COMMISSION OF THE EUROPEAN COMMUNITIES

COM(94) 151 final - COD 343

Brussels, 21.04.1994

Amended proposal for a

EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

Concerning comparative advertising and amending Directive 84/450/EEC concerning misleading advertising

(presented by the Commission pursuant to Article 189 A (2) of the EC-Treaty)

[redacted]

EXPLANATORY MEMORANDUM

INTRODUCTION

Following the opinions delivered by the European Parliament[1] and the Economic and Social Committee[2] on the proposal for a Council Directive concerning comparative advertising and amending Council Directive 84/450/EEC concerning misleading advertising[3], the Commission is called upon to adopt a modified proposal, in so far as it intends to accept the proposals and, where necessary, to make other changes to its initial proposal.

Furthermore, as part of the debate on the extent and practical application of the principle of subsidiarity, the Commission has included this proposal among those texts which it undertook at the Council meeting in Edinburgh to examine in greater depth, with a view to withdrawing provisions which would go into excessive detail in relation to the objective pursued and to establishing general principles to be given more detailed form by Member States[4].

In the case of comparative advertising, the Commission has concluded, following an in-depth discussion, that the essence of the proposal, namely harmonisation of the regulations governing the fairness of comparative advertising, must be maintained and that, in principle, a proposal modified in the light of amendments proposed by the European Parliament, of the opinion of the Economic and Social Committee and of the debates at Council level, may be presented in accordance with Article 189a(2) of the TEU.

1. GROUNDS FOR THE PROPOSAL IN TERMS OF SUBSIDIARITY

a) What are the objectives of the measure envisaged in relation to the Union's obligations?

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1 Opinion of 18.11.92, PV 38 11 (EP 162.994)

2 OJ C 49, 24.2.1992, p. 35.

3 OJ C 180, 11.7.1991, p. 14.

4 Conclusion of the Presidency. The European Council of Edinburgh, 11/12 December 1992; Document SI(92) 1050, section A Annex 2, page 3.

R. The objective of the measure is to facilitate the creation and functioning of the internal market at a high level of consumer protection by approximating laws governing comparative advertising; hence the measure will encourage the free movement of advertising services in so far as they will be governed by a harmonised regime in all the Member States.

b) Is the envisaged measure the exclusive competence of the Union or a competence shared with the Member States?

R. The harmonisation of Member States' laws governing comparative advertising is an exclusive competence of the Union.

c) What is the Community dimension of the problem?

R. The current situation in which comparative advertising is authorised in certain Member States and banned in others not only creates obstacles to the free movement of goods and services but also puts consumers, advertisers and publicity workers in certain Member States at a disadvantage, and the medium used (press, radio or television) leads to substantial distortions in competition.

d) What is the most effective solution when the Union's instruments are compared with those of the Member States?

R. Harmonisation of legislation relating to comparative advertising in order to ensure that the consumer's right to information is respected and that appropriate safeguards are established to avoid disputes between advertisers resulting from incompatible legislation.

e) What is the concrete added value of the Union's envisaged measure and what would it cost to do nothing?

R. Given the entry into effect of the Treaty on European Union, the envisaged measure should make it possible to provide European consumers with better information, to stimulate competition and to cope with the rapid development of new communication techniques.

To do nothing would deprive consumers of a useful source of information in making a rational choice and would create obstacles to the free movement of products and services and hence adversely affect free competition.

f) What instruments are at the Union's disposal?

R. The directive, because it is a question of amending an already existing directive.

[redacted]

g) Are uniform rules necessary or is it enough to have a directive laying down general objectives, leaving implementation to the Member States?

R. A directive is sufficient.

2. ELEMENTS OF THE INITIAL PROPOSAL CONTAINED IN THE AMENDED PROPOSAL

The title of the proposal remains unchanged. This also applies to the definition of comparative advertising.

As to the means for controlling advertising (Article 1 (4)), given that such means have already been established by all the Member States in accordance with the provisions of Directive 84/350/EEC[5] and that they are functioning properly, it is not considered necessary to amend the text of the initial proposal which extends to comparative advertising the scope of the provisions applied to misleading advertising.

Likewise, Article 1 (6) concerning the validity of voluntary control of misleading advertising and comparative advertising by independent bodies remains unchanged.

The Commission considers that systems for the voluntary control of advertising should be encouraged, as recognised in the sixteenth recital of Directive 84/450/EEC; the fact that Article 5 of this Directive will also apply to comparative advertising is proof that the Commission is continuing to encourage such systems, particularly if account is taken of the principles of subsidiarity and proportionality; the Commission therefore considers it unnecessary to stress this aspect any further in the modified proposal.

The reversal of the burden of proof established by Article 6 of Directive 84/450/EEC also applies to comparative advertising. The Commission considers that maintaining this principle is fundamental, hence the explicit reference made in the new eleventh recital of the modified proposal.

Finally, it has been agreed that the minimal character of the provisions relating to misleading advertising shall not be applicable to provisions governing comparative advertising, for the reasons already set out in the explanatory memorandum attached to the initial proposal.

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5 OJ L 250 of 19.9.1984, p. 17.

3. THE AMENDMENTS INTRODUCED

Recitals 3, 6 and 11 have been amended in order to bring them into line with the Parliament's amendments accepted by the Commission, concerning the conditions for authorising comparative advertising;

The amendments contained in recital 4 are designed to refer specifically to obstacles to the principle of free movement and in particular the freedom to provide services relating to comparative advertising.

Recital 12 has been amended because it was considered necessary to emphasise the fact that reversal of the burden of proof - one of the mainstays of Directive 84/450/EEC - also applies to comparative advertising;

Recital 14 has been amended, at Parliament's request, in order to establish clearly the relationship between comparative advertising and the advertising of certain specific products or services;

As regards recital 15, it summarises the elements taken into consideration in order to bring the proposal into line with the subsidiarity principle.

As regards the articles, the amendments concern Article 1 (3) and (7) and Article 2.

4. COMMENTS ON THE AMENDMENTS

a) Reducing the scope of the text

However, it is not simply a question of modifying the text in accordance with the usual principles. Under the criteria set out in the document submitted to the Edinburgh Council, it was considered necessary to reduce the number of subjects covered in the proposal.

The Commission has observed that the provisions concerning comparative tests, which are only indirectly linked to comparative advertising, may be completely removed from the text, not because they would be without foundation but because they do not appear to be strictly necessary in order to arrive at the legislative goal as set out and justified in the initial proposal[6].

This partial restructuring of the text involves the deletion of the ninth recital and of Article 3a(2) of the initial proposal. Amendments numbers

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6 COM(91) 147 of 21.6.1991.

4 and 14 put forward by Parliament and received favourably at the time by the Commission are now therefore superfluous.

The text is therefore completely in accordance with the requirements of the principle of subsidiarity (see new fifteenth recital).

b) The limits of comparative advertising

As the European Parliament has pointed out, the use of comparative advertising must be subject to strict limitations. While ensuring that the proposal is not completely stripped of meaning, the Commission has therefore, after an in-depth discussion as announced at the Edinburgh Council, accepted a number of suggestions from Parliament, reinforcing the text to this effect (see annexed tables). In particular, the new wording of Article 3a broadens the criteria set out in the initial proposal in order to ensure fairness in comparative advertising. The new subparagraph d) has been introduced to clarify an aspect which was also raised by the Economic and Social Committee: when a comparative reference is made to a service, it should relate only to the characteristics of the service itself and not to the intellectual qualities of the provider, which cannot be subject to comparison.

A new paragraph 2 has been introduced in Article 3a at the request of Parliament, with the content having been specified by the Economic and Social Committee in its opinion: if "objective truth" is the guiding principle in the formulation and use of a comparative advertisement, this must also include the full "actuality" of the statement at the time it is disseminated; this applies particularly in the case of products and services which are the subject of a special offer or where the offer is of limited duration.

c) Relationship with sectoral advertising

Both the European Parliament and the Economic and Social Committee have stated that they are particularly concerned with problems which might arise owing to the existence of specific regulations concerning advertising for items such as medicaments, tobacco products or foodstuffs. The Commission agrees with the opinion of the two institutions in so far as, in areas in which advertising is subject to partial bans or other more stringent restrictions, comparative advertising must also be governed by the same rules. Article 7 (3) has ben introduced precisely in support of this concept, which was already implicit in the initial proposal.

PARLIAMENT'S OPINION

Amendment No.	Initial proposal	Accepted by the Commission	Integrated (New numbering)
1	-	Yes	-
2	Recital No 3	Yes partly	Recital No 2
3	Recital No 6	Yes partly	Recital No 5
4	Recital No 9	No	
5	Recital No 12	Yes	Recital No 10
6	Recital No 13	No	
7	Recital No 14	No	
8	-	Yes	Recital No 13
9	Article 1.3	Yes partly	Article 1.3
10	Article 1.3	No	
11	Article 1.3	Yes	Article 1.3
12	Article 1.3	No	
13	Article 1.3	No	
14	Article 1.3	Yes partly	Not integrated (subsidiarity)
15	Article 1.3	No	
16	Article 1.3	Yes	Article 1.3
22	Article 1.3	No	
17	Article 1.6	No	
18	Article 1.6	No	
19	Article 1.7	Yes partly	Article 1.7

OPINION OF THE ECONOMIC AND SOCIAL COMMITTEE

	Keynotes of the ECS opinion	Commission's position
2.6	Precise rules governing means of controlling advertising	Rejected. Directive 84/450/EEC contains adequate provisions.
2.7	Conformity of comparative advertising with specific rules on sectoral advertising.	Accepted. Article 1.7
	Compliance with EEC standards concerning registered trade marks and designations of origin.	Accepted as regards trade marks (Recitals 8, 9 and 10). As regards designations of origin, the Commission maintains its initial proposal (Article 1 (2) and (3)).
2.8	Drafting of a self-regulatory code of practice whose framework would be defined by Community rules.	Rejected. It is not up to the Commission to take action in this domain for reasons of subsidiarity. It is sufficient to encourage voluntary control (Recital 11).
2.10	Setting up of voluntary bodies representing the various interests involved.	Rejected for reasons of subsidiarity.

[redacted]

3.2	Comparative advertising to be allowed only in the form of explicit references, not implicit ones.	Rejected. The Commission maintains its initial text (definition of comparative advertising).
3.3	Ban on the presenting of goods or services as imitations or replicas already protected by the legislation on trade marks.	Rejected. This proposal is not the appropriate place to treat this question.
3.8	"Objective truth" should also be taken to imply that the information is fully up to date,	Accepted. (Article 1.3).

[redacted]

Amended proposal for a

EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

Concerning comparative advertising and amending Directive 84/450/EEC concerning misleading advertising

INITIAL PROPOSAL	**AMENDED PROPOSAL**
THE COUNCIL OF THE EUROPEAN COMMUNITIES	THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION
Having regard to the Treaty establishing the European Economic Community and in particular Article 100a thereof,	Having regard to the Treaty establishing the European Community and in particular Article 100a thereof,
Having regard to the proposal from the Commission,[1]	Having regard to the proposal from the Commission,
	Acting in accordance with the procedure referred to in Article 189b of the Treaty[2]
	Having regard to the opinion of the Economic and Social Committee[3]
In cooperation with the European Parliament, (2)	
Having regard to the opinion of the Economic and Social Committee, (3)	
Whereas one of the Community's main aims is to complete the internal market by 31 December 1992 at the latest; whereas measures must be adopted gradually to establish the internal market; whereas the internal market comprises an area which has no internal frontiers and in which goods, persons, services and capital can move freely;	1. Whereas one of the Community's main aims is to complete the internal market whereas measures must be adopted gradually to establish the internal market; whereas the internal market comprises an area which has no internal frontiers and in which goods, persons, services and capital can move freely;

1

2

3

[redacted]

Whereas advertising is a very important means of creating genuine outlets for all goods and services throughout the Community; whereas the basic provisions governing the form and content of advertising must therefore be uniform; whereas, however, this is not currently the case for comparative advertising;	2.	Unchanged.
Whereas the completion of the internal market will mean an ever wider range of choice; whereas, given that consumers can and must make the best possible use of the internal market, the use of comparative advertising must be authorised in all the Member States since this will help demonstrate the merits of the various products within the relevant range; whereas comparative advertising can also stimulate competition between suppliers of goods and services to the consumer's advantage;	3.	Whereas the completion of the internal market will mean an ever wider range of choice; whereas, given that consumers can and must make the best possible use of the internal market, the use of comparative advertising must be authorised under certain very stringent conditions in all the Member States since this will help demonstrate the merits of the various products within the relevant range; whereas under such conditions comparative advertising can stimulate competition between suppliers of goods and services to the consumer's advantage.

[redacted]

[redacted]

4. Whereas the laws, regulations and administrative provisions of the Member States concerning comparative advertising differ widely; whereas advertising reaches beyond the frontiers and is received on the territory of other Member States; whereas the acceptance or non-acceptance of comparative advertising according to the various national laws may constitute an obstacle to the free movement of goods and services and created distortions of competition; whereas, in particular, firms may be exposed to forms of advertising developed by competitors to which they cannot reply in equal measure; whereas the freedom to provide services relating to comparative advertising must be assured; whereas the Union is called on to remedy this situation;

[redacted]

Whereas the sixth recital of Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising[1] states that, after the harmonisation of national provisions against misleading advertising, "at a second stage ..., as far as necessary, comparative advertising should be dealt with, on the basis of appropriate Commission proposals";	5. Unchanged.
Whereas point 3(d) of the Annex to the Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy includes the right to information among the basic rights of consumers[2]; whereas this right is confirmed by the Council Resolution of 19 May 1981 on a second programme of the European Community for a consumer protection and information policy[3], point 40 of the Annex to which deals specifically with consumer information; whereas comparative advertising, when it compares relevant and verifiable details and is neither misleading nor unfair, is a legitimate means of informing consumers to their advantage;	6. Whereas point 3(d) of the Annex to the Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy includes the right to information among the basic rights of consumers; whereas this right is confirmed by the Council Resolution of 19 May 1981 on a second programme of the European Community for a consumer protection and information policy, point 40 of the Annex to which deals specifically with consumer information; whereas comparative advertising, when it compares details which are relevant, always verifiable and neither misleading nor unfair, may be a legitimate means of informing consumers to their advantage;

1 OJ L. 250 of 19.9.1984, p. 17
2 OJ No C 92 of 25.4.1975, p. 1
3 OJ No C 133 of 3.6.1981, p. 1

Whereas objective criteria must be established in order to determine which practices relating to comparative advertising are unfair and therefore may distort competition, cause damage to competitors and have an adverse effect on consumer choice;	7.	Unchanged
Whereas, in particular, in order to prevent comparative advertising being used in an unfair and anti-competitive manner, only comparisons between competing goods and services of the same nature should be allowed;	8.	Unchanged
Whereas comparative tests carried out by third parties can constitute a valuble basis for comparative advertising; whereas, however, this independent activity requires clearly defined protection against the unauthorised use of results by advertisers; whereas, where such use is lawfully made, advertisers must themselves assume responsibility for it;		Deleted

[redacted]

Whereas Article 5 of Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks[4] confers exclusive rights on the proprietor of a registered trade mark, including the right to prevent all third parties from using in the course of trade any sign which is identical with, or similar to, the trade mark in relation to identical goods or services or even, where appropriate, other goods;	9.	Unchanged.
Whereas it may however be indispensable, in order to make comparative advertising effective, to identify the goods or services of a competitor making reference to a trade mark or trade name of which the latter is the proprietor;	10.	Unchanged
Whereas such use of another's trade mark or trade name, provided it complies with the conditions laid down by this directive and, in particular, does not try to capitalise on the reputation of another trademark, does not breach this exclusive right given that this kind of use is not intended to steal reputations but to distinguish between them and thus objectively highlight differences;	11.	Whereas such use of another's trade mark or trade name does not breach this exclusive right <u>in cases where</u> it complies with the conditions laid down by this directive and <u>does not capitalise</u> on the reputation of another trademark, but <u>is intended solely</u> to distinguish between them and thus objectively highlight differences;

[4] OJ L 40, 12.2.1989, p. 1.

Whereas provision must be made for the legal and/or administrative means of redress mentioned in Articles 4 and 5 of Directive 84/450/EEC to be available to control comparative advertising which fails to meet the requirements of fairness laid down by this Directive;	12.	Whereas provision must be made for the legal and/or administrative means of redress mentioned in Articles 4 and 5 of Directive 84/450/EEC to be available to control comparative advertising which fails to meet the requirements of fairness laid down by this Directive; whereas Article 6 applies to comparative advertising in the same way;
Whereas Article 7 of Directive 84/450/EEC allowing Member States to retain or adopt provisions with a view to ensuring more extensive protection for consumers, persons carrying on a trade, business, craft of profession, and the general public should not apply to comparative advertising, given that the objective of this amendment is to allow it in all Member States under the same conditions and with a ligh level of protection,	13.	Unchanged.
	14.	Whereas this Directive does not in any way affect Community provisions on advertising for certain products and/or services or relating to the advertising content of particular media;
	15.	Whereas the authorisation of comparative advertising is, under the conditions set out in this Directive, necessary for the completion of the Internal Market and that an action at community level is required; whereas the adoption of a Directive is the appropriate instrument because it lays down uniform general principles while allowing the Member States to choose the form and appropriate method by which to attain these objectives; whereas it is therefore in accordance with the principle of subsidiarity.

HAS ADOPTED THIS DIRECTIVE:	HAVE ADOPTED THIS DIRECTIVE:
Article 1	Article 1
Council Directive 84/450/EEC is hereby amended as follows:	Unchanged
1. The title is replaced by the following title:	
"Council Directive of 10 September 1984 concerning misleading and comparative advertising"	
2. In Article 2, point 3 is replaced by the following:	
"3. "comparative advertising" means any advertising which expiicitiy or by implication identifies a competitor or goods or services of the same kind offered by a competitor;"	
4) person means any natural or legal person."	
3. the following Article 3a is added:	
"Article 3a	"Article 3a
1. Comparative advertising shall be allowed, provided that it objectively compares the material, relevant, verifiable and fairly chosen features of competing goods or services and that it:	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;	(a) does not mislead;

(b)	does not cause confusion in the market place between the advertiser and a competitor or between the advertiser's trade marks, trade names, goods or services and those of a competitor;	(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 a competitor or his trade marks, trade names, goods, services or activities or aim principally to capitalise on the reputation of a trade mark or trade name 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.	Reference to or reproduction of the results of comparative tests on goods or services carried out by third parties shall be permitted in advertising only if the person who has carried out the test gives his express consent. In such cases the advertiser shall accept responsibility for the test as if it had been performed by himself or under his direction."		Deleted
		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.

[redacted]

4. Article 4(1) is replaced by by following:	4. Unchanged.
1. Member States shall ensure that adequate and effective means exist for the control of misleading advertising and comparative advertising in the interests of consumers as well as competitors and the general public.	
Such means shall include legal provisions under which pesons or organisations regarded under national law as having a legitimate interest in prohibiting misleading or comparative advertising may:	
(a) take legal action against such advertising; and/or	
(b) bring such advertising before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings.	

It shall be for each Member State to decide which of these facilities shall be available and whether to enable the courts or administrative authorities to require prior recourse to other established means of dealing with complaints, including those referred to in Article 5."

5. Article 4(2) is replaced by the following:

"2. Under the legal provisions referred to in paragraph 1, Member States shall confer upon the courts or administrative authorities powers enabling the, in cases where they deem such measures to be necessary taking into account all the interests involved, and in particular the public interest:

- to order the cessation of, or to institute appropriate legal proceedings for an order for the cessation of, misleading or comparative advertising, or

5. Unchanged.

- if misleading or comparative advertising has not yet been published but publication is imminent, to order the prohibition of, or to institute appropriate legal proceedings for an order for the prohibition of, such publication,

even without prooof of actual loss or damage or of intention or negligence on the part of the advertiser.

Member States shall also make provision for the measures referred to in the first subparagraph to be taken under an accelerated procedure:

Unchanged

- either with interim effect,
- with definitive effect,

on the understanding that it is for each Member State to decide which of the two options to select.

Furthermore, Member States may confer upon the courts or administrative authorities powers enabling them, with a view to eliminating the continuing effects of misleading or comparative advertising the cessation of which has been ordered by a final decision:

- to require publication of that decision in full or in part and in such form as they deem adequate,	
- to require in addition the publiction of a corrective statement."	
6. Article 5 is replaced by the following:	6. Unchanged
"Article 5	
This Directive does not exclude the voluntary control of misleading or comprative advertising by self-regulatory bodies and recourse to such bodies by the persons or organisations referred to in Article 4 if proceedings before such bodies are in addition to the court or administrative proceedings referred to in that Article."	
7. Article 7 is replaced by the following:	7. Article 7 is replaced by the following:
"Article 7	"Article 7
"1. This Directive shall not preclude Member States from retaining or adopting provisions with a view to ensuring more extensive protection, with regard to misleading advertising, for consumers, persons carrying on a trade, business, craft or profession, and the general public.	1. Unchanged

2. Pragraph 1 shall not apply to comparative advertising"	2. Unchanged.
	3. Community provisions on advertising for specific products and/or services or concerning the advertising content of particular media shall remain unaffected by this Directive.
Article 2	Article 2
Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 1992 at the latest. They shall inform the Commission thereof forthwith.	1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 1995 at the latest. They shall inform the Commission thereof forthwith.
When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.	2. When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.
	3. Member States shall communicate to the Commission the text of essential provisions in domestic law adopted in the domain governed by this Directive.
Article 3	Article 3
This Directive is addressed to the Member States	Unchanged.

REVISED IMPACT ASSESSMENT FORM

Title: Amended proposal for a Directive of the European Parliament and the Council concerning comparative advertising and amending Directive 84/450/EEC concerning misleading advertising.

Reference No: COM(91) 147 final - SYN 343.

1.Q. Taking account of the subsidiarity principle, why is Community legislation necessary in this area and what are its main aims?

R. The current situation in which comparative advertising is authorised in certain Member States and banned in others puts consumers, advertisers and publicity workers in certain Member States at a disadvantage, and the medium used (press, radio or television) leads to substantial distortions in competition; hence the most practical and effective solution is to harmonise legislation on comparative advertising so as to ensure that the consumer's right to information is respected and that appropriate safeguards are established to avoid disputes between advertisers resulting from incompatible legislation.
The purpose of the measure is to facilitate the creation and functioning of the internal market, at a high level of consumer protection, by approximating laws governing comparative advertising; hence the measure will encourage the free movement of advertising services insofar as they will be governed by a harmonised routine in all the Member States.

The impact on business

2.Q. Who will be affected by the proposal?

R. Businesses, of all sizes, which wish to use comparative advertising to publicise the features of their products or services in greater detail.

These businesses are not concentrated in particular geographic zones.

3.Q. What measures will businesses have to comply with the proposal?

R. The proposal does not require the adoption of specific measures; advertisers will from now on be free to use comparative advertising in the Member States in which it is current banned or potentially risky.

4.Q. What economic effects is the proposal likely to have?

- on unemployment

- on investment and the creation of new businesses
- on the competitive position of businesses.

R. It should not have any particular effect on employment or on the creation of new businesses or investment. As regards effects on competitive position, the proposal enjoins compliance with a certain number of conditions which risk exposing businesses to legal action if they use comparative advertising improperly; hence businesses which do not have a legal department, and in particular SMEs, might tend to avoid making use of comparative advertising; initially this could lead to a certain competitive disadvantage, which should disappear with the growth of established case law in this domain.

5.Q. Does the proposal contain measures to take account of the specific situation of small and medium-sized enterprises?

R. The proposal does not contain any particular measures relating to SMEs.

Consultation

6. List of organisations which have been consulted about the proposal and outline their main views.

- Consumers' Consultative Council: the CCC says that it has not called for this Directive although it recognises that comparative advertising is one element of information, albeit partial, to which consumers will have access.

- UNICE is in favour of harmonising rules on comparative advertising but wants authorisation of comparative advertising to be subject to conditions so as to ensure fair competition and protection of brand names.

In general industry is divided on this issue and opinions range from those who would prefer a total ban of comparative advertising to authorisation without any conditions at all or authorisation under specific conditions.

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