and media, this is to be welcomed.

In their commentary on the Paper, Miskin and Vahrenwald ask

*"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."* [9]

I will argue that the answer to their question is implied in the Commission's new approach, rather than being explicitly contained in the Green Paper. That approach will next be considered.

### **The Commission's "New Approach"**

It is argued that the adoption of such dynamic concepts as represented by the idea of Commercial Communications, it is possible to avoid problems often associated with jurisdictional dispute. With the recognition in the Working Paper that the Member States of the European Union have each approached the regulation of the sector with different aims and priorities, it would be surprising to find consistent and complementary rules existing from state to state.

The Commission puts forward three main proposals in the Green Paper, all of which have been accepted in the post-consultation Communication:

1. The adoption of transparent and objective methodology for ascertaining whether Community action is necessary in a particular area;
2. The creation of a Commercial Communications Expert Group to promote both administrative co-operation between the Commission and Member States, and to stimulate dialogue generally as to the way forward in regulating the sector;
3. The establishment of a Commercial Communications Information Database in order to facilitate access to relevant national law, EC law and to self-regulatory codes of practice, and a Commercial Communications Contact Point to allow interested third parties a central point of focus.

The Commission has rejected an approach based on general harmonisation of Commercial Communications sectors. It recognises throughout the Green Paper and Follow-up Communication that the concept of proportionality must be applied to Community action. The fact that in their replies to the Paper, Member States and interested parties alike were willing to accept the adoption of a new macro-concept to allow regulation of the sector, demonstrates that such an approach is successful. It would be hard to imagine that there would have been general approval for a detailed harmonisation of any of the areas covered by the Green Paper.

An approach based on general harmonisation of existing national rules would necessarily involve an attempt to realign Member States' regulation into a single, common structure. In order to do this, the Commission would have to lay down specific rules in each area. With the pre-existing national regulatory structures, it would be difficult for the Commission to adopt anything other than industry-specific and medium-specific regulation. Several criticisms may be levelled at such an approach. At a time when the distinction between advertising, sales promotion, direct marketing and public relations generally is becoming blurred, and at a time where the industry is evolving cross-media services, such a move would operate to restrict the market. Further, regulation will always lag technological development. As a consequence, the concepts adopted by the law may be unlikely to be relevant to the current and future practices involved in Commercial Communications. Finally, narrow technical definitions are open to attempts at avoidance. This may allow anti-competitive practices to retard the achievement of a single market. For an effective and relevant regulatory framework to exist, this possibility must be minimised.

An important hurdle which must be overcome if a successful regulatory system is to exist in disparate and evolving areas such as Commercial Communications is the tendency of the lawyer to want to hone legal concepts into sharp definition. This is particularly true of Common Law systems, but it is a danger in Civil Law legal culture also. Professor J L Austin is attributed as saying that we may use

*"a sharpened awareness of words to sharpen our perception of the phenomena"*. [10]

However, the attempt to produce such precise definitions in areas of existing disparity and continuing change only retards the law from developing a rational system of regulation. Instead, workable *sui generis* concepts are required which will let the sector evolve without regulatory resistance. Finely-drawn technical distinctions are quickly overtaken by commercial and technological developments, with the result that the regulatory system will cease to promote evolution and will in itself become a barrier.

Further, any attempt to adopt narrow technical definitions in the regulation of a sector such as Commercial Communications inevitably leads to differing interpretations of the concept's application. Where the application of law depends on the knife-edge definition of a concept, the possibility of one Member State being swayed by particular national economic, social and cultural values is significant. This would make the incidence of conflict between national legal systems all the more likely, giving rise to jurisdictional uncertainty.

Although the Green Paper is primarily concerned with the regulation of Commercial Communications, it nonetheless recognises consumer redress as a relevant and significant barrier to the cross-border delivery of such services. Where such redress leads to court action, it will be important for the jurisdictional issues to be sorted out with certainty and transparency. Adoption of macro-concepts will preclude the problem known as 'classification' in private international law. The issue of classification arises because the allocation of a particular legal conflict to a legal system is carried out by firstly categorising the problem in terms of its nature, and secondly, by applying the relevant choice of law rule to the question.

However, it is not always true that two legal systems will categorise a legal dispute along the same lines. As an example, misrepresentation may be treated as a contractual issue by some jurisdictions, but as a matter of

delict or tort in others. The adopted solution to such questions generally in national systems of private international law is to undertake classification by the *lex fori*, the law of the state in which the court happens to be. The adoption of a largely arbitrary solution and the lack of certainty that results is not conducive to a satisfactory system of redress. However, the issue of classification can be avoided if the legal systems in question are prepared to adopt common concepts. Such concepts must be both rational and dynamic in order to be acceptable to Member States and not to operate as barriers to the attainment of the single market.

### **Implications for The Green Paper on the Convergence of Telecommunications, Media and Information Technology Sectors [11]**

In December 1997 the Commission released its 'Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation'. The Green Paper reviews the current technological and economic reality of convergence, and concludes that convergence will lead to changes in the way business is conducted and in the way that citizens interact with society. However, the Green Paper falls short of a detailed analysis of the implications for the legal regulatory framework. Instead, it opens a discussion of the ways forward, recognising that the issue of convergence will be complex and far-reaching.

The Commission would do well to adopt an approach based on upwards harmonisation of the concepts involved in the regulation of information and communication technology. Second-guessing the progress of technological development in the future will not ensure that Europe has a legal framework which permits growth and innovation in the service sector, particularly in the light of the United States' threatened domination of the market. [12]

In comparison with the many sectors making up 'Commercial Communications', the European Union does not have to contend with divergent national regulatory systems concerned with the convergence of information and communication technology. The Commission recognises the need for minimum regulation, solely to meet well-defined public interest objectives and the goal of an open and competitive market. What is needed is a conceptual framework in which information and communications technology can develop. The adoption of a legal framework based on technical definitions will become outdated quickly, and will constrain the evolution of the European Information Society. It is argued that the best approach will be to construct new, flexible and dynamic concepts which will preclude jurisdictional uncertainty as technology progresses. It is all the more important for Europe to provide a competitive legal environment in light of the United States' declared wish to adopt permanent jurisdiction over the internet.

### **Conclusions**

If the European Information Society is to be allowed to develop without the obstacles of jurisdictional uncertainty, it is necessary for the European Union to adopt a regulatory framework which will accommodate the inevitable technological changes into the new millennium. The ability to regulate across services and media which are converging, merging and emerging requires a new approach.

In other areas, the articulation of new macro-concepts has had a profound effect. As an example, the linking of computers together would not have had the significance it now has if the concept of 'internet' had not been created. The reason why the questions 'what is the internet?' and 'where is the internet?' command vague answers is because the internet is the concept of linking networks, rather than anything physical in itself.

It is argued that the ability to look up and find new global concepts which will rationalise legal regulation, in addition to the tendency to look down at the minutiae of the law, will lead to better law-making on the part of legislators, and better analysis of the law by practitioners and academics.

The Commission's creation of a new, wider legal concept of 'Commercial Communications' has paved the way for the development of a rationalised regulatory framework at the European level. In the Green Paper on the Convergence of Technology, the Commission recognises this approach as a possibility in the area of information and communication technology, and comments that "This option would require a broader definition of communication services to supersede those of telecommunications and audiovisual services with Community legislation." [13] The Commission, by this route, will save itself from trying to regulate within ever-blurring boundaries and within an ever-changing sector.

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## Notes

- (1). COM(96) 192, May 1996
  - (2). Executive Summary to the Green Paper, Note 1 *supra*.
  - (3). Working Document XV/9579/96
  - (4). Green Paper, Note 1 *supra*, at p.1
  - (5). Working Document, Note 3 *supra*, Figure B.3, 'Advertising spend per capita in the EU in ECU as compared to the US and Japan', p.23
  - (6). "The Follow-up to the Green Paper on Commercial Communications in the Internal Market", Communication from the Commission to the European Parliament, the Council and the Economic and Social Committee, March 1998
  - (7). e.g. Misleading Advertising Directive 1984 (84/450/EEC), Data Protection Directive 1995 (95/46/EC)
  - (8). Green Paper, Note 1 *supra*, at p.4
  - (9). Miskin C, Vahrenwald A, *Commercial Communications in the Internal Market - At What Price?*, [1996] 11 EIPR 621, at p.621
  - (10). quoted in the *Preface* to Hart H L A, *The Concept of Law*, Clarendon, 1961
  - (11). COM(97) 623, December 1997
  - (12). Joint EU and Member State Response to the US Green Paper on Internet Governance adopted at the Telecommunications Council, 26 February 1998
  - (13). Green Paper on the Convergence of the Telecommunications, Note 11 *supra*, Chapter V, at p. 24.
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