

Deutsche Vereinigung
für gewerblichen Rechtsschutz
und Urheberrecht e.V.

Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht
Theodor-Heuss-Ring 19-21 • 50668 Köln

Europäische Kommission
z.Hdn. Direktor Thierry Stoll
Generaldirektion E „Binnenmarkt“
Rue de la Loi 200

B-1049 Bruxelles

Sitz Berlin
Hauptgeschäftsstelle Köln
50668 Köln, den **tt.01.jjjj**
Theodor-Heuss-Ring 19-21
Telefon (0221) 77 16-151
Telefax (0221) 77 16-205
e-mail: office@grur.de

Ihr Zeichen:
Unser Zeichen:
(Bei der Antwort bitte angeben)

PRACTICE GROUP UNFAIR COMPETITION

**HERE: COMMENTS OF THE GERMAN ASSOCIATION ON THE PROPOSAL FOR AN ORDINANCE CONCERNING
"SALES PROMOTION IN THE INTERNAL MARKET"**

Dear Mr. Stoll,

Following our last meeting in Berlin on 9 October 2001, you asked for a first assessment of the Commission proposal for an ordinance concerning sales promotion in the internal market.

The *Deutsche Vereinigung für Gewerblichen Rechtsschutz und Urheberrecht* (GRUR = German Association for the Protection of Intellectual Property Rights) discussed the Commission proposal at the meeting of its committee for marketing and competition law on 7 December 2001.

Based on the discussion of the committee, we are able to give a first assessment of the Commission proposal:

I. Goals and Structure of the Commission Proposal

The Commission proposal aims at a European Union-wide regulation "sales promotion campaigns" with the aid of discounts, gratuities, give-aways, or contests and lotteries. Its intention is to regulate by law a part of the extensive area of unfair competition.

1. We continue to advocate adhering to the goal of creating a harmonised European fair trade law. The disadvantages of sectional solutions are appropriately described in the "*Grünbuch zum Verbraucherschutz in der Europäischen*

Union" ("Green Book on Consumer Protection in the European Union") – KOM (2001) 531 endg. The arguments against the creation of a harmonised European fair trade law given by the Commission in the context of its proposal of the ordinance do not seem cogent.

- a) We do not agree that there is no suitable legal basis for the creation of a harmonised European fair trade law. Like the Directive of the European Council concerning misleading and comparative advertising, a harmonised European fair trade law could be based on Article 94 (ex-Article 100) of the Treaty establishing the European Community.
- b) We are also not of the opinion that a harmonised European fair trade law could not be created at European Union level because it would not be possible to reach a consensus. The Commission appropriately stated in its Green Book on Consumer Protection that there is, to all intents and purposes, a "general legal principle" in the Member States – usually in the form of a blanket clause, to prevent advertising practices which are *contra bonos mores* or violate fair trade rules. This corresponds to the mutual obligation of the Member States through the Paris Convention. The Paris Convention contains, in Article 10, a blanket clause concerning the prohibition of unfair competition which – possibly in a newly worded version – could be the authoritative "basic standard" and blanket clause of a European Union fair trade law to be created.
- c) The multitude of regulations passed up to now concerning the area of unfair competition and sales promotion campaigns, which are, for example, mentioned in the 9th reasoning considerations on the Commission proposal, lead to a complex legal position comparable to a "patchwork quilt". The complexity not only complicates the enforceability of the regulations in the internal market; it also complicates the transparency of the legal position of businesses and consumers involved in the market. The legal fragmentation thus becomes an independent restraining factor for the communal market. The Commission also appropriately deplored the legal fragmentation in the "Green Book on Consumer Protection" and therefore brought forward a "combined approach". GRUR expressly supports such a

"combined approach" and will give further reasons for this in a separate written commentary on the Green Book.

2. In proposing an ordinance, the Commission forsakes the approach it has taken in this area up to now, which was to effect the harmonisation of laws by means of directives. The individual nations thus will not retain any national implementation leeway of their own in the area regulated by decree. This could be accepted if a comprehensive harmonisation of fair trade laws were indeed effected and the already existing directives were thus ultimately replaced by an ordinance directly applicable in all Member States.

II. Details of the Commission Proposal

In the following, we present our comments on the Commission proposal. For clarity, we will keep to the order of the articles, taking, however, also the "Announcement of the Commission" on the proposal as well as its reasoning into account within the framework of this first assessment:

1. Article 1 states the aim of the regulation to rule the "use and commercial communication" of sales promotion campaigns. Even if the term "commercial communication" has caught on at European Union level, it can be gathered from the definition in Article 2 lit. a) that "commercial communication" ultimately is supposed to include all forms of advertising. Article 2 lit. a) of the draft regulation is largely in line with Article 2(1) of the Council Directive concerning misleading and comparative advertising and the definition of "advertising" to be found therein. It could possibly be worded more simply that the ordinance will regulate the "use as well as the advertising" for sales promotion campaigns.
2. The definitions
 - a) Article 2 lit. a), in sentence 1, defines "commercial communication". The exception in half-sentence 2, second bullet point, which excludes information from the term "commercial communication" which "is given independently and, in particular, without financial compensation", apparently particularly concerns press information. This could also be expressly stated.

- b) The definition of "sales promotion campaigns" in Article 2 lit. b) mentions "discounts, gratuities, and give-aways", as opposed to the "opportunity to participate in a contest or a lottery". That not only discounts, gratuities, and give-aways that are actually given are meant can be inferred from the definitions in lit. e) to g), which are based on such offers. It could be stated already in the definitions of the "sales promotion campaigns" that offers of discounts, gratuities, and give-aways come under the heading "sales promotion campaigns".
- c) In Article 2 lit. e) to i), discounts, gratuities, give-aways, contests, and lotteries are characterised as limited in time.
- (1) In practice, it is not mandatory that such "sales promotion campaigns" always be limited in time. Indeed, it is probably not intended that only time-limited "sales promotion campaigns" come under the ordinance. At least, the comments of the Commission in the "Announcement" (p. 7), according to which the legal framework for customer binding systems such as sales promotion campaigns are supposed to be harmonised by the ordinance, indicate this. According to the present wording ("limited in time") of the ordinance proposal, however, customer binding systems would not be included and would only come under the area of applicability of the ordinance if sales promotion campaigns which were limited in time were carried out.
 - (2) It could also speak for the inclusion of unlimited sales promotion campaigns that these would be more likely to require European harmonisation than the limited sales promotion campaigns. It is to be expected that unlimited sales promotion campaigns tend to be carried out more often by large businesses which do their advertising Community-wide and thus will be more affected than others by material differences in the legal framework.
 - (3) The time limitation in connection with the obligation to specify the first and last days of the time period of the offer raises a number of additional questions. For example, it is doubtful whether supply-lim-

ited sales promotion campaigns ("as long as supply lasts") could still be carried out, because in these cases the "last day of the time period of the offer" within the meaning of the obligation to provide information under clause 1.1 could not be specified. The duration of sales promotion campaigns which is not limited by the proposal of the ordinance may, in practice, also be extended to the extent that, in the view of the public, there is no longer an important difference from a sales promotion campaign which was limited in time from the beginning; consequently, with regard to the differentiation, there might be difficult, doubtful cases.

- (4) Due to the above-mentioned circumstances, it could be taken into consideration to forgo the characteristic trait "time limitation" in the definitions.
- d) The definition of "gratuity" in Article 2 lit. f) as well as the definition of "give-away" in Article 2 lit. g) seems to be worthy of reconsideration, to the extent that here "identical" goods are meant. We lean towards the opinion that the "identity" of the goods should not be relevant.
 - e) In Article 2 lit. l), the "general prohibition" with regard to the "use and commercial communication of sales promotion campaigns" is defined as a prohibition which is not specifically aimed at a certain type of promoted goods or services.
 - (1) Exempted, however, are all of the prohibitions ensuing from Community law, regardless of whether they are based on directives or ordinances. It should still be examined whether (and which) national prohibitions permitted under the definition standard for certain types of goods and services exist and, on the basis of these case studies, decided whether these restrictions are appropriate and workable.
 - (2) In our opinion, the distinction between specific and general prohibitions may lead to problems. It should still be possible to determine the permissibility of "sales promotion campaigns" under competition law, taking into account all special circumstances of the individual case, for example, on the basis of the blanket clause of §1 UWG

aimed at "goods and services promoted in no specific way" (e.g., the prohibition of sales promotion campaigns by means of unsolicited telephone advertising, outsider advertising contrary to fair competition, etc.).

- f) In Article 2 lit. d), "customer" is defined. This definition, which is merely tailored to an actual purchase, seems to be too narrow. Prospective buyers should be included.
 - g) In Article 2 lit. n), "sale below cost" is defined. Regardless of the fact that other definitions are imaginable, the planned provisions on the sale below cost seem to be exceedingly problematic. We comment on this in connection with the information obligations.
3. The provision in Article 3 forms the core of the ordinance proposal. According to this provision, the Member States may not enact
- a general prohibition with regard to the use and commercial communication of sales promotion campaigns unless Community law provides for such a prohibition;
 - a restriction with respect to the value of sales promotion measures except for discounts on books;
 - a prohibition of discounts before seasonal sales;
- or
- an obligation to grant advance permission for the use or commercial communication of a sales promotion campaign. This also applies to obligations to the same effect.
- a) The prohibition directed at the Member States and non-public authorities to enact a general prohibition of sales promotion campaigns must be construed to the effect that already existing regulations may also not be retained. This could also be expressly stated. From the German point of view, "non-public authorities" are irrelevant.

- b) The design of the draft ordinance aims at prohibiting the Member States from enacting (or retaining) certain provisions. The regulating content of the rule only becomes clear with recourse to the "Announcement" as well as the reasoning in conjunction with the information obligations planned for single sales promotion campaigns, which are substantiated on the basis of Article 4 only in an appendix to the draft ordinance. It would be more comprehensible and transparent and thus preferable to describe in detail which sales promotion campaigns are supposed to be permissible in the future. It could, for example, be worded positively that discounts, give-aways, and gratuities are permissible without a value limitation, provided that the information obligations to be listed in detail are fulfilled.
- c) The repeal of the *ZugabeVO* (Give-Away Ordinance) and the *RabattG* (Discount Act) which became effective in the middle of the year 2000 did away with significant restrictions of the "use and commercial communication" for sales promotion campaigns. Thus, German law is already basically in line with the draft ordinance (if the very extensive information obligations under Article 4 remain, however, it would seem that the execution of many sales promotion campaigns would likely be made more complicated in comparison to the current German legal situation). Based on the "Announcement" and the reasoning of the Commission, it follows at the same time that give-aways and discounts are to be permissible without value limits. To this extent, the draft ordinance contains a clarification as compared to the German legal situation.
- d) The provision in Article 3, second bullet point, provides for an exception from the prohibition only for "discounts on books". However, this price maintenance also includes other publishing products. It seems doubtful whether a differential treatment is justified.
- e) The ordinance proposal, in its current version, would also prevail over national antitrust law. There is a lot to be said for adding a qualification to the effect that the applicability of (national) antitrust law would (also) remain unaffected, similar to the qualification in the Directive concerning e-commerce.

4. The following proposals of the draft ordinance provoke misgivings:
 - a) As before, the prohibition of lotteries requiring a purchase as prerequisite for participation should be maintained. Experience shows that lotteries do indeed have a considerable attraction. This is all the more true because lotteries are to be permissible without any value limits in the future. It should also be taken into account that lotteries are often also addressed to children and youth, who are not able to soberly consider the consequences to the same degree as adults.
 - b) An "advance permit" for the use or commercial communication of a sales promotion campaign will come into consideration under German law especially for clearance sales pursuant to §8 UWG. According to the broad definition of "sales promotion campaign", a big sale with discounts and give-aways for the purpose of carry out a clearance sale might be included in the prohibition to regulate. At least the publication obligation arising from §8(3) UWG could be seen as an "obligation with the same effect". Based on the abuses still to be found in this sector, the general prohibition to regulate appears too broad.
 - c) It can be inferred from the basic reasoning that the provision of Article 3(1) requires that sales below cost be permissible. This principle is in line with German law. Under certain circumstances, however, sales below cost can be in violation of antitrust law. This should not be challenged by the Commission proposal. The information obligations connected with this provision appear problematic and will be discussed in this respect.
 - d) The interdiction of the prohibition of discounts before seasonal sales appears acceptable. Provided that the regulations on seasonal sales are retained at all, it does, however, seem necessary that the discounts may not give the impression of a seasonal sale.
5. According to Article 3(2) of the ordinance proposal, the Member States should, because of the use and commercial communication of sales promotion campaigns, restrict the free movement of neither services nor goods which profit from the use of sales promotion. This provision is linguistically unclear and problematic as to content.

It is emphasised in the basic reasoning that the principle of mutual acceptance applies to all sales promotion campaigns not falling under Article 3(1). According to the reasoning, this principle is to prevent "sales promotion campaigns related to services from other Member States being restricted, which would not be compatible with Article 49 of the EU Treaty". In particular, services of planning and advertising agencies, media services, services of media planners, sponsoring agencies, or direct marketing businesses as well as ultimate consumers and customer service businesses are included. Prohibited is to be "any form of restriction of such services stemming from other Member States concerning the use of sales promotion campaigns as well as their publication through commercial communication; i.e., all acts of a Member State are prohibited which would hinder the execution and publication of the sales promotion campaign or make it less attractive".

It can, however, not be seen which territorial regulations would restrict the service providers mentioned in their activities for the sales promotion campaigns in question. The practical relevance of the provision is not discernible. The principle of mutual acceptance also contains a waiver of regulation and leads to an erosion to the level of the lowest standard. This is not in line with the aim of the draft ordinance (or of the Green Book on Consumer Protection), with which a particularly high level of protection is supposed to be reached.

6. Pursuant to Article 4, the ordering party of "sales promotions campaigns" has far-reaching information obligations. Before we treat these in detail, some more general comments are in order:

According to Consideration 10 of the draft ordinance, the non-compliance with information obligations constitutes a violation of the prohibition of misleading advertising (pursuant to Directive 84/450/EEC). It appears to be problematic, however, to deem to be misleading any non-compliance with information obligations whatsoever regardless of their significance for consumers and the gravity of the violation. It might possibly suffice to phrase the provision so that the non-compliance with information obligations can constitute a violation of the prohibition of misleading advertising, depending on the case and the gravity of the non-compliance with information obligations.

We fear that information obligations contained in the proposal in their entirety could not be practically fulfilled by many businesses actually interested in such sales promotion campaigns. In our view, a very critical examination will be necessary to discover whether the currently proposed catalogue does not, after all, prove to be counterproductive and pose – for example, as opposed to the new German legal situation – a considerable impediment. This comment should by no means question the importance of comprehensive consumer information – also as a certain counterpart to the liberalisation of fair trade laws in general and the rules for sales promotion campaigns in particular. However, we are of the opinion that the present proposal will unduly burden businesses interested in the sales promotion campaigns in question – in particular, small and midsize businesses – in some sectors and that the consumers also do not have such a far-reaching interest in information and enlightenment. The latter is true especially also with respect to the fact that the picture of the "informed, attentive, and knowledgeable average consumer" drawn by the European Court of Justice has caught on not only on the Community level, but meanwhile, for example, also in Germany. It is presumed that the consumer, as a rule, possesses a certain attentiveness and intelligence (perhaps depending on his situation). He is to be protected from being misled and to be provided with necessary information, does not require, however, "oversupply", which would, on the one hand, cast doubt on his maturity and, on the other hand, adversely affect or prevent the practical execution of sales promotion campaigns, which are, in any case, in his interest.

Our comments on the individual information obligations are as follows:

a) Obligatory information for all sales promotion campaigns

- (1) Under clause 1.1, it is mandatory to give the prices of the advertised goods or services for all sales promotion campaigns. This rules out any advertising for sales promotion campaigns without listing the prices. This seems too far-reaching. This regulation would practically rule out, in particular, the sales promotion campaigns often carried out by brand name companies. These companies cannot and may not, as a rule give the resale prices of their outlets (prohibition of retail price maintenance). The obligation to list precise prices under

clause 1.1 (second bullet point) would also prevent all sales promotion campaigns for larger production lines or even the entire product range ("everything 20 percent cheaper on Friday").

- (2) Furthermore, clause 1.1 requires that the first and last day of the time period for which the offer is valid always be stated. This should only apply to sales promotion campaigns which are indeed limited as to time. This provision would rule out any sales promotion campaign limited to the stock at hand.

b) Discounts

- (1) Clause 2.1 requires an indication of any sale below cost. These indications are – as can be seen in connection with the provision of 2.4 —to be made towards consumers. These information obligations would appear to be superfluous, because ultimately only the precise offer prices are of importance to consumers, but not what the seller paid. In any case, such indications could be used as a lure by the seller in cases where the objective cheapness of the offer does not justify a price with the indication "sale below cost". In the area of telecommunications and for sellers of electronic equipment, it is not seldom the case that due to technical developments, former cost prices become general market prices. The indication of a sale below cost might also lead to an adverse effect on the reputation of brand name goods.
- (2) The provision in clause 2.4 requires information on a possible sale below cost towards the supplier. This provision already appears to be unworkable if delivery is still to be made, because the subsequent selling prices often are not set at the time of delivery. To the extent it is intended in the "Announcement" of the Commission that the supplier could also refuse to deliver because of the planned sale below cost, the requirement to provide information could also be problematic under Articles 81, 82 of the EU Treaty, because it would bring about or promote retail price maintenance.

- c) To the extent clause 3.1 requires, with respect to gratuities and giveaways, that their "actual value" must be stated, this appears problematic. This could probably only apply to a "customary" value; the business doing the advertising should be allowed a relatively generous leeway for the determination of this "customary" value in order to avoid a multitude of fruitless disputes.
 - d) We also have considerable doubts whether the information obligations in clause 4 with respect to contests and lotteries can be fulfilled in practice. The chances of winning can often not be substantiated in advance, since the number of participants is unknown, as a rule.
7. Article 6 of the draft ordinance has the heading "Legal Remedy". It could be deliberated whether to expressly provide that breaches of obligations provided for in the draft ordinance as well as in its appendix can be taken to court. In addition, it should be examined whether the general reversal of the burden of proof to be borne by the ordering party provided for in Article 6(1) is justified in every case. It might possibly be sufficient to give the burden of proof to the ordering party for his information, provided the respective complainant does not have the relevant information himself or the information is not accessible for him.

Dr. Kunz-Hallstein
Präsident

Dr. Loschelder
Generalsekretär