THE REGULATION OF COMPARATIVE ADVERTISING IN THE EUROPEAN UNION

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I. INTRODUCTION

The phenomenon of comparative advertising is known to anybody in the United States who even only occasionally watches television. Advertisements of supermarkets claiming to be cheaper than others,[1] car manufacturers boasting that *all* their cars are built with the same precision a competitor has claimed for its most expensive luxury model, and soft drink producers' ads featuring tests of their products by consumers against a competitor's products with the result, in no way unexpected, that the advertisers' soft drinks win by a high margin, are all common on television in the United States. Any consumer exposed to advertising, therefore, is also familiar with comparative advertising.

In many branches of industry the wide use of comparative advertising[2] as a marketing technique is a relatively new development.[3] Not very long ago it was deemed to be improper business behavior to make negative references to a competitor's goods or services. These negative references were considered to be against the code of conduct to which all honest businessmen

1. For an empirical study of comparative price advertisements in newspapers, see Roberto Friedman & Paula Haynes, *An Investigation of Comparative Price Advertising in Newspapers*, 13 CURRENT ISSUES & RESEARCH IN ADVERTISING 155 (James H. Leigh & Claude R. Martin, Jr. eds., 1991).

2. Jean J. Boddewyn, *Comparison Advertising: Advantages and Disadvantages for Consumers, Competitors, Media, Industry and the Marketplace*, UNFAIR ADVERTISING AND COMPARATIVE ADVERTISING 175, 179 (Eric Balate ed., 1988) (empirical studies found that up to 35% of U.S. television commercials in the early eighties used some form of comparative advertising; for 1977 only 10% were shown); *see also* Caryn L. Beck-Dudley & Terrel G. Williams, *Legal and Public Policy Implications for the Future of Comparative Advertising: A Look at U-Haul v. Jartran*, 8 J. PUB. POL'Y & MKTG. 124, 124-25 (1989).

3. Studies show that this practice started in the late sixties. Normand Turgeon & David J. Barnaby, *Comparative Advertising: Two Decades of Practice and Research*, 11 CURRENT ISSUES & RESEARCH IN ADVERTISING 41 (James H. Leigh & Claude R. Martin, Jr. eds., 1988).

adhered.[4] Furthermore, marketing specialists alleged that comparative advertising would not work for the advertiser. Mentioning the competitors' brands in comparative ads would amount to a costless promotion of his products, and aggressive comparisons would deter rather than attract consumers.[5] This opinion obviously no longer prevails in the United States, at least not in markets where there is very intense advertising.[6]

Advertising customs and legal rules are quite different in the European Union. One obvious reason is that the regulation of comparative advertising in most member states is much stricter than in the United States.[7] Another reason is that even in relatively liberal jurisdictions, industries make only limited use of their relatively greater advertising freedom. The old ideas of what constitutes honest business practices seem to be much more alive and widely accepted in the E.U.

The Commission of the European Union has recently taken up the problem of comparative advertising and published a proposal for a Council Directive for the Harmonization of the Law on Comparative Advertising.[8] This proposal, if enacted, would require most member states to substantially liberalize their attitudes towards comparative advertising. Due to strong opposition from many sides, including the

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4. For references to such codes and to the Federal Trade Commission's efforts to remove them, see Michael B. Bixby & Douglas J. Lincoln, *Legal Issues Surrounding the Use of Comparative Advertising: What the Non-Prescriptive Drug Industry Has Taught Us*, 8 J. PUB. POL'Y & MKTG. 143 (1989).

5. Beck-Dudley & Williams, *supra* note 2, at 124 (with further references to the marketing literature).

6. Comparative advertising seems to be more effective for some products than for others. *See* Turgeon & Barnaby, *supra* note 3, at 45 (citing P.J. O'Connor, *The Information Value of Comparative Advertising Mediating Purchase Intention*, *in* AMERICAN MARKETING ASSOCIATION, EDUCATORS CONFERENCE, PROCEEDINGS Series No. 52, 23-37 (1986)).

7. For an extensive review of U.S. law on comparative advertising, see 3 GEORGE E. ROSDEN & PETER E. ROSDEN, THE LAW OF ADVERTISING, §§ 31.03-31.22 (1992). The trademark law issues are dealt with in 2 THOMAS J. MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, §§ 25.75-25.81 (3d ed. 1992). *See also* Jerome G. Lee, *Comparative Advertising, Commercial Disparagement, and False Advertising*, 71 TRADEMARK REP. 620 (1981); Beck-Dudley & Williams, *supra* note 2; WOLF HUDELMAIER, DIE NEUERE PRAXIS ZUR VERGLEICHENDEN WERBUNG IN DEUTSCHLAND, BELGIEN, FRANKREICH, GROßBRITANNIEN UND USA 131-48 (1991).

8. Proposal for a Council Directive Concerning Comparative Advertising and Amending Directive 84/450 EEC Concerning Misleading Advertising, COM(91) 147 final at 343 (21 June 1991), *reprinted in* 3 C.M.L.R. 470 (1991).

industrial sector, the current version of the proposal will certainly not be the Commission's last word. The final Directive, however, will undoubtedly provide for less regulation of comparative advertising.

The following review of the current and possible future law of comparative advertising in the E.U. begins with a clarification of the different practices which can be termed "comparative" advertising. This discussion is based mainly on German law, which has developed a very detailed categorization of this phenomenon. The Article then highlights conflicting and parallel interests of advertisers, competitors, consumers, and the public involved in comparative advertising. Next, the current solutions of this problem in the twelve member states of the E.U. are discussed. This review will concentrate on the approaches used in unfair competition law. Trademark law, which can be at least equally important, is treated only lightly. Even with this focus on unfair competition doctrines, it is obvious that with so many countries only very brief summaries of the law can be provided. The discussion then turns to the development of advertising regulation at the European Union level and proceeds to a more detailed consideration of the Commission's proposal for harmonization of comparative advertising law. The Article concludes with comments on possible future developments of the law on comparative advertising in the European Union.

II. CATEGORIES OF COMPARATIVE ADVERTISING

Though comparative advertising is a fact of commercial life for consumers, some terminological refinement and clarification is helpful when dealing with the legal implications of this marketing technique. Categorization is necessary because the term "comparative advertising" covers quite different forms of advertising claims, which under the national laws of the member states of the European Union, and the rules of the proposed Council Directive on Comparative Advertising, may lead to different legal evaluations and consequences.[9]

The common denominator of all advertising practices discussed in this Article is that some form of comparison is involved.

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9. For the categories used here and their evaluation under German law, see ADOLF BAUMBACH & WOLFGANG HEFERMEHL, 1 WETTBEWERBSRECHT, UWG, ¶¶ 329-437 (17th ed. 1993), and JOCHEN MEYER, DIE KRITISIERENDE VERGLEICHENDE WERBUNG 12-42 (1991).

The first criterion for distinguishing different types of comparisons is the nature of the object of comparison. Usually the object of the comparison is the product or service offered by the advertiser on the one hand, and those of his competitors on the other. The claim may be, for example, that car X has as many features as car Y, but car X costs less; or that pain reliever A causes fewer stomach problems than pain reliever B. In these cases, a product or service is directly addressed and its producer is identified.

The object of the comparison may be not only a single product of a certain identified or identifiable competitor, but a whole range or category of products with certain properties. This kind of comparison is most often, but not exclusively, found in advertisements of trade or industry associations promoting the products of their members, and comparing them to near substitute products of other branches of a particular industry. The association of producers of glass bottles may, for instance, place an ad alleging that glass bottles are better for the environment than plastic bottles because they can be recycled. In these "systems comparisons," reference is made not to one brand or producer but to a whole class of products and a whole branch of industry.

A third category of comparative advertising does not directly compare the products or services of competitors, but is instead directed to the competitors themselves and their personal characteristics. This category includes, for instance, reference to race, gender, religion, nationality, professional conduct and experience, police records and state of health.

As well, comparative advertising can be directed to the advertiser's own products or services. Perhaps to the surprise of an American reader, even these self-references encounter legal problems in the E.U. Luxembourg and Germany, for instance, prohibited most advertisements in which an advertiser compared its old prices to its new prices. Both provisions, however, were recently struck down by the European Court of Justice as unjustified obstacles to the freedom of movement of goods and services.[10] Though other problems with

10. Judgment of March 7, 1990, GB-Inno-BM v. Confédération du Commerce Luxembourgois (case C-362/88), Gewerblicher Rechtsschutz und Urherberrecht, Internationaler Teil [GRUR Int.] 12/1990, 955 and Judgment of May 18, 1993,

these self-references remain, they will not be dealt with in this Article since they do not involve the typical conflict of interest caused by "normal" comparative advertising.

Apart from the object of comparison, other criteria for distinguishing different kinds of comparative advertising can also be used. One such criterion is the degree of explicitness of the comparison. On the one hand, the reference to the competitor may be explicit when the competitor is expressly mentioned in the ad. On the other hand, the reference may be more subtle; the competitor is not mentioned expressly, but the circumstances and the design or wording of the ad make it clear to the consumer whose products are being compared with those of the advertiser. The car which is claimed to be inferior may, for instance, be recognizable only by its shape; or the advertiser may take up a theme of his competitor's earlier advertising campaign, making it obvious to the consumer who is meant. In still another example, the Federal Supreme Court in Germany has found that a soft drink ad featuring a test of the advertiser's brand against an unnamed brand would clearly be understood by a sufficient number of consumers as a comparison with the leading brand on the market.[11]

One can also distinguish favorable from critical comparisons. Normally comparative advertising is associated with critical comparison: the advertiser claims that its product or service is better than its competitor's and thereby at least implicitly criticizes it. But the reference to the competitor may also be positive. This method of comparative advertising is often used to participate in the good reputation of a competitor's product. In this scheme, the advertiser claims that its product is "as good as" the competitor's product, or that it is made the same way. Here, the competitor's product is not criticized, but rather used as a vehicle to promote the advertiser's product. Positive and negative references may also be combined in claims like "as good as . . . but cheaper."

A final criterion used to distinguish different kinds of comparative advertising is the degree of truthfulness or falsehood and deceptiveness in the advertisement. The claims put forward in the ad

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Schutzverband gegen Unwesen in der Wirtschaft v. Y. Rocher GmbH (case C-126/91), GRUR Int. 1993, 763.

11. Judgment of May 22, 1986, "Cola Test" Gewerblicher Rechtsschutz und Urherberrecht [GRUR] 1987, 49 (comment by Sack).

may be correct, and capable of being objectively analyzed and substantiated, or they may be false. If a claim is false, it normally will also be deceptive and misleading: only if the falsehood is clearly recognizable by the consumers will this not be the case. But the reverse does not necessarily hold true: a true comparison may also be misleading. The properties compared favorably for the advertiser's product may, for instance, be of little relevance for a comprehensive evaluation of the product, or the comparison may mention only such properties of the advertiser's product which are in fact superior, while in other nondisclosed but equally relevant respects, the product is inferior. Finally, comparative advertising can be both true and nonmisleading. This is the area in which the national laws of member states relating to comparative advertising exhibit the widest differences, because it is clearly allowed in some and generally forbidden in others.

Each of these different kinds of comparative advertising requires a balancing of interests of the parties concerned, and of the public interest. In the member states of the E.U., such balancing can lead to very diverse outcomes.

III. INTERESTS INVOLVED IN COMPARATIVE ADVERTISING

When deciding on the legality of comparative advertising under national or European unfair competition law, one must balance the legitimate interests of the advertiser with the interests of competitor(s), consumers, and the public at large.[12]

A. The Interests of the Advertiser

The interests of the advertiser are primarily those of informing consumers about its products and services, and persuading consumers to buy them. The advertiser is also interested in using the most effective means of relaying this information. If comparative

12. A comprehensive discussion of the interests involved can be found in HELMUT EICHMANN, DIE VERGLEICHENDE WERBUNG IN THEORIE UND PRAXIS 67-127 (1967) and Meyer, *supra* note 9, at 163-230. See also the summary of the arguments for and against comparative advertising in Rosden & Rosden, *supra* note 7, §§ 31.3-31.5; Bernard Francq, *Die vergleichende Werbung*, GRUR Int. 1977, 93, 109; Thierry Bourgoignie, *Comparative Advertising and the Protection of Consumer Interests in Europe: Reconcile the Irreconcilable?* 3 EUR. CONSUMER L.J. 15-18 (1992).

advertising should happen to be the best method for the advertiser to compete with a competitor, then the advertiser will directly compare its products and services with a competitor's and highlight the most positive characteristics of its products. In addition to the interest in attracting customers, the advertiser may also have a general interest in telling consumers and the public its own opinion about matters the advertiser considers important. This latter interest takes the unfair competition problems of comparative advertising into the arena of laws on the freedom of commercial speech. The borderlines of this area of law are far from being completely explored in the member states of the European Union.[13]

B. The Interests of the Competitor(s)

The competitor has a strong interest in "being left alone." A competitor may wish not to be dragged into the public by his rivals, or to be used as a vehicle for his rivals' advertising either negatively, by being criticized in an ad and serving as background to bring out the allegedly superior properties of the advertiser's products, or positively, by having the good reputation of his name or product and service used as a standard which the advertiser claims also to meet, but at lower prices. The competitor also has an interest in having his products and services judged by consumers on their own merits and their own merits alone. When the comparison by the advertiser is directed to specific products or services, it will almost inevitably be biased. If the ad concerns the personal properties of the competitor and not the characteristics of his products, in almost all cases these personal references are, or should be, irrelevant to a rational buying decision by the consumer. Personal references, therefore, hardly ever merit protection.

If comparative advertising cannot be prohibited, the competitor has, at a minimum, an interest in assuring that the ads are at least true, that they are in no way misleading, and that they do not disparage the competitor's reputation.

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13. Free speech protection for commercial speech in Germany and under the European Convention for the Protection of Human Rights is briefly discussed in the text accompanying note 67 and notes 105-107 respectively.

C. The Interest of Consumers and of the Public at Large

The public and the consumers have an interest in being informed as completely as possible, in order to enable consumers to fulfill their proper role in a market economy by making rational buying decisions. Normally it does not matter to consumers who is providing this information, as long as they can expect it to be true, comprehensive, relevant and focused on objective properties in a verifiable way.[14] Consumer research, however, has established that ordinary people are not normally equipped to make rational decisions when taking into account the evaluations of more than seven properties of one product against properties of another product.[15] Comparative advertising involving irrelevant aspects of the products or services is therefore capable of distorting the decisional process of the consumer and, consequently, may be against the public interest. On the other hand, when properly done, comparative advertising can be a valuable (and costless) source of information. It can be argued, therefore, that true comparative advertising will often be in the interest of the consumer. This is especially so since other sources of information, such as tests by consumer associations, are not always available, and gathering information on one's own may be too costly or even impossible. In such cases, a competitor may be in the best position to judge the qualities and deficiencies of a certain product, provided that the competitor can be induced to make the comparison in a truthful and nonmisleading way.

D. Conflicts and Parallelism of Interests

The above description of the interests of advertisers, competitors, consumers, and the public clearly shows that while there

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14. A new approach in the information economics of advertising suggests that all advertising, even if it contains no objective or verifiable information about the product, is not necessarily negative from a consumer standpoint. Since advertising costs are "sunk costs," those which cannot be recovered if consumers are disappointed, they signal product quality.

An outline of this theory (with further references to the economics literature) and a critique of the German courts for not considering the theory in their harsh treatment of comparative advertising can be found in Burkhart Menke, *Die moderne, informationsökonomische Theorie der Werbung und ihre Bedeutung für das Wettbewerbsrecht, dargestellt am Beispiel der vergleichenden Werbung*, GRUR Int. 1993, 718-28.

15. G.A. Miller, *The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information*, 63 PSYCHOL. REV. 81 (1956).

are many points of common interest, there is also a potential for substantial conflict. A strict prohibition of all comparative advertising is not justifiable; but unfettered freedom of comparative advertising is also seldom wholly in the interest of all concerned parties.[16]

The most obvious conflict is the one between the advertiser and the competitor. While the advertiser wants to be free to use the most effective means to promote its products or services, the competitor will understandably resist being made an instrument for this task. The consumer's interest lies somewhere in between: if the comparison is false or misleading, the consumer will side with the competitor, but if the information is true and useful, the consumer will most likely support the advertiser.

When it comes to comparative advertising, therefore, the distribution of interests is different from the distribution one normally finds in other forms of advertising. If noncomparative advertising is false or misleading, the interests of the competitor and the consumer coincide; both will oppose such false advertising practices. These parallel interests also exist for true noncomparative advertising. Neither the consumer nor a reasonable competitor will see its legitimate interests hurt by these practices. This is different for comparative advertising, as the above analysis of interests has shown: the consumer values true comparative advertising while the competitor objects to it. Hence, comparative advertising poses a special problem for countries where the rules against unfair competition have as their main objective the protection of competitors against unfair practices based on the assumption of a parallelism of interests between consumers and competitors. In these countries the indirect protection of consumers, via competitor actions, will not work.

It can also be argued that the benefits from comparative advertising for the consumer and the public are, at best, limited. Comparative practices more likely will lead to "advertising wars" between competitors than other advertising techniques, since the attacked rival cannot leave unanswered the biased claims of an

16. See Hudelmaier, *supra* note 7, at 70-72, for his approach to balancing these interests.

advertiser.[17] In the final analysis, the informational benefit for the consumer would be negligible since the necessary counter advertisements serve only to set off the effects of the biased information created by the first comparative ad. At the end of such a "war," the consumer is no better informed about the products advertised and will have had to pay the costs of the unnecessary campaigns via higher prices. This is true without even considering the opportunity costs of the time spent on processing reciprocally neutralizing "zero sum" information advertisements.

On the other hand, some argue that a liberalization of comparative advertising may benefit small-and middle-sized companies because this is a means, and perhaps the only means, for them to make their products known in a crowded market.[18] It is, however, questionable whether these smaller companies would have the staying power to endure an "advertising war" started by their competitors.[19]

The historical development of the objectives of the national rules against unfair competition in the member states of the E.U. and the current balancing of the relevant interests are not in accord. It certainly comes as no surprise, therefore, that the rules on comparative advertising are far from being harmonized. One finds nearly total prohibition, as well as nearly total freedom, and numerous intermediate solutions. This diversity, however, does not apply to personal comparisons and "systems comparisons." Here the laws of the member states reach very similar solutions for the balancing of interests. Personal comparisons are almost always forbidden from a practical standpoint. A legitimate reason can rarely be found for the advertiser to refer to the personal properties of the competing

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17. They may also ignite a "legal war." In their marketing textbook, David L. Kurtz & Louis E. Boone warn practitioners against using comparative advertising because of its potential to produce law suits. DAVID L. KURTZ & LOUIS E. BOONE, MARKETING 612 (2d ed. 1984).

Beck-Dudley & Williams suggest that "comparative advertising may be more likely to lead to legal action from the named competitor than would simple misrepresentation." Beck-Dudley & Williams, *supra* note 2, at 125.

18. This argument is reported by Boddewyn, *supra* note 2, at 178.

19. There is evidence that smaller companies do not engage in comparative advertising. *See* Bourgoignie, *supra* note 12, at 17; *Rapport du Conseil National de la Consommation sur la publicité comparative*, BULLETIN OFFICIEL DE LA CONCURRENCE ET DE LA CONSOMMATION, Jan. 15, 1986, *reprinted in* UNFAIR ADVERTISING AND COMPARATIVE ADVERTISING 211, 220 (Eric Balate ed., 1988).

producer of goods or services. "System comparisons," on the other hand, which do not identify individual competitors, are generously allowed if not misleading or deceptive. Hence, the following discussion will concentrate on critical and favorable references to the goods and services of identified or identifiable competitors.

IV. CURRENT REGULATION OF COMPARATIVE ADVERTISING IN THE MEMBER STATES OF THE E.U.

Using this narrower understanding, the regulation of comparative advertising in the member states of the European Union is very diverse, spanning nearly the whole range of theoretically possible solutions to the problem.[20] This diversity reflects the different traditions, and courses of development, of the national rules against unfair competition. Rules concerning comparative advertising are a part of this area of national law, as are the varying degrees of receptiveness of these rules to explicitly incorporate new ideas of consumer protection. As far as misleading or disparaging comparisons are concerned, one finds nearly unanimous condemnation, though remedies may differ among the member states.

In general, over the last century, the law of unfair competition has developed as a distinct branch of law on the Continent.[21] It has traditionally been perceived as regulating the relationship between businesses in the open market and setting the rules of fair play and honest business practice between competitors in the market place. Businesses are protected against unscrupulous outsiders who do not play by the generally accepted rules. These competitors are prohibited from gaining an unfair advantage and causing a more general deterioration of business morals.

The public and consumers are thought to be protected indirectly, but effectively by keeping up these high standards of market "morals" through competitors' actions. Regulation of advertising, therefore, is based on a balancing of interests among

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20. See the brief review of national laws of member states in the annex to Commission Press Release P-31 of May 22, 1991, announcing the Commission's proposal for a Directive to harmonize the law on comparative advertising.

21. The development is traced by Friedrich Karl Beier, *The Law of Unfair Competition in the European Community—Its Development and Present Status*, 16 INT'L REV. OF INDUS. PROPERTY & COPYRIGHT L. [IIC] 139 (1985).

competitors alone. As outlined above, this approach, judged from a consumer protection viewpoint, can only be sufficient as long as the interests of the competitor and the consumer are in parallel. For comparative advertising, this is not necessarily the case. The divergence of interests, however, has not led to a generally more favorable treatment of comparative advertising on the Continent.

The following discussion will highlight some of the general patterns of the regulation of comparative advertising in the member states of the E.U. This analysis will proceed from the more stringent regimes to the more liberal ones.[22]

A. Belgium[23]

Belgium has traditionally been the member state with the strictest rules against comparative advertising. In 1991 the Belgian Law on Commercial Practices was completely rewritten, and the nearly absolute prohibition of comparative advertising upheld.[24] The more liberal treatment of comparative advertising under the proposed E.U. Directive, if enacted in its current form, would require Belgium to change its law again.

The new Belgian law, like the old law,[25] forbids any misleading and disparaging advertising and any advertising that "unnecessarily identifies a commercial actor."[26] Accordingly, comparative advertising has been tolerated only in exceptional cases. Examples of this tolerance include instances where advertising is used

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22. For comparable reviews, see Francq, *supra* note 12; Bernard Francq, *Le statut de la publicité comparative dans les pays de la CEE*: *Etude sommaire de droit comparé,* UNFAIR ADVERTISING AND COMPARATIVE ADVERTISING [PUBLICITE DELOYALE ET PUBLICITE COMPARATIVE] 137 (Eric Balate ed., 1988); Bourgoignie, *supra* note 12; Annette Kur, *Die vergleichende Werbung in Europa: Kurz vor dem Pyrrhus-Sieg?, in* FESTSCHRIFT FOR MOGENS KOKTVETGAARD 436-52 (1993). *See also* JEAN J. BODDEWYN, INT'L ADVERTISING COMPARISON ADVERTISING: REGULATION AND SELF-REGULATION IN 55 COUNTRIES (1983).

23. *See* FRAUKE HENNING-BODEWIG, DAS RECHT DER WERBUNG IN EUROPA: BELGIEN ¶¶ 226-262 (2d. ed. forthcoming 1995) (manuscript at ¶¶ 226-262, on file with author); Antoine Braun, *La publicité comparative en Belgique*, REVUE DE DROIT INTELLECTUEL 138-44 L'Ingenieur-Conseil [Ing. Cons.] 1993.

24. Roger van den Bergh, *Das neue belgische Gesetz über die Handelspraktiken und die Information und den Schutz des Verbrauchers*, GRUR Int. 11/1992, 803, 808-09.

25. The old law is covered extensively by FRAUKE HENNING-BODEWIG, DAS RECHT DER WERBUNG IN EUROPA: BELGIEN ¶¶ 138-165 (1st ed. 1990); Hudelmaier, *supra* note 7, at 75-96; Francq, *supra note* 12; Francq, *supra* note 22, at 140-47.

26. Art. 32 No. 2 Law on Commercial Practices 1991.

defensively to correct a competitor's comparison,[27] or to help introduce a new product.[28] These cases, however, stand out as exceptions.

The Belgians obviously stand firmly convinced that no businessman has to tolerate being drawn into the public light, even by true comparative advertising.[29] They believe, furthermore, that experience has shown that comparative advertising, as regularly practiced in the market, tends to be misleading, misinforming, biased and/or disparaging, at any rate far from what consumer protectionists would like it to be.[30] Under the Belgian theory, therefore, allowing comparative advertising would not further the consumer interest because it regularly violates the protectable interests of the competitor and the public.

Furthermore, the use of a competitor's trademark in comparative advertising is not only an act of unfair competition, but also according to the Benelux Uniform TradeMark Act, an infringement of the owner's exclusive trademark rights to the trademark.[31]

B. Luxembourg[32]

The situation in Luxembourg is similar to the one in Belgium, with a general prohibition of comparative advertising under unfair competition law[33] and parallel trademark restrictions under the Benelux Uniform TradeMark Act.[34]

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27. Decision of the President of the Commercial Court of Brussels of May 20, 1985, Ing. Cons. 1985, 271, 277.

28. Decision of the President of the Commercial Court Brussels of Nov. 15, 1982, Rechtskundig Weekblad [RW] 1983-84, 717 (comment by Stuyck).

29. Francq, *supra* note 12, at 95, citing Louis Frédéricq's conclusion in his treatise that, "the Competitor has the right to require that no one speaks of him, even to say the truth, if it is said in such a way as to impact his commercial potential."

30. Jean J. Evrard, *Les practiques du commerce, l'information et la protection du consommateur*, JOURNAL DU TRIBUNAUX [J.T.] 681, 686 (1992).

31. Art. 31(a)(1), (2) Benelux Uniform Trademark Act.

32. For the law before 1986, which was in no way liberalized by the Law of November 27, 1986, see Francq, *supra* note 22, at 156.

33. Art. 17 (g) Law of Nov. 27, 1986; *see* Paul Emering, *Das Recht des unlauteren Wettbewerbs in Luxemburg*, 1991 WETTBEWERB IN RECHT UND PRAXIS [WRP] 72, at 74.

34. Art. 13(a)(1), (2) Benelux Uniform Trademark Act.

C. Germany[35]

Comparative advertising is very much frowned upon by the German courts. The courts have developed a very restrictive regime for comparative advertising under two general clauses, Sections 1 and 3 of the Law against Unfair Competition.[36] The original objective of this 1909 law was the protection of the competitor alone; only in 1965 did the consumer interest find explicit recognition in it, through legislative amendments which, among other things, gave consumer associations standing to sue.

Under this tradition of competitor protection, the law as it stands today allows comparative advertising if the advertiser can invoke a "sufficient" or legitimate reason for using it; and if the advertisement is restricted to true and objective information and does not go beyond what is necessary. Recent hopes, or fears, depending on one's point of view, that the Federal Supreme Court may liberalize its approach have not yet been fulfilled, though the right of the consumer to be informed is high on the list of the objectives of the consumer protection policy of the E.U. Commission.

Presently, comparative advertising in Germany is only allowed under specific and very limited circumstances—for example, when a competitor employs an advertising campaign and the comparative practices in question consist of the defensive use of counter comparisons to present a different viewpoint to the consumer. Comparative advertising may also be legitimate if it is necessary to correct the misconceptions of consumers, or to communicate the facts about technical progress to the consumer. This method may only be effectively used by making comparisons with existing products to which the public is accustomed. Furthermore, comparisons are allowed if specifically requested by a consumer (e.g., when a customer in an automobile dealers' showroom asks a salesperson for a comparison with features of competing models).

Beyond these limited fact situations, comparative advertising, even if true, is regularly forbidden since no legitimate reason exists

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35. Baumbach & Hefermehl, *supra* note 9, at ¶¶ 329-437; Hudelmaier, *supra* note 7, at 3-74; Meyer, *supra* note 9, at 43-126.

36. Section 1 grants injunctive relief against competitive acts which are against good morals in commerce. Section 3 prohibits misleading advertising.

for its use. The "information" interests of the consumer alone will not suffice to tip the balance in favor of the comparison.

D. The Netherlands[37]

Unlike Belgium and Germany, the Netherlands deals with comparative advertising under the general tort clause in the Civil Code.[38] There is no general prohibition of comparative advertising; however, an advertisement is unlawful if it is misleading or disparaging. In practice, Dutch courts generally avoid the problem of deciding on the mere unfairness of comparative advertising by relying on the sweeping criteria of deception or disparagement.[39] Given the breadth of these categories, comparative advertising under Dutch law is severely restricted.

It also should be mentioned that the Benelux Uniform Trademark Act forbids the use of another's trademark in advertising.[40] In practice, this enhances the already severe restriction on comparative advertising under unfair competition theories, since it is nearly impossible to make a comparison without mentioning a trademark.

E. France[41]

France has recently introduced a new law on comparative advertising, partly in anticipation of the coming Harmonization Directive of the European Union. Before its enactment in January 1992, practically all comparative advertising was considered to be a disparagement, on the ground that only disparaging comparisons

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37. FRAUKE HENNING-BODEWIG, D.W. FEER VERKADE & ANTON QUADVLIEG, DAS RECHT DER WERBUNG IN EUROPA: NIEDERLANDE ¶¶ 256-91 (forthcoming 1995) (manuscript at ¶¶ 256-91 on file with author); Francq, *supra* note 22, at 165-66.

38. Art. 6: 163 j Burgerlijk Wetbook; *see* Frauke Henning-Bodewig, *Das neue (alte) Wettbewerbsrecht der Niederlande*, GRUR Int. 2/1993, 126.

39. D.W. Feer Verkade, Angleichung des nationalen Markenrechts in der EWG: Benelux-Staaten, GRUR Int. 2/1992, 92, 95.

40. Art. 13(a)(1), (2) Benelux Uniform Trademark Act.

41. For the law before 1992, see Hudelmaier, *supra* note 7, at 97-117, and Francq, *supra* note 22, at 148-54. For the new law, see THOMAS DREIER & SILKE v. LEWINSKI, DAS RECHT DER WERBUNG IN EUROPA: FRANKREICH ¶¶ 106-121 (forthcoming 1995).

would enable the advertiser's products to come out ahead. A narrow exception was made, however, for true price comparisons.[42]

The new Consumer Protection Law[43] has now made comparative advertising legal insofar as it has fair and true objectives and relates to relevant and verifiable properties of goods and services. The comparison should also not seek to disparage the competitor, or to achieve a free ride on the competitor's reputation.[44]

Keeping in mind the Belgian position that comparative advertising is hardly ever true, unbiased, and objective, the new French law, if strictly enforced, may not achieve the desired liberalization. Liberalization, though, was obviously intended and thus an interpretation of the new law that only preserves the status quo ante may be against the legislative intent. Having named the new law the Consumer Protection Law may also suggest that consumer informational interests must be given more weight when balancing the interests involved.

F. Denmark[45]

The law of Denmark upholds the strong tradition of consumer protection present in the Scandinavian countries. Comparative advertising, based on such consumer protection theories, is generally allowed, provided it is not misleading or disparaging. These provisos are strictly applied by Danish Courts, with the effect that comparative ads most often will be enjoined. It is also telling and reminiscent of the Belgian position that the Danish Consumer Ombudsman, in his 1981-1982 Annual Report, complained about industry's unwillingness to use comparative advertising as a tool to inform consumers objectively.[46]

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42. Decision of the Cour de Cassation of July 28, 1986, Recueil Dalloz [D.] 1986, Jurisprudence [Jur.] 486; Jurisprudence commercial del Belgique [J.C.B.] 1987 II, Ed. E, 14901; German translation, GRUR Int. 1987, 598 (comment by Cas).

43. Loi No. 92-60 of Jan. 18, 1992.

44. Art. 10 Loi No. 92-60.

45. ANNETTE KUR, DAS RECHT DER WERBUNG IN EUROPA: DANEMARK, ¶¶ 64-68 (1990).

46. Forbrugerombudsmandens berettelse 1981-82, 37.

G. Italy[47]

The Italian law on comparative advertising is marked by a negative attitude. Though there is no general prohibition of comparative advertising, misleading and disparaging advertising is forbidden.[48] In practice, critical comparisons are regularly judged by the courts as a disparagement. The most common forms of critical comparative advertising, consequently, are only allowed if the advertiser can point to a legitimate reason for using them. This "legitimate exception" rule is interpreted narrowly and includes mainly defensive comparisons, and comparisons asked for by a customer. Lip service is sometimes paid to the informational interest of the consumer, but the practical consequences are minimal since the required fairness standards are hardly ever met.[49]

Though the government has the statutory power to regulate comparative advertising in anticipation of the proposed Council Directive,[50] Italy has not yet used it. Accordingly, comparative advertising is still governed by the general principles outlined above.

H. Spain[51]

Spain has recently adopted special rules on comparative advertising in its General Advertising Law of 1988[52] and the Law on Unfair Competition of 1991.[53] The practice of comparative advertising is not generally forbidden, but must meet strict standards. The comparison must be true, it must relate to substantial properties and concern comparable goods and services, and it must not relate to goods and services that are obscure or have a low market share. The claims must also be verifiable. Misleading and disparaging comparisons are not allowed. Since both laws are of recent vintage,

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47. Francq, *supra* note 22, at 154-56; Kur, *supra* note 22, at 7.

48. According to Art. 2598 No. 2 codice civile.

49. *See* KARL-JOSEF SCHALTENBERG, DIE BEKÄMPFUNG UNLAUTERER UND IRREFÜHRENDER WERBUNG IN ITALIEN 182-94 (1988).

50. Art 41(f) Law No. 428 of Dec. 19, 1990.

51. GÜNTHER BREDOW, DAS RECHT DER WERBUNG IN EUROPA: SPANIEN, ¶¶ 43-50 (1990) for the law before 1991.

52. Art. 6(c) Law No. 34 1988 of Nov. 11, 1988, Boletin Oficial del Estado num. 274 de 15 de noviembre de 1988; German translation in GRUR Int. 1989, 908.

53. Art. 10 No. 1, 2, Art. 7 and Art. 9 Law No. 3/1991 of Jan. 10, 1991 on Unfair Competition, Boletin Oficial del Estado No. 10 de 11 enero de 1991; German translation in GRUR Int. 1991, 551.

there is little practical judicial experience. Consequently, it is too early to make a final judgment as to whether the express intent of the legislature to liberalize the regulation of advertising will find its way into judicial practice.

I. Portugal[54]

The situation in Portugal is roughly comparable to that in Spain. Comparative advertising is not expressly forbidden, but it must follow strict rules to safeguard true, objective, and relevant consumer information. The general prohibition of misleading and disparaging advertising is also applicable to comparative advertising.

J. Greece[55]

In 1991, Greece adopted a new Consumer Protection Law which also dealt with comparative advertising.[56] The substance of these rules is comparable to those of the Spanish or Portuguese regulations; comparative advertising is permitted if certain conditions are fulfilled. The comparison may not be misleading or disparaging, must relate to comparable goods or services and to relevant properties, and must be verifiable. If, as under the old law,[57] these criteria are strictly applied by the courts, the intended liberalization may not lead to a wide use of this advertising form in Greece.

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54. For an overview of the Portuguese law on comparative advertising, see José Vera Jardim, *Werberecht in Portugal*, *in* HANDBUCH DES WERBERECHTS IN DEN EG-STAATEN, ÖSTERREICH, SCHWEIZ UND USA 389, 393 (Peter Schotthöfer ed., 1991).

55. For an overview of the Greek law, see Elisa Alexandridou, *Die gesetzgeberische Entwicklung des Verbraucherschutz- und Wettbewerbsrechts, in Griechenland* GRUR Int. 2/1990, 120.

56. Consumer Protection Law of Sept. 3, 1991, Art. 20, Law No. 1961/1991, *reprinted in* Alexandridou, *supra* note 55, at 124 (containing a German translation of the relevant parts of the law).

57. *See also* Francq, *supra* note 22, at 137, 164 (citing the old law).

K. United Kingdom[58]

Unlike the countries on the European continent, the United Kingdom does not have a distinct branch of unfair competition law. The Continent's notion of unfairness is flexible enough to be applied to ever changing and newly emerging marketing practices, and also covers diverse cases including consumer deception, competitor disparagement, trademark dilution, misappropriation of good will, and slavish imitation. In the United Kingdom, unfair competition law is split into a few recognizable legal actions developed under different theories. These include actions for malicious falsehood, actions for passing off, and actions for libel and slander.[59]

Consequently, comparative advertising, can only be prohibited if it falls under one of these recognized branches of unfair competition. Therefore, true comparative advertising is generally allowed under the common law of the United Kingdom.[60]

On the other hand, trademark law,[61] according to court decisions,[62] could, until recently, set strict limits for using a competitor's trademark in comparative ads. Such use was considered an infringement of the trademark owner's exclusive rights. This obvious contradiction to the intention of the proposed Directive to generally allow comparative advertising was eliminated by Section 10(6) of the New Trade Mark Act of 1994, which allows the use of trademarks in comparative ads as long as it is in line with the principles of "honest practices in industrial or commercial matters."

Another particular trait of British advertising law worth mentioning is the traditionally strong influence of self-regulatory

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58. For a very recent review of the British law on comparative advertising, see Ansgar Ohly, *Die vergleichende Werbung im britischen Recht*, GRUR Int. 1993, 730*;* Hudelmaier, *supra* note 7, at 118-30; EUGEN ULMER & HARTWIG V. WESTERHOLF, DAS RECHT DES UNLAUTERN WETTBEWERBS IN DEN MITGLIEDSTAATEN DER EUROPÄISCHEN WIRTSCHAFTGEMEINSCHAFT: VEREINIGTES KÖNINGREICH VON GROSSBIEANNIEN UND NORDIRLAND (1981).

59. Ohly, *supra* note 58, at 733-36; Hudelmaier, *supra* note 7, at 119-24.

60. Francq, *supra* note 22, at 137-62; Ohly, *supra* note 58, at 730, 733; Commission Press Release on the Harmonization of the Law on Comparative Advertising 31 (1991).

61. Trade Marks Act, 1 & 2 Geo. 6, ch. 22, § 4(1)(b) (1938) (Eng.).

62. Compaq Computer Corp. v. Dell Computer Corp. Ltd., 1992 FLEET STREET REP. 93 (High Ct. of Justice, Ch. Div.); Chanel v. Triton, 1993 REPORTS OF PATENT, DESIGN, AND TRADEMARK CASES 32.

codes of conduct of the advertising industry.[63] Adherence to the 1988 British Code of Advertising Practice (CAP) is controlled by the Code of Advertising Practice Committee and the Advertising Standards Authority.[64] Though these bodies do not have judicial enforcement authority, their decisions carry substantial weight for advertising practice and set the standard, at least for the companies which are members of the subscribing industry associations. The current text of this code allows comparative advertising in principle, but goes on to subject it to much more restrictive criteria than the common law.[65] Under the code, the comparisons must be objective, unbiased, and neither unfairly disparaging nor exploitative. These criteria come rather close to the unfairness standards in continental countries. Despite the more liberal approach of the common law and the new trademark law, comparative advertising is far less common in the United Kingdom than in the United States.

L. Ireland

As in the United Kingdom, Irish attitudes toward comparative advertising are liberal. Irish law generally allows comparative advertising, as long as its claims are true and there is no violation of consumer protection laws.[66]

M. Conclusions

This very brief review of comparative advertising under the national laws of the E.U. member states has shown that though it differs widely, the majority of the states, despite consumer protection arguments, still severely restrict this marketing practice. Two factors are responsible for this result:

- the traditional emphasis on competitor protection, and the limited weight gain given to consumer informational interests in the balancing process; and

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63. Ohly, *supra* note 58, at 737-39.

64. COMMITTEE ON ADVERTISING PRACTICE, BRITISH CODE OF ADVERTISING PRACTICE (8th ed. 1988).

65. *See* BRITISH CODE OF ADVERTISING PRACTICE, Art. B.21, *reprinted in* Francq, *supra* note 22, at 137, 208-209.

66. Francq, *supra* note 22, at 160; Commission Press Release, *supra* note 60.

> - the experience that the advertising industry has only limited interest in true, comprehensive, and fair comparisons, such as would pass the consumer information test. Advertisers seem to stress, rather, more biased, irrelevant, or even false and misleading comparisons.

This strict approach to comparative advertising is hardly softened by ideas of constitutional protection of commercial speech. Though the commercial nature of the speech does not render it unprotected, the scope of protection is more limited than for "serious" speech. Under the German Constitution, freedom of speech may be limited by "general" statutes (i.e. statutes whose objective is not the limitation of speech, but the protection of other values, such as the safeguarding of one's children, of a person's honor, or of the democratic basis of a political system). The German Law against Unfair Competition is also considered to be a "general" law since its objective is to safeguard the fairness of competition in the marketplace. Restrictions on advertising which are required by this law are not normally considered to be unconstitutional. In interpreting the law, however, the evaluations found in the Constitution must be taken into account.[67]

V. THE NEED FOR HARMONIZATION OF ADVERTISING LAW IN THE E.U.

The idea of harmonizing advertising law among the member states of the E.U. dates back to the sixties. The E.U. Commission commissioned a study of unfair competition law in the six founding states of the Community. The study was undertaken by the Max Planck Institute for Foreign and International Patent, Copyright, and Competition Law in Munich, Germany, and later extended to the new member states.[68] The comparative summary of these original six

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67. GERHARD SCHRICKER, DAS RECHT DER WERBUNG IN EUROPA: EINFÜRUNG 12-15 (1990); Meyer, *supra* note 9, at 129-59. See notes 105-107 for the influence of the European Convention for the Protection of Human Rights on German national law.

68. For six volumes published in German to date, see generally 1 EUGEN ULMER, DAS RECHT DES UNLAUTEREN WETTBEWERBS IN DEN MITGLIEDSTAATEN DER EUROPÄISCHEN WIRTSCHAFTSGEMEINSCHAFT: VERGLEICHENDE DARSTELLUNG (1965); 2(1) EUGEN ULMER ET AL., DAS RECHT DES UNLAUTEREN WETTBEWERBS IN DEN MITGLIEDSTAATEN DER EUROPÄISCHEN WIRTSCHAFTSGEMEINSCHAFT: BELGIEN, LUXEMBURG (1967); 2(2) EUGEN

countries' surveys suggested strongly that the envisioned common market needed a harmonized law on unfair competition in order to create roughly identical competitive conditions and to remove obstacles to trade between member states.[69]

Meanwhile, in numerous decisions, the European Court of Justice has held that different national laws on unfair competition can be a restriction on trade between member states.[70] However, the Court has also recognized that, in the absence of Community level regulations on unfair competition, national differences of unfair competition law must be tolerated under articles 30 et seq. of the E.C. Treaty, as long as they can be justified under article 36, or as a "mandatory requirement" under article 30. Differing unfair competition laws may be justified under article 36 if the means used to protect the national interest are not more extensive than necessary. This proportionality principle also applies to "mandatory requirements" allowed under article 30.

Consumer protection and the protection of fair business practices are examples of "mandatory requirements" recognized by the Court.[71] Without E.U. regulation of unfair competition, however, the harmonizing effect of the Court on diverse national laws can only

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ULMER ET AL., DAS RECHT DES UNLAUTEREN WETTBEWERBS IN DEN MITGLIEDSTAATEN DER EUROPÄISCHEN WIRTSCHAFTSGEMEINSCHAFT: NIEDERLANDE (1967); 3 EUGEN ULMER & DIETRICH REIMER, DAS RECHT DES UNLAUTEREN WETTBEWERBS IN DEN MITGLIEDSTAATEN DER EUROPÄISCHEN WIRTSCHAFTSGEMEINSCHAFT: DEUTSCHLAND (1968); 4 EUGEN ULMER & ROLF KRAßER, DAS RECHT DES UNLAUTEREN WETTBEWERBS IN DEN MITGLIEDSTAATEN DER EUROPÄISCHEN WIRTSCHAFTSGEMEINSCHAFT: FRANKREICH (1967); 5 EUGEN ULMER & GERHARD SCHRICKER, DAS RECHT DES UNLAUTEREN WETTBEWERBS IN DEN MITGLIEDSTAATEN DER EUROPÄISCHEN WIRTSCHAFTSGEMEINSCHAFT: ITALIEN (1965); 6 EUGEN ULMER & HARTWIG G. VON WESTERHOLT, DAS RECHT DES UNLAUTEREN WETTBEWERBS IN DEN MITGLIEDSTAATEN DER EUROPÄISCHEN WIRTSCHAFTSGEMEINSCHAFT: VEREINIGTES KÖNIGREICH VON GROSSBRITANNIEN UND NORDIRLAND (1981). Other volumes are also available in other official E.C. languages.

69. *See* 1 ULMER, *supra* note 68, at 231-80.

70. For a recent decision, see Case 362/88, GB-Inno-BM v. Confédération du commerce luxembourgois, 1 E.C.R. 667 (1990), 2 C.M.L.R. 801 (1991).

71. This line of cases started with Case 8/74, Procureur du Roi v. Dassonville, 1974 E.C.R. 837, 2 C.M.L.R. 436 (1974), was later clarified in the Cassis de Dijon case, Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649, 3 C.M.L.R. 494 (1979) [hereinafter Cassis de Dijon], and was expressly applied to consumer protection and the protection of fair business practices, *inter alia*, in Case 286/81, Criminal proceedings against Oosthoek's Uitgeversmaatschappij BV, 1982 E.C.R. 4575, 3 C.M.L.R. 428 (1982), and Case 382/87, R. Buet and Educational Business Services (EBS) SARL v. Ministère public, 1989 E.C.R. 1235 (1989).

be limited. Without such regulation the Court can only strike excessive regulation of unfair competition and advertising if the national rules cannot as justified by legitimate "mandatory requirements" or if these rules do not pass the proportionality test. Under this test, the national measure must be suitable to reach its objective, and must do so in the least restrictive way.[72]

In a line of cases, the Court has repeatedly acknowledged the consumer's right to protection. The Court has upheld protection against deception as to the quality and ingredients of beer,[73] as to the kind of wheat used for making pasta,[74] and as to the alcohol content of alcoholic beverages,[75] as legitimate national regulatory measures. An outright ban on imports of products not complying with the national regulations, however, has been held to go far beyond what is necessary for the protection of the consumer.[76] According to the Court, proper labeling adequately protects consumers in the least restrictive way, thereby passing the proportionality test.

As long as the national regulations are kept within these limits, their diversity must be tolerated. Nevertheless, this diversity still poses a major problem for European and foreign industries which are more and more forced to plan and act for all of Europe, or even globally. Differing national standards for advertising make cost effective E.U.-wide advertising campaigns very difficult or even impossible.[77] Many companies are forced to develop different promotional campaigns tailored to different national rules. A specific strategy for one country may not be successful in more restrictive countries. In the age of satellite and cable TV, an advertising spot planned for one country may also be seen in other countries. Due to millions of tourists and the freedom of movement of workers, newspapers and magazines are regularly sold all over Europe. The E.U. member country in which the spot is seen or the paper read may,

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72. For instance, this test was decisive in Case 261/81, Walter Rau Lebensmittelwerke v. De Smedt PvbA, 1982 E.C.R. 3961, 2 C.M.L.R. 496 (1983).

73. Case 178/84, Commission v. Germany, 1987 E.C.R. 1227, 1 C.M.L.R. 780 (1988).

74. Case 407/85, Drei Glocken GmbH v. USL Centro-Sud, 1985 E.C.R. 4233 (1985).

75. Cassis de Dijon, 1979 E.C.R. 649.

76. Case 58/80, Dansk Supermarked A/S v. Imerco A.S., 1981 E.C.R. 181 (1981).

77. This argument is expressly put forward by the Commission to support the need for harmonization in Misleading Advertising Directive No. 84/450, European Economic Community, (1984) preamble, *reprinted in* 1984 O.J. (L 250) 17.

according to its international conflict of laws rules, apply its own national law.[78]

In these situations, the only way for a company to be safe is to follow the strictest rule and to bring its advertising in line with the law of the most restrictive member state. Thus, for all practical purposes, comparative advertising can hardly be practiced by international companies.

Another obstacle for the freedom of movement of goods and services is the fact that the idiosyncrasies of the national laws are much harder for a foreigner to grasp and to comply with than for a domestic company. Domestic companies, therefore, have a competitive advantage. By allowing very diverse national regulations based on local and traditional ways of doing business to persist, the differences between national markets tend to solidify by immunizing local markets against pressure to adjust. Obstacles to the transborder flow of goods and services are thereby maintained.[79] True harmonization is needed to remove these obstacles.

Another reason for harmonizing advertising law is the Commission's charge to develop a European consumer protection policy. On one hand, this consumer protection policy must serve the consumer's interest by allowing actions against misleading advertising, and on the other, it must secure and even create channels of information for the consumer. In order to guarantee a sufficient level of consumer protection in both respects throughout the Community, the Commission must set minimum standards for national laws. By widely banning comparative advertising the Commission believes that some national laws have thrown the "baby of consumer information" out with the "murky bathwater" of deceptive and unfair advertising. The Commission, therefore, may strike a new balance between the competing interests in comparative advertising and require the member states, via a Directive, to incorporate this new balance into their respective national laws.

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78. For the German law on such conflict of laws problems, see SCHRICKER, *supra* note 67, at 43-59; Winfried Tilmann, *Grenzüberschreitende vergleichende Werbung*, GRUR Int. 2/1993, 133.

79. The European Court of Justice has addressed this danger several times. For the German beer purity law as an example, see Case 178/84, Commission v. Germany, 1987 E.C.R. 1227, 1 C.M.L.R. 780 (1988).

Finally, harmonizing advertising regulations in the E.U. can be motivated by the objective of promoting effective competition. A vital element of this competition is the ability of consumers to fulfill effectively their assigned role as the final arbiters of market success or failure. This role can only be played if their decisions are based on comprehensive and objective information about prices, qualities and other relevant properties of goods and services—in other words, if a sufficient degree of market transparency exists.

Any advertising which provides this information should therefore be encouraged and not banned. However, comparative advertising, like all advertising, does not always (skeptics would say hardly ever) aim at providing consumers with information which would enable them to make rational choices. Quite to the contrary, advertising may try to induce irrational choices from consumers. But again, the Commission may try to strike a balance by cutting back on overprotective national laws against "irrational" advertising, to legalize more truly informative advertising.

The foregoing considerations suggest that the need for harmonizing the widely differing national regulations on advertising clearly exists. This was recognized by the Commission very early.[80] After first setting up an ambitious program for harmonization of the whole area of unfair competition[81] the Commission, in 1978, published a first draft of a Directive to harmonize national laws on misleading and unfair advertising.[82] This proposal, however, met with harsh criticism, which was, however, directed mainly to its provisions on unfair advertising, since the regulation of misleading advertising was less controversial even though the extended Community by then included two common law countries, the United Kingdom and Ireland.[83] An agreement on the minimum level of

80. For a history of the Commission's attempts to harmonize the national unfair competition law, see Frauke Henning-Bodewig, *History, Features and Prospects of the Commission Proposal on a Directive on Unfair and Comparative Advertising*, UNFAIR ADVERTISING AND COMPARATIVE ADVERTISING 225, 228-32 (Eric Balate ed., 1988).

81. Harmonization of Unfair Competition Program, E.C. Commission, Doc. No. XIV/156/72-D (1972).

82. Commission Draft Directive on Misleading and Unfair Advertising, 1978 O.J. (C 70) 4.

83. David J. Harland, *The Legal Concept of Unfairness and the Economic and Social Environment: Fair Trade, Market Law and the Consumer Interest*, UNFAIR ADVERTISING AND COMPARATIVE ADVERTISING (Eric Balate ed., 1988).

Europe-wide prohibition of unfair advertising practices could not be reached. Countries with high protective standards did not want to lower them, and more liberal countries did not want to burden their industry with even more restrictions, or to introduce foreign concepts of unfair competition into their legal system.[84] In 1984, the stalemate was finally ended by the Community passage of the Directive on the Harmonization of the Law on Misleading Advertising, which sets minimum standards to be applied in each member state.[85] The Commission, however, did not give up its task of harmonizing the law on unfair and comparative advertising and expressly stated in the Preamble to this Directive that it would address these issues in the future.[86]

The Commission fulfilled part of this prediction in 1991 by publishing a new Draft Directive on Comparative Advertising.[87] Again, the discussion is open and highly controversial, although the Commission has chosen only the relatively narrow subject of comparative advertising, and not the much broader problem of unfair advertising. The Commission may have hoped that by limiting the discussion to the seemingly clear-cut subject of comparative

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> Unfair advertising has been defined by the Commission as any advertising which:
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> (a) casts discredit on another person by reference to his nationality, origin, private life or good name; or
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> (b) injures or is likely to injure the commercial reputation of another person by false statements or defamatory comments concerning his firm, goods or services; or
>
> (c) abuses or unjustifiably arouses sentiments of fear; or
>
> (d) promotes discrimination on grounds of sex, race or religion; or
>
> (e) abuses the trust, credulity or lack of experience of a consumer, or influences or is likely to influence a consumer or the public in general in any other improper manner.

Commission Amended Proposal for a Directive concerning the Harmonization of Unfair and Misleading Advertising Law, 1979 O.J. (C 194) 3-4.

84. *See* SCHRICKER, *supra* note 67 (citing 7 CONSUMER LAW TODAY, Oct. 1984, at 1) ("It is not unfair to say that the directive represents an almost total victory for the long campaign waged by the United Kingdom. The references to "unfair" advertising . . . have gone . . . .").

85. Council Directive 84/450, 1984 O.J. (L 250) 20.

86. *Id.*

87. Proposal for a Council Directive Concerning Comparative Advertising, *supra* note 8; *see also* Bourgoignie, *supra* note 12, at 9 (noting that this new activity of the Commission came as a surprise to some).

advertising, a compromise between the different approaches of member states would be easier to reach; it may even have hoped to pave the way, or set a precedent, for an agreement on the whole problem of advertising regulation. Up to now, this hope has not been fulfilled. Quite to the contrary, the Commission is now criticized for its piece-meal approach. It is ironic that the problem of unfair advertising, which was the original stumbling block for the comprehensive proposal of the Commission in the seventies, and led to the passage of the piece-meal Misleading Advertising Directive, could now again stop the Comparative Advertising Directive because the Commission's approach is not comprehensive enough.

The proposal is also being criticized for being too detailed. The new principle in European policy called "subsidiarity"[88] requires that the Commission only regulate matters at the Community level insofar as they cannot be dealt with effectively on the lower national or regional level.[89] Applying this principle, the European Council at the Edinburgh Summit, in December 1992, decided that the proposal on comparative advertising violated the subsidiarity principle by

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88. This principle is found in the new Article 3b which has been inserted into the E.C. Treaty by the Maastricht Treaty, signed on February 7, 1992, which came into effect on November 1, 1993. TREATY ON EUROPEAN UNION, Feb. 7, 1992. A consolidated text of the E.C. Treaty incorporating the Maastricht amendments is reprinted in 1992 O.J. Nr. C 224.

89. This is a very crude definition, but it may suffice here to convey an idea of the principle. The new Article 3b states:

> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty.

TREATY ON EUROPEAN UNION, art. 3b. The exact content of such "subsidiarity" in general and its consequences for specific Community (not just Commission) activities and plans is hotly debated. Some clarification was brought by the European Council at the Edinburgh summit on December 11 and 12, 1992, when some general rules for the application of the subsidiarity principle were adopted. *See* Presse- und Informationsamt der Bundesregierung, *supra* note 89, at 1280. For an introduction to the problems concerning subsidiarity, see Ivo Schwartz, *Subsidiarität und EG-Kompetenzen. Der neue Titel "Kultur," Medienvielfalt und Binnenmarkt,* 1993 ARCHIV FÜR PRESSERECHT 409-16. For an evaluation of the principle from the standpoint of the Federal Republic of Germany's state of Bavaria trying to preserve state competences against ever-increasing centralization on the national and the European level, see Thomas Goppel, *Die Bedeutung des Subsidiaritätsprinzips: Der Beitrag Bayerns zur Konkretisierung des Subsidiaritätsprinzips*, *in* EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 367 (1993).

being too specific. The prescription of only general principles for the harmonization of the law on comparative advertising would suffice.[90]

On April 21, 1994, the Commission published an amended proposal,[91] after having considered extensively the arguments of the European Parliament and the Edinburgh Summit of 1992. Surprisingly, the provisions on comparative advertising survived this procedure without any major change. The Commission only struck that part of its former proposal which related to the use of test results and provided in part that:

> 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 the responsibility for the test as if it had been performed by himself or under his direction.[92]

This provision basically is one of civil law and not advertising law. The authority to reprint or use such test results, and the responsibilities or liabilities flowing therefrom, are more properly contract, tort or perhaps copyright issues, and not issues arising out of the regulation of advertising. The deletion of these provisions, therefore, has to be welcomed.

VI. THE PROPOSAL FOR THE HARMONIZATION OF THE REGULATIONS ON COMPARATIVE ADVERTISING

A. Objectives of the Proposed Directive

According to the Commission, the objectives of the Directive are threefold.[93] The first goal is to provide better information for consumers. Comparative advertising can, if strict rules are applied, serve as a useful source of information for consumers and can facilitate their decision-making. The second goal is to strengthen competition, which would benefit consumers as well as dynamic and

90. Presse- und Informationsamt der Bundesregierung, *supra* note 89, at 1283.
91. COM (94) 151 final-COD 343.
92. *Id.*
93. Preamble of Proposal for a Council Directive Concerning Comparative Advertising, *supra* note 8.

innovative enterprises. The third goal is harmonization of national laws and is intended to help in the development of the Single European Market.

The Commission clearly stresses the consumer perspective by stating in the preamble:

> 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 the member states since it will help demonstrate the merits of the various products within the relevant range. Comparative advertising can also stimulate competition between suppliers of goods and services to the consumer's advantage.

The Commission then goes on in the preamble to invoke the established "basic right of consumers to information."[94]

On the other hand, the Commission also realizes the necessity of providing for certain limits to comparative advertising in order to protect consumers against deception and competitors against disparagement and free riding.

It is important to note that unlike the Directive on Misleading Advertising, the Commission not only sets minimum standards for the member states with an eye toward achieving these goals, but also expressly provides that the member states may not enact stricter rules. Under the Directive on Misleading Advertising, the member states are free to have stricter rules,[95] but under the new proposal, they are not.[96] Member states must not only provide that comparative advertising meet certain minimum standards, but also that comparative advertising must *only* observe these minimum standards, and not stricter ones. This latter principle serves to prevent the informational effect of comparative advertising from being curtailed,

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94. *Id.*

95. Article 7 of the Directive states: "This directive shall not preclude Member States from retaining or adopting provisions with a view to ensuring more extensive protection for consumers, persons carrying on a trade, business, craft or profession, and the general public." *Supra* note 85.

96. See article 1, number 7, of the Preamble, in Proposal for a Council Directive Concerning Comparative Advertising, *supra* note 8, at 471, which would amend Article 7 of the Directive Concerning Misleading Advertising by restricting the possibility of stricter rules for misleading advertising and expressly excluding it in comparative advertising.

or even eliminated, by national laws that put more emphasis on the protection of the competitor. The minimum standards prescribed, on the other hand, safeguard the legitimate interests of the consumer against undue manipulation and of the competitor against such practices as disparagement and free riding.

B. Scope of the Proposal

The scope of the Proposal is determined by the definition of the term "comparative advertising," as employed by the Commission. Article 1, number 3 defines comparative advertising as "any advertising which explicitly or by implication identifies a competitor or goods or services of the same kind offered by a competitor."[97]

This definition is narrow and wide at the same time. It is narrow because not all comparisons in advertising are covered. "Systems comparisons," such as advertising that glass containers do less environmental harm than plastic containers are not covered because these ads do not identify either *a specific* competitor or goods and services offered by *a specific* competitor. Here, one system of packaging goods is compared with another one, both of which are offered by whole groups of enterprises. Consequently, "systems comparisons" would not be covered by the Proposal's prohibition of stricter rules. The member states would only be required to adhere to the minimum standards against misleading advertising. Even in countries with very strict rules against comparative advertising, "systems comparisons" are dealt with much more liberally.[98] The danger that systems comparisons could possibly be subject to stricter rules than the minimum standards (at least in some countries), because of their exclusion from the scope of the proposal on comparative advertising, is, therefore, only hypothetical.

The definition is broad insofar as it covers not only explicit identifications of competitors or their goods and services, but also identification by implication. For example, Avis' famous claim "We try harder because we're No. 2" does not expressly mention Hertz; however, this ad would be covered by the Proposal because to most

97. *Supra* note 8.

98. For a discussion of Germany's rules against systems comparisons, see, for example, Hudelmaier, *supra* note 7, at 39-40.

people it is clear that this is a reference to Hertz as the Number One car rental agency.

The proposed rules are applicable to favourable comparisons as well as to critical ones. The former may be used when the advertiser claims that his good or service is "as good as" the competitor's or that it is an alternative thereto (most often, of course, at a lower price).

The definition encompasses not only comparisons with the competitor's goods and services, but also with the competitor personally. This inclusion of personal comparisons has been heavily criticized. For instance, in Germany, a justification for personal references can hardly ever be found, on the theory that business people should compete on the merits of their goods and services, not on their personal characteristics. In addition, a competitor should not have to tolerate this type of intrusion into his personal sphere. It is very doubtful, however, that this breadth of the definition would make personal comparisons legal. Personal comparisons need only be allowed insofar as the required minimum standards are adhered to. However, these minimum standards presuppose a comparison of features of *goods and services* and not of personal properties. Hence, it can be argued that personal comparative advertising does not meet these standards and may be more stringently regulated by national law.

C. Minimum Standards for Comparative Advertising

The Commission's position that comparative advertising should be allowed in all member states must be balanced by provisos to safeguard the legitimate interests of consumers and competitors. These minimum standards, to which legally unobjectionable comparative advertising must conform, are found in a new article 3a, which is to be included in Directive 84/450/EEC on Misleading Advertising.[99] According to article 3a, comparative advertising will only be allowed if it "objectively compares the material, relevant, verifiable and fairly chosen features of competing goods or services." Furthermore, it must:

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99. Proposal for a Council Directive Concerning Comparative Advertising, *supra* note 8.

> - not mislead,
> - not cause confusion in the market place between the advertiser and a competitor or between the advertiser's trademarks, trade names, goods or services and those of a competitor and
> - not discredit, denigrate or bring contempt on a competitor of his trademarks, trade names, goods, services or activities or aim principally to capitalize on the reputation of a trademark or trade name of a competitor.

This list is very inclusive. It seems to take into account all relevant interests that could be affected by comparative advertising. Misleading and deceiving the consumer is prohibited, as well as trying to influence the consumer through incomplete, biased or irrelevant information. If comparative advertising follows the words and the meaning of article 3a, the consumer would be provided with valuable information for the buying decision.

The competitor is protected because the consumer may not be unduly influenced or confused, and disparagement must not result from the comparison. Free riding on the competitor's reputation by "referential advertising" is also forbidden, at least as far as an advertiser *principally* aims at capitalizing on another's market reputation. If this is not the main motive or is just a side effect of an otherwise perfectly legal comparison, the ad would have to be tolerated.[100]

The Commission's proposed minimum standards contain many vague and sweeping terms (i.e. material, relevant, fairly chosen, principal aim) whose scope is not readily ascertainable, and which will need more precise definition by the courts. Clarification is a lengthy process, however, and in the meantime, advertisers and competitors lack legal certainty about what is allowed and what is

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100. This policy has been criticized because proving the subjective element of "principal aim" may be difficult, thus hampering claimants. It has also been criticized because it would protect free riders whose motive to trade on the competitor's reputation is equally as strong as legitimate ones. Gerhard Schricker, *Zur Werberechtspolitik, der EG—Liberalisierung und Restriktion im Widerstreit*, GRUR Int. 5/1992, 347, 352; *Stellungnahme der Deutschen Vereinigung für Gewerblichen Rechtsschutz und Urheberrecht zum Richtlinienvorschlag vergleichende Werbung in der EG-Kommission* [hereinafter Stellungnahme], GRUR Int. 1992, 370, at 371.

prohibited. These vague terms in the proposed Directive make it easy for national courts to continue to apply their traditional theories of unfairness as outlined above. Real harmonization, then, could only come about by decisions of the European Court of Justice interpreting the Directive, and defining the national particularities which are still permitted. This process will take time.

On the other hand, "open" terms provide the Directive with the necessary flexibility to enable it to keep up with innovation in marketing practices.[101] If one had to describe precisely the techniques of comparative advertising that were to be tolerated, the rules would soon be outwitted by new methods exploiting the loopholes in the rules, thus requiring amendment after amendment. Furthermore, the "European mindedness" of the national courts should not be underestimated. There is a growing trend in the national courts to take the European dimension of their decisions into account, and not to merely stick to old national concepts.

VII. CONCLUSIONS AND SOME THOUGHTS ON THE FUTURE OF COMPARATIVE ADVERTISING IN THE E.U.

The above discussion of the national regulations on comparative advertising has shown that regulations among the member states of the E.U. differ widely and include nearly every position on the spectrum, from total prohibition to total freedom. The number of different approaches will continue to grow as new member states such as Austria, Sweden, Finland, and the former socialist and eastern European states join the Community. The need for harmonization of comparative and unfair advertising, therefore, is undeniable.

It is still unclear, however, if such harmonization will come about in the form of the proposed Directive as amended. As discussed, there are strong objections against the piece-meal approach taken by the Commission. Some member states would prefer a comprehensive harmonization of the whole area of unfair advertising, or even unfair competition. This is true even though during the earlier discussions which led to the enactment of the Directive on Misleading Advertising, this approach seemed to be impossible, and

101. Harland, *supra* note 83, at 19.

agreement does not appear more likely today. Furthermore, as a result of the discussions during the 1992 E.U. summit in Edinburgh, the adoption of the proposed Directive was postponed, and, based on the subsidiarity principle, a less exhaustive regulation was recommended.[102] The Commission's amended proposal[103] does not seem to fully take into account these concerns.

European and foreign companies and consumers will, therefore, have to continue for quite some time to reckon with the diversity of the national laws on comparative advertising. The proposed Directive, however, even if not adopted in its published form, will give an indication of the lines along which a future harmonization could be brought about. One must also remember that the Directive on Misleading Advertising is broad in its scope and covers misleading comparative advertising as well. A certain minimum protection for consumers, therefore, is already guaranteed.

In the meantime, pressure for harmonization may be put on the member states by the European Court of Justice, which seems to have started to strike national rules on allegedly unfair competition which, from the Court's viewpoint, are overprotective and not justified by legitimate concerns of consumer or competitor protection. Such rules have been eliminated, therefore, as obstacles to the freedom of movement of goods and services.

As far as protection of free commercial speech is concerned, another player has recently entered the field: the European Court of Human Rights.[104] The European Convention on the Protection of Human Rights, which is applicable to each member state of the European Union, sets minimum standards for the protection of free speech which must be acknowledged by each member state.[105] In some cases, the European Commission on Human Rights has already ruled that national restrictions on commercial speech undertaken under the ambit of unfair competition law are contrary to the

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102. *See* Presse- und Informationsamt der Bundesregierung, *supra* note 89, at 1283.

103. COM (94) 151 final-COD 343.

104. On the role of the European Commission and the European Court of Human Rights for the regulation of advertising, see SCHRICKER, *supra* note 100, at 13-15.

105. Art. 10.

Convention.[106] Though the European Commission and Court of Human Rights have no power to enforce their judgments, the member states are bound by them nonetheless. Pressure for a more liberal attitude toward comparative advertising may, therefore, also come from this direction if this mechanism becomes more widely known and used.

In some member states such as France, and, even though less pronounced, Germany, a trend toward more liberalization can be sensed which runs parallel to tendencies in the E.U. Commission, the European Court of Justice and the European Court of Human Rights.[107] The future, therefore, will undoubtedly bring a more liberal approach to comparative advertising in the E.U.

A totally different question, of course, is whether advertisers will make use of this new freedom, or if the old formal and informal codes of conduct between business people will prove to be stronger. The means used to protect the interests of consumers and competitors may reduce "fair" comparative advertising to merely a possible, but unattractive, option for the marketing departments of industry.

106. *See* The Barthold case, GRUR Int. 10/1984, 631 and the market intern case, Archiv für Presserecht 1988, 231. The European Court of Human Rights in its decisions has not yet clearly defined the scope of Art. 10 protection for commercial speech.

107. The literature is nearly one hundred percent in favor of liberalization. *See* Schricker, *supra* note 100, at 352.