II

(Preparatory Acts)

COMMISSION

Amended proposal for a European Parliament and Council Directive concerning comparative advertising and amending Directive 84/450/EEC concerning misleading advertising (1)

(94/C 136/04)

(Text with EEA relevance)

COM(94) 151 final — COD 343

(Submitted by the Commission pursuant to Article 189A (2) of the EC Treaty on 21 April 1994)

(1) OJ No C 180, 11. 7. 1991, p. 14.

ORIGINAL 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,	Having regard to the proposal from the Commission,
	Acting in accordance with the procedure referred to in Article 189b of the Treaty,
In cooperation with the European Parliament,	
Having regard to the opinion of the Economic and Social Committee,	Having regard to the opinion of the Economic and Social Committee,
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;
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

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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 authorized in all 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 authorized 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;
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 create distortions of competition;	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 create 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;
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 harmonization 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 (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 details which are relevant, always verifiable and neither misleading nor unfair, may be a legitimate means of informing consumers to their advantage;
(1) OJ No L 250, 19. 9. 1984, p. 17.	(1) OJ No L 250, 19. 9. 1984, p. 17
(2) OJ No C 92, 25. 4. 1975, p. 1.	(2) OJ No C 92, 25. 4. 1975, p. 1.
(3) OJ No C 133, 3. 6. 1981, p. 1.	(3) OJ No C 133, 3. 6. 1981, p. 1.

ORIGINAL PROPOSAL	AMENDED PROPOSAL
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 unauthorized use of results by advertisers; whereas, where such use is lawfully made, advertisers must themselves assume responsibility for it;	Deleted
Whereas Article 5 of Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (1) 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 capitalize on the reputation of another trade mark, 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 in cases where it complies with the conditions laid down by this Directive and does not capitalize on the reputation of another trade mark, but is intended solely to distinguish between them and thus objectively highlight differences;
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;

(1) OJ No L 40, 12. 2. 1989, p. 1.

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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 or 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 authorization 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 explicitly 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;

ORIGINAL PROPOSAL	AMENDED PROPOSAL
(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 capitalize 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 capitalize 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.'
4. Article 4 (1) is replaced by the 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 persons or organizations 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.	

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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:	5. Unchanged
'2. Under the legal provisions referred to in paragraph 1, Member States shall confer upon the courts or administrative authorities powers enabling them, 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	
— 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 proof 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:	
— either with interim effect, or	
— 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 publication of a corrective statement.';	

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6. Article 5 is replaced by the following:	6. Unchanged
'*Article 5*	
This Directive does not exclude the voluntary control of misleading or comparative advertising by self-regulatory bodies and recourse to such bodies by the persons or organizations 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. Paragraph 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