



Analysis of the existing European Law on Commercial communications in the light of the new conditions created by the Information Society

Hoofdstuk A. uit *Final Report Study on Consumer Law and the Information Society*

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1. Sources

001 The existing body of European material law on commercial communications consists of the relevant primary rules of the EC Treaty itself and the accessory decisions of the Court, as well as the more specific European rules on advertising and marketing. The last category could be divided into:

(a) General rules, pertaining to all forms of advertising (the directive on misleading and comparative advertising: directive 84/450/EEC, as amended by 97/55/EC).

(b) Rules which are restricted to certain media (the TVWF directive, the directive on Electronic Commerce and the directive on Distance Selling, respectively directive 89/552/EEC, as amended by directive 97/36/EC; directive 2000/31/EC; directive 97/7/EC).

(c) Rules which are restricted to certain products (foodstuffs, cosmetics, pharmaceuticals, tobacco products, respectively directive 79/112/EEC, as amended by directive 89/395/EEC; directive 76768/EEC as amended by directive 88/667/EEC and directive 93/35/EEC; directive 92/98/EC; directive 89/622/EEC and directive 98/43/EC).

(d) Rules which are restricted to certain services (Consumer Credit, Travel, respectively directive 87/102/EEC; directive 90/134/EEC).

(e) Rules which concern certain target groups (art. 16 of the TVWF directive).

(f) Rules which concern certain advertising tools (the Trade Mark directive and the directive on price indications, respectively directive 89/104/EEC; directive 98/6 EC; the TVWF directive contains rules on non spot advertising and sponsoring).

002 Relatively speaking, this body of law is rather small. Notably, there exists only one

general directive. This incompleteness is particularly striking in the field of specific marketing methods like promotional offers, lotteries and competitions. Specific regulation for advertising directed towards children, sponsoring, product placement and the like is only to be found in the TVWF directive.

2. Introduction

003 What should be the touchstone when assessing whether a legal framework is Information Society proof in view of consumer protection? This is a question that merits attention. It is generally understood that the 'legitimate expectations of the consumer' constitute the framework for the protection of the consumer. [1] These expectations, which for example, operate in privacy law [2] and in contract law, have not yet been of significant practical value in advertising law, or to put it in modern terminology, in the law on commercial communications. Nevertheless, they do operate in certain fields of this branch of the law, for example in the field of the law on misleading advertising. [3] The credibility of certain statements is indeed dependant on the legitimate expectations of the consumer: highly exaggerated claims deserve less credibility than factual statements and are therefore less vulnerable for a complaint as regards misleading advertising than the last mentioned statements. It is a matter of research to know whether the 'legitimate expectations of the EU Information Society consumer' could function as an overall guideline in the law of commercial communications. A criterion like this could for instance at first sight be of considerable value in determining the borderline between forbidden surreptitious advertising and consumer information on the Internet.

004 The principles ruling the lawfulness of commercial communications in an off-line world certainly constitute the expectations of the Information Society consumer. He or she would not expect things to be completely different from his or her experiences with advertising and the like in an offline world. The widely acknowledged principle that 'what is valid off-line, should also be valid on-line' has to be accepted as a guiding principle.

005 However, off-line rules do not completely cover new technologies on the Internet. Framing, deep linking, the use of so-called meta tags provide for information search methods which are unknown in the off-line world and call for new approaches by the existing law on commercial communications. This is also the case with the reliability of information on the Internet and more especially with the borderline between independent consumer information and commercial communications.

006 Also, the role of consumers is less univocal in the Information Society. Firstly, the classical distinction between consumer and producer is blurring. Consumer (groups) are offering goods and services on-line more and more. Secondly, one may also question whether the Information Society consumer is a better informed (and more emancipated) consumer than the off-line consumer. In order to determine whether a description, trade mark or promotional description or statement is liable to mislead the purchaser, the Court of Justice of the European Communities has taken into account the *presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect*. [4] In some cases this holds more true for the on-line world: the Information Society consumer being an active information seeker and, therefore, presumed to be reasonably well informed, observant and circumspect. The circumstances of the use of this medium are also different and point towards this direction. It could be questionable for instance if the national protective measures for auctions, should also be applied to an auction on the Internet where there is more time

and deliberation possible than during a real auction. [5]

007 Whether the concept of the *presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect* holds true for all advertising law cases seems questionable. Certainly in unfair competition cases where matters of confusion are at stake, a concept like this could lead to a considerable diminishment of protection against acts of confusion. In case of offensive or shock advertising, a concept like this seems not to be wholly adequate, because the average consumer and the vulnerable consumer alike could be offended by shocking statements. And even in cases of misleading advertising, this concept should not always be a primary criterion. The Court of Justice has as a matter of fact decided that the concept of the average consumer as described above, is not applicable in all cases. [6] Certainly, the concept will not hold for vulnerable groups like children.

3. Approach

008 Before going into the legitimate expectations of the (reasonably well-informed) consumer towards commercial communications in an Information Society environment we have to look at the scope of the concept of *commercial communications* as defined in the electronic commerce directive .

009 Article 2 (f) of the directive on electronic commerce contains a technology neutral definition of commercial communication. It is defined as: «any form of commercial communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession». Not considered to constitute a commercial communication under this directive is information allowing access to the activities of companies, organisations or persons (domain names or electronic e-mail addresses). Also not considered a commercial communication is communication relating to goods, services or image of the company, organisation or person compiled in an independent manner, particularly when this is without financial considerations.

010 Since commercial communications is a new concept in EC law on advertising, it is necessary to bring this new concept into line with the existing definitions on advertising. This is not a problem that is typical for webvertising. Nevertheless the existing definitions of advertising of course influence the application of the concept of commercial communications and *vice versa* . Below we will look at the definitions used in various directives.

011 Directive 92/98/EEC on Advertising of Medicinal Products for Human Use , contains a detailed description of advertising which includes for example also the sponsoring of scientific congresses and in particular payment of expenses by persons who are qualified to prescribe or supply medicinal products. The exceptions to this detailed description are interesting. Answers to specific questions about a particular medicinal product are not covered under the definition of advertisement, provided they are not accompanied by material of a promotional nature. [7] Factual, informative announcements, provided they do not contain product claims are also not covered. Neither are general statements relating to human health. A restriction as to the independent nature of this information is not foreseen. Probably the independent nature is given by the nature of the information itself, being factual, or being a specific answer to a question and the like. In this respect two different criteria are used. The first is the criterion of the definition of commercial communications, being a criterion that is not linked to the content of the information but to the way it is produced. The second is a criterion that is linked only to the content of

the information. Experiences with a definition of surreptitious advertising on television have taught us that the first criterion is generally preferable, seen from the point of view of freedom of speech.

012 VPRO, a Dutch public broadcasting company was fined (with a symbolic fine) on account of its showing the wrapping of a MARS chocolate bar in the TV film 'Hofmann's Hunger' whilst clearly not being paid for this form of product placement. The same approach has been followed in the Wokkels case. Wokkels dealt with a children's programme on junk food in which by way of explicit satire the trade marks of Coca Cola and of Wokkels (a Dutch make of for potato chips) were shown. Even the European Commission decided that there was not a breach of Article 10 of the European Convention for the Protection of Human Rights in fining the broadcasting company for this form of product placement which certainly was not in the interest of the Coca Cola Company or the producer of Wokkels potato chips. The Commission accepted that the interference complained of was intended to protect the right of young children to be protected against indirect advertisement in television programmes primarily aimed at a young audience and the right of companies to be protected against unfair competition. It considered the interference not to be unreasonable or disproportionate in view of the target audience of the programme and the specific position of the applicant in the Dutch broadcasting system and the respective amounts of the fines imposed. [\[8\]](#)

013 Directive 98/43/EC on advertising and sponsorship of tobacco products defines advertising as any form of commercial communication with the aim or the direct or indirect effect of promoting a tobacco product, including advertising which tries to circumvent the advertising ban. Noteworthy in this respect is that the notion of indirect effect is not accompanied by restrictions as to the way in which the information is produced and therefore could also include statements that should not be considered as advertising in the sense of the directive on electronic commerce. [\[9\]](#)

014 Finally, the TVWF directive, directive 89/552/EC, contains in article 1a, whereas a specific definition of advertising that is based on the criterion of payment by the advertiser or similar consideration, directive 84/550/EEC as amended by directive 84/450 EEC (misleading advertising directive) uses the classic definition of advertising as the making of a representation in any form in order to promote the supply of goods or services without mentioning criteria like payment or similar consideration.

015 An important issue is whether a web site has to be considered a commercial communication. A recent decision by the Court of Appeal in Rennes (France) provides a rule of conduct. It was decided that a web site on which a bank offered credit solutions accompanied by examples of financing and a page of advertising for a credit card had to be considered a commercial communication. According to the Court of Appeal the internet site constituted an advertising support, even though visitors to the site in question had to register first and chose deliberately to visit the site. According to the Court the essential criterion of an advertising support is that it can carry an advertising message, whatever form it takes. As the site was aimed, not by its very existence but also by its content, at promoting the commercial activity of the bank, the attractive presentation of the credit contracts, it was considered a commercial communication. [\[10\]](#)

Provisional Conclusion

016 What, in conclusion, should thus be the scope of advertising rules in the Information Society? Should it be diverse, like it seems to be now, adapted to the special circumstances of the medium or the product and therefore implying a separate concept, adapted to the on-line world? Or should there be only one concept, applicable both to an on-line and an off-line consumer? In answering this question, the specific features of

advertising on the Internet, and other media that will emerge in the Information Society, must be taken into account on the one hand, and general principles of advertising law on the other. The last ones indicate especially - later on we shall discuss these principles more thorough - the importance of a clear borderline between advertising on the one hand and unbiased, independent information on the other. The specific features of the Internet have blurred this borderline, it is true, but the same holds true for other media in which ingenious non-spot advertising methods are constantly developed and applied.

017 In conclusion the concept of commercial communications in the electronic commerce directive is suitable for the on-line world. As the Court in Rennes has put it: the essential criterion of an advertising support is that it can carry an advertising message, whatever form it takes. [11] This particularly applies, given the fact that the consumer would not expect differences in the concept of commercial communications, dependant on media differences. This expectation could indeed also serve as a plea for a unified concept of commercial communications in the secondary law of the European Union.

4. Analysis of the Legal Framework

018 After having established the scope of commercial communication we now turn to the consumer needs in an Information Society environment. What are the essential needs of such a consumer? In this domain the following categories of consumer needs will be looked at:

(a) The need for correct information about relevant features of products and services.

(b) The need for easily accessible information for consumers, applying search methods that will lead to useful information.

(c) The need for recognisable information as to its nature: commercial or originating from independent sources.

(d) The need for protection against unsolicited and obtrusive commercial messages (so-called 'spamming').

a. Correct information about relevant features of products and services.

Misleading advertising and the provision of correct information

019 The distance selling directive contains in article 4 a provision to ensure that the consumer will be properly informed before the conclusion of any distance contract of information about e.g. the identity of the supplier, the main characteristics of the goods and services, the price of the goods and services etc.

020 In terms of advertising law this field of misleading information is covered by the directive on misleading and comparative advertising and by directives concerning specific products or services.

021 National cases in various Member States on misleading advertising on the Internet indicate that a broad concept of misleading advertising is a perfect tool to attack

misleading practices. Without doubt, the same holds for European law on misleading advertising. The definition of advertising is so wide that one could almost speak of a directive on misleading marketing practices. [12] Even individual, non-public statements made by the seller in connection with the conclusion of a contract are covered. Whilst directives on special products or services do not exclude the applicability of this general directive, it may be said that its field of application is really comprehensive and easy to use as an instrument to suppress misleading commercial statements of every nature and with respect to any medium.

022 There is a drawback to this flexible concept of misleading advertising. In its Green Paper on Commercial Communications, the Commission regrets this flexibility, because it gives ample possibilities to the national judges to interpret this concept differently in different Member States. [13] In addition, one may remember that the directive on misleading advertising is a minimum directive, that does not preclude Member States from retaining or adopting provisions with a view to ensuring more extensive protection with regard to misleading advertising. Taken together, these two elements may indeed create barriers to the flow of advertising services. [14] The recent case law of the European Court of Justice, however, shows some unifying tendencies: we have already noted the opinion of the Court about the concept of the consumer. This is not the only factor from which a certain unifying tendency emanates. Cases like Pall, GB-INNO, Clinique, Nissan and Sucrandel [15] provide us with a balanced interpretation of the concept of misleading advertising, which should also be normative in pure national cases. Whereas it is not possible to do without a general concept of misleading advertising, given the flexibility of advertising itself, it is recommendable to look for mechanisms in which the interpretation of the Court in cases of transborder advertising should also be valid in purely national cases. One of these mechanisms would be a maximal harmonisation of the directive on misleading advertising, in the same way as comparative advertising is treated.

Comparative advertising and the provision of correct information

023 The definition of advertising in the context of comparative advertising, being the same as the one used for misleading advertising, does not seem to create difficulties in applying the European rules for comparative advertising on comparative webvertising. The main problem with comparative advertising on the Internet and elsewhere, is made up by the link between unfair competition and comparative advertising. As long as the field of unfair competition is not harmonised in the Community, even the effects of maximum harmonisation of comparative advertising will be hampered by the different interpretations the national Courts may employ, concerning categories like passing off, discrediting competitors, free riding, confusion, etc. [16] In this respect, it would be advisable that the Commission again takes preparations for the harmonisation of unfair competition, like it did at the first draft of a directive on misleading and unfair advertising. This, however, relates to general problems of advertising law; nevertheless, harmonisation could also bring solutions to some specific problems relating to webvertising, more particularly relating to reliable search methods on the Internet.

024 For consumers comparative advertising can be a very useful tool to gather information about products and services. Art. 7 paras. 4 and 5 of the directive on misleading and comparative advertising contains exceptions to the rule that comparative advertising shall be permitted. These exceptions permit Member States to maintain or introduce certain advertising bans or restrictions on comparative advertising. More particularly, bans or limitations on the use of comparisons in the advertising of professional services may be maintained or introduced by the Member States. As the Internet is a very suitable medium to provide detailed and correct information about professional services - and in fact is already used for that purpose - which could be relevant for the consumer, it is advisable to rethink the existing provisions of the

directive. One reason thereof is also the decision of the European Commission in the EPI case. [17]

Particular problems of webvertising in the sector of medicines and tobacco

025 Public advertising for medicinal products that are available on medical prescription only must be prohibited by the Member States, according to Art. 3.1 of directive 92/28/EEC . The directive on advertising and sponsorship of tobacco products bans all forms of advertising and sponsorship, regardless of its public nature. In both cases questions may arise as to whether the *holding* of a website containing information about tobacco products or medicinal products in itself is a contravention of these bans on advertising. The same holds true for medical claims concerning foodstuffs that are prohibited by Art. 2 parra. 1(b) of the directive on the Labelling, presentation and advertising of foodstuffs . To avoid different interpretations of these two bans, it is advisable to have some guidelines in this respect. (In its Roche case a German ban on advertising which also covered non-misleading statements was considered by the Court as an infringement on the freedom to trade and sell. This non-paternalistic approach, which already in the GB-INNO case had been used by the Court, has been repeated in cases like the Mars case and the Clinique case. It may lead to research into cases in which for several reasons correct information that could be relevant for the consumer is nevertheless banned.)

026 Generally, consumers benefit from actual and relevant information on subjects such as tobacco and medicine. The information provided on web sites should in any case be objective and correct. Especially the health risks involved in web prescription of drugs and medical advice that is (automatically) given on the Internet without professional interventions are substantial. E.g. a patient with a heart condition was given Viagra after Internet consultation. [18] Since Viagra has been linked to the death of heart patients and should not be given to people taking nitrate drugs for heart diseases this could have been a vital error. Consumers should be protected from such health risks. Also in this respect, a sharp borderline between editorial and commercial communication is eminent (see below sub c). Apart from that, since health is an eminent consumer interest, serious consideration has to be given to the question whether there is a need for public legislation that regulates medical advice on the internet.

Promotional offers

027 A subject that has a clear link with existing public law in several Member States is the legislation with regard to promotional offers for commercial purposes such as premiums and lotteries. With regard to on-line promotional offers, only the directive on electronic commerce contains a provision on the mandatory information with respect to these offers in commercial communications (Art. 6c and d). Transparency and information requirements are required for sales promotion activities such as rebates, premiums, gifts etc.

028 As a consequence of the country of origin principle in the directive on electronic commerce , promotional offers can be provided trough the Internet into *all* Member States irrespective of the legislation of some Member States restricting promotional competitions, game lotteries etc. This has a negative impact on the consumer protection standard in those countries. In this respect some clarification is needed as to whether this is a desirable consequence.

b. Easily accessible information for consumers

029 Typical (and important) for webvertising are search methods that will lead to useful information. The way in which some advertisers try to lure consumers in their web by abusing meta-tags, links, framing and the like, deserves special attention. Easy access is very important for consumers. Their civil right, the freedom to gather information, is directly touched upon if their access to information is blocked or otherwise diverted.

030 Hyperlinks provide a very effective search method for the consumer on the Internet. These may even function as a sort of comparative advertising by the consumer himself. Unfair competition law and intellectual property law, however, prohibit some linking methods. Generally speaking: [\[19\]](#)

(a) Mere hyperlinking is not considered as an unlawful use of a trademark or a company name.

(b) A clear expression of opposition on a competitor's website to hyperlinking may be legally effective to exclude hyperlinking to that website.

(c) Deep linking, that is linking while bypassing the competitors home page, could be prohibited if by deep linking the false impression could be given that the page which appears belongs to the website of original website.

(d) As far as framing is concerned, it is accepted that the owner of a website being framed, can easily find recognition in a statement of his or her authorship on the quoted page. This means that framing in itself will not be readily considered as unfair competition.

(e) The use of meta tags could amount to infringements of Trade Mark Law, unless the use of the trade mark could be considered as lawful editorial use.

031 It is expected that, these issues can be addressed under the current unfair competition law and intellectual property laws. However, they need constant attention, since they represent an important consumer need in this field.

c. Information its nature which is recognizable as regards

032 It is of key importance that consumers are acquainted with the nature of information they are confronted with. Is the information commercial or does it originate from independent sources? Since the Internet is a convergent medium that unites all possibilities of all sorts of media such as newspapers, film, telephone, broadcasting and databases, the borderline between editorial and commercial communication on web pages is often blurred. The reliability of the classical media in this respect is absent on the Internet (see also domain D3).

033 European law contains, except for television, no specific rules concerning the borderlines between editorial and commercial communication. This field for the greatest part is covered by national and international self-regulation. Although art. 10.1 of the TVWF directive contains the principle that editorial and commercial communication has to be clearly distinguished, the application of this principle in Article 11 (the interruption system) is tailor-made for television and cannot be used on the Internet.

034 As a general rule, commercial communication should be recognisable as such. This principle has been laid down in the directive on electronic commerce . In Article 6a it is stated that Member States shall ensure that commercial communication is clearly identified as such. Also, according to the second paragraph of Article 4 of the distant selling directive , the supplier of goods and services is obliged to make clear what the commercial purposes of the information on his website are.

035 The directive on misleading and comparative advertising defines misleading advertising as any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed, thereby making it possible to take action against forms of surreptitious advertising on the Internet. Nevertheless, more specific rules should be considered.

036 The same reasoning holds for sponsorship. Since on the Internet it is rather difficult for consumers to establish whether they are dealing with objective information or information that has a commercial nature, extra safeguards are needed as to the identity of a sponsor of a site. On the Internet one can see more and more companies sponsoring sites. E.g. a producer of cosmetics can sponsor a site with information for teenagers and their problems. On this site information about facial spots can be given and teenagers can unknowingly be lured to buy the anti-pimple product of the sponsor. In this context, clear rules are required under which the sponsor is obliged to identify itself. Under Article 6 b of the directive on electronic commerce the natural or legal person on whose behalf a commercial communication is made, has to be clearly identifiable . So far it is not yet clear whether the sponsoring of an Internet site has to be considered commercial communication within the meaning of the directive on electronic commerce.

037 In this context, there is another issue that is critical: how does article five of the electronic commerce directive apply to telecommunications? At present there are applications where an SMS message is transmitted to a mobile phone when entering a certain area. How should this be seen? Is this message received in the context of a pre-contractual arrangement? One could ask whether there is not a need for a contract between the consumer and the provider of the service. This also raises the question of who is the counterparty? The service provider or the person advertising? Obviously, given the expected boom in telecom applications (WAP etc.), the relation between telecoms and advertising will become increasingly important and may require reassessment.

038 In conclusion, although the principle that consumers have to be informed about the nature of information is expressed in the relevant directives, some clarification is needed with regard to the way in which companies have to distinguish commercial information from objective information on the Internet, as is already done with regard to TV commercials in the TVWF directive.

Children

039 Since children are a very vulnerable group of consumers in the analogue world, the TVWF directive contains a specific provision for children in Article 16. The underlying principle of this provision is that TV commercials may not cause moral or physical damage to children. To this end, TV advertisements may not incite children to buy products or to incite their parents to buy the products and may not show children in dangerous situations etc.

040 Since Article 16 TVWF directive is formulated in a medium-dependent way it can only be directly applied to TV commercials. Therefore it is not Information Society proof per se and needs clarification. If this provision would be reformulated to include all

commercial communications, it could be a very useful point of departure for the regulation of on-line advertisements [20]. At this moment also some effort is being made to implement self-regulation among advertisers throughout the EU [21].

d. Unsolicited and obtrusive commercial messages

041 Unsolicited commercial e-mail also known as spamming [22], is a growing problem on the Internet. By sending spam mail the advertisers move the advertising costs to the consumer who spends (valuable) time reading the e-mails. The problem of the legality of spam mails has not yet been solved. In article 10 of the directive on distance selling the prior consent of the consumer is required with regard to the use of automatic calling systems without human intervention and the use of facsimile machines for distance communication (opt in). With regard to other means of individual distance communication, such as spam mails, the Member States will have to ensure that these may be used only where there is no clear objection from the consumer (opt out). It should be noted that this directive only refers to distance selling. Not all spam mail will be sent for the purpose of distance selling.

042 In Article 12 of the telecom-privacy directive the use of automatic calling systems without human intervention or facsimile for the purpose of direct marketing may only be allowed in respect of subscribers who have given their prior consent (opt in). For means other than via automatic calling or facsimile the telecom-privacy directive leaves the Member States a choice between an opt out or an opt in system. Until now, it is not totally clear whether spam mail can be squeezed in under this last category. The Commission has taken an initiative to clarify this situation in its Proposal for a Directive concerning the processing of personal data and the protection of privacy that is intended to replace the current Directive 97/66/EC. In article 13 of this proposal, electronic mail for direct marketing purposes other than at the request of a subscriber, will be covered by the same type of protection that exists for automatic calling systems and taxes. The Commission thus proposes a harmonised opt in approach that is technology neutral (COM (2000) 385).

043 The directive on electronic commerce has a special provision on unsolicited commercial communications by e-mail in article 7. This provision does not univocally solve the problem of unsolicited e-mail. It leaves both possibilities of opt out and opt in to the discretion of the Member States. In any case the spam mail should be clearly and unambiguously identifiable as such at the same time defining a specific obligation for the Member States to take measures in the field of the so-called Robinson lists or opt out registers. Service providers are required to check regularly these registers and to respect the consumers that have registered their preference not to receive spam mail. Under Article 13 of the draft directive concerning the processing of personal data and the protection of privacy in the electronic communications sector, unsolicited communications (spamming) will only be allowed in respect of subscribers who have given their prior consent.

044 In conclusion, the present rules on spamming still need some clarification to be Information Society proof. Also for harmonisation purposes, a choice should be made between an opt out and an opt in system for spam mails. An opt in system seems most favourable for consumers whereas an opt out system allows advertisers to send spam mail if the consumer does not (clearly) object. The recent Commission proposal (COM (2000) 385) embraces this principle.

5. Conclusions

Information Society proof rules

045 The scope of commercial communication as defined in the electronic commerce directive is Information Society proof. The distance selling directive, and the directive on misleading and comparative advertising contain provisions to ensure that the consumer will be correctly informed about relevant features of products and services and can also be titled as Information Society proof. In respect of access to information and on-line search methods (hyperlinking en meta tagging) for consumers one can rely on the existing regulatory network, being unfair competition law and intellectual property laws.

Rules whereby clarification is needed

046 Since the directive on misleading and comparative advertising allows for an exception for the comparative advertising of professional services and the Internet is a very suitable medium to provide detailed and correct information about professional services some clarification is needed as to whether the EU wishes to maintain that exception on-line. Furthermore, The Information Society consumer will expect information to be recognisable as regards its nature: commercial or originating from independent sources. Although the general rule that commercial communication should be recognisable is as such laid down in the directive on electronic commerce and the distance selling directive clarification is needed about the way in which companies have to distinguish commercial information from objective information on the Internet. Especially in respect of information with regard to prescribed medication it is eminent that companies draw a clear borderline between editorial information and commercial communication. Also with regard to vulnerable consumer groups such as children it is of the utmost importance that commercial communication is clearly identifiable as such for this target group. Also, the rules on spamming still need some clarification: the problem of the legality of spam mails is not yet solved. The Commission has taken recent action to clarify this by proposing an opt in system for spam mail in its Proposal for a Directive concerning the processing of personal data and the protection of privacy that is intended to replace the current Directive 97/66/EC. Finally, as a consequence of the country of origin principle in the directive on electronic commerce promotional offers can be provided through the Internet into *all* Member States irrespective of the legislation of some Member States restricting promotional offers etc. Some clarification is needed as to whether this is the desired consequence.

Non-Information Society proof rules

047 None.

Gaps in EU legislation

048 The health risks involved in web prescription of drugs and medical advice that is (automatically) given on the Internet without professional interventions are substantial. Since health is an eminent consumer interest, serious consideration has to be given to the question whether there is a need for public legislation that regulates medical advice on the Internet. Furthermore, no regulation exists with regard to on-line commercial communications directed to children. Since article 16 TVWF directive is formulated in a medium-dependent way it can only be directly applied to TV commercials. If this provision would be reformulated to include all commercial communications directed at children, it could be a very useful point of departure for regulating for on-line

advertisements.

