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ADVERTISING OF PRIVATE COMMERCIAL SPACE SERVICES IN THE EUROPEAN COMMUNITY

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Abstract

There is much potential for European Union law to apply through its Member States' national laws to space contracts and space activities. This is particularly valuable for potential space consumers within Member States that do not have any specific domestic space law binding within the States. This paper will examine the impact of Council Directive 84/450/EEC of the 10th September 1984 as amended to include comparative advertising by Directive 97/55/EC of the 6th October 1997 on the private commercial space tourism market in the European Community. The purpose of the directive, as amended, is to provide a minimum level of protection to consumers from any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor and to lay down the conditions where comparative advertising is permitted.

INTRODUCTION

Although, international law is stated in the Outer Space Treaty to apply to outer space and national law will apply to space objects and any personnel aboard that are on a state's national registry (and therefore subject to their jurisdiction in accordance with Art. VIII of that Treaty), there is also great potential for the application of European Union law to apply, through its Member States' national laws, to space contracts and space activities. This is particularly valuable for potential space consumers within Member States that do not have any specific domestic space law binding within them (for example, Ireland). In this regard, Community measures in relation to consumer protection¹ that have the potential to apply to the space tourism market are of particular interest as these measures were not

drafted in the light of the needs of the emergent private commercial space industry. Such measures also provide a contrasting approach to existing specific national space law dealing with the industry such as the Commercial Space Launch Amendments Act 2004. The European Union, as one of the world's great economic blocks with a population of 459.5m², is an ideal target market for the services sector, including private commercial space tourism services.³ Critical to that sector is the role of advertising which is defined here as 'the process of persuasion, using the paid media in which purchasers of goods, services and ideas are sought.'⁴ It enables the market to expand by allowing producers and service-providers access to consumers and by increasing consumer awareness of particular goods and services, both of which are of much importance for the space tourism industry at its current phase of development. This paper will examine the impact of EU advertising law on the content of advertising for the space tourism industry. It will also assess the

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alternate approach to existing specific national space law dealing with the industry, such as the Commercial Space Launch Amendments Act 2004, in illustrating the protection given to pre-contractual space consumers'/space flight participants' knowledge.

THE FREEDOM TO PROVIDE SPACE SERVICES

Art. 49 (ex. Art.59) of the Treaty establishing the European Community provides for a prohibition on restrictions on the freedom to provide services in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.⁵ Measures may be extended to apply to nationals of third countries who provide services and who are established in the Community. Both Art.49 and Art.50 have direct effect.⁶ It is clear from the parameters provided in Art.50 (ex. Art.60) regarding 'services' that both advertising⁷ and private space services fall within its scope as activities of a commercial character provided for remuneration within the meaning of Art.50 (ex Art.60)⁸ (provided the remuneration does not come from the public purse of a Member State)⁹. The recreational element to space tourism does not affect the construction of the activity as economic;¹⁰ nor does the remuneration have to come from the recipient of the service.¹¹ However, Art.51 (ex Art.61), excludes transport services from the chapter as it is dealt with in Title V (ex IV).

Under Art.71 of Title V (ex Art.75) the Community is empowered to lay down common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States, the conditions under which non-resident carriers may operate transport within a Member State, measures to improve safety and any other appropriate provisions. It is possible therefore that either the services or the transport provisions may be

relied on in respect of space tourism/hospitality, with the choice depending on its interpretation either as a service or as a form of transport. Given the current state of development of space tourism and the ruling in *Cowan*, where a tourist was found to be the recipient of a service,¹² it is submitted to be viewed more as the former than the latter. However, there has been no determination by the ECJ on the matter.

ADVERTISING AND THE E.U.

While advertising is highly subjective, it is important that consumers receive correct, accurate and objective information regarding goods and services. This is vital where a new service enters into the market, especially one that is attendant with high risk. It will be essential for the private space tourism sector when the industry develops and the market expands. Advertising has a direct effect on the establishment and the functioning of the common market by causing, *inter alia*, distortions in competition. The increase of cross-frontier advertising also increases the desirability of harmonisation as discrepancies may disrupt intra-Community trade.¹³ The second programme of the EEC for a consumer protection and information strategy provided for appropriate action to be taken in the field of misleading advertising.¹⁴ Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising¹⁵ was subsequently passed.

Directive 84/450 notes that advertising "affects the economic welfare of consumers" whether it induces a contract or not. The purpose of the Directive is "to protect consumers, persons carrying on a trade or business or practising a craft or profession and the interests of the public in general against misleading advertising and the unfair consequences thereof" (Art.1).¹⁶ Recipients of

space services, such as space tourists, would constitute such consumers and would therefore have their economic welfare expressly protected in a way that does not occur within national space laws, such as the Commercial Space Launch Amendments Act 2004(CSLAA). While the latter Act safeguards the physical safety of space flight participants, their economic welfare is only indirectly protected insofar as the Act provides for extensive pre-disclosure of space flight risks prior to the receipt of any compensation. Furthermore, the requirement for a waiver, applicable, under the Commercial Space Launch Act 1984,¹⁷ to space flight participants arguably protects the economic welfare of the emerging private commercial space flight industry more than that of individual consumers.

APPLICATION OF DIRECTIVE 84/450 TO SPACE SERVICES

Directive 84/450 applies to advertising of space service providers operating within the Community. It establishes conditions for determining whether an advertisement is misleading. In doing so, it ensures a minimal level of protection for the consumer's right to information, even if that information is not impartial, at the inducement stage, rather than prior to the exchange of consideration. This requirement for the provision of information is also safeguarded by the CSLAA but not at the inducement stage. Art.2 defines advertising as "the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or *services*, including immovable property, rights and obligations". All three constituents must be present for the announcement to constitute an advertisement.¹⁸ Misleading advertising is defined as "any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its

deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor." It is clear that the advertising of private commercial space services within the Community will fall within the scope of the directive.

In determining whether advertising is misleading, the directive requires that account be taken of all its features noting in particular any information concerning:

- “(a) the characteristics of goods or services, such as their availability, nature, execution, composition, method and date of manufacture or provision, fitness for purpose, uses, quantity, specification, geographical or commercial origin or the results to be expected from their use, or the results and material features of tests or checks carried out on the goods or services;
- (b) the price or the manner in which the price is calculated, and the conditions on which the goods are supplied or the services provided;
- (c) the nature, attributes and rights of the advertiser, such as his identity and assets, his qualifications and ownership of industrial, commercial or intellectual property rights or his awards and distinctions”. (Art.4)

Condition (a), with its requirement to take account the results and material features of tests and checks on the service in assessing whether an advertisement is misleading, is of particular benefit in protecting the interests of space consumers by restricting misleading claims regarding the safety of the space activity in question. Where a space service provider has included certain claims regarding the tests conducted on their space vehicle and its general safety features etc., they may be required by the courts of Member States to

provide factual evidence to support the accuracy of those claims.

IMPLEMENTATION OF THE DIRECTIVE

The Directive leaves a degree of flexibility to Member States in the level of protection afforded to the consumer, which may be above that set out by the measure itself. However, as the ECJ noted, it "should be remembered, however, that that power must be exercised in a way that is consistent with the fundamental principle of the free movement of goods, as expressed in the prohibition contained in Art.28 EC on quantitative restrictions on imports and any measures having equivalent effect between Member States."¹⁹

The definition of misleading advertising is not uniform throughout the Community. In England, advertising is misleading 'if it conveys a false impression to an average reasonable viewer of the advertisement... there must be a reasonable probability of confusion being caused by the advertisement, and not just an abstract risk'.²⁰ Furthermore, "both literal and implied meanings must be considered; all persons likely to see the advertisement must be taken into consideration, including persons of low intelligence or limited means."²¹ In Belgium omissions of essential characteristics will also amount to misleading advertising.²² In France, pictorial representations may amount to misleading statements.²³ In Greece, false statements that misled can result in imprisonment for up to six months, a fine or both.²⁴ In Ireland, persons are forbidden from publishing advertisements which are likely to mislead and cause loss, damage or injury to members of the public to a material degree.²⁵ However, Spanish law only prohibits advertising that causes an error resulting in economic action or omission or that may or does damage a competitor. Ohly points out two additional questions, first whether the deception is to be determined as a purely

factual matter or as a normative one²⁶ and second, the actual number of consumers who need to be deceived for the advertisement to be construed as misleading, both of which have received varied responses before the national courts and the ECJ.²⁷ Advertisers of space services should refer in each case to national law to ensure full compliance with any additional requirements.

COMPARATIVE ADVERTISING

Directive 97/55/EC of 6 October 1997, as amended by Directive 84/450/EEC²⁸ to include comparative advertising,²⁹ was borne out of a need to create a uniform provisions governing the form and content of comparative advertising in the interest of the internal market and the consumer's right to information. The Directive also protects the economic welfare of space consumers in assisting them in choosing amongst competitors. This protection is, of course, only advantageous where there are multiply space service providers operating within the market. Art.2 inserts a new Art.2a into Directive 84/450 which provides a definition of comparative advertising, viz, "any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor."³⁰ Thus where space service providers resort to comparative advertising, as a weapon against their competitor the provisions of the directive, as incorporated into national law, will be engaged. Art.3a of the amended Directive provides exhaustively³¹ the cumulative conditions³² under which a comparative advertisement is permitted:

- (a) it is not misleading according to Arts 2 (2), 3 and 7 (1);
- (b) it compares goods or services meeting the same needs or intended for the same purpose;
- (c) it objectively compares one or more material, relevant, verifiable and

representative features of those goods and services, which may include price;

(d) it does not create confusion in the market place between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor;

(e) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor;

(f) for products with designation of origin, it relates in each case to products with the same designation;

(g) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;

(h) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name.”

The conditions above have a number of consequences. Condition (b) only requires that the service meet the same need, rather than being identical, so space hospitality advertising comparing different space vehicles will meet the condition because of their reasonable interchangeability. According to the ECJ's case law, it may be legitimate to use a competitor's registered trade mark where necessary to inform the public of the intended purpose of the service offered.³³ Under the Directive, the use of another's trade mark in comparative advertising will not infringe the Trade Marks Directive³⁴ as long as it is not unfair, does not denigrate the competitor's services, nor cause confusion.³⁵ Denigration, in this context, varies between claiming a competitor's service inferior³⁶ to depictions as 'generally unsatisfactory'.³⁷ Ohly suggests that a better approach to condition (e) is 'to apply it in situations in which an otherwise acceptable comparison is expressed in a

manner that is denigrating, though not so exaggerated as to make the advertisement lacking in objectivity or misleading'.³⁸ In addition, as Kelly observes, the condition at (c) "ensures that the test is essentially an objective one. A statement will only be verifiable if the advertiser can provide the respective information upon request."³⁹ The ECJ has held that these conditions must be interpreted in the sense most favourable to such advertisements.⁴⁰ Any such advertising must "indicate in a clear and unequivocal way the date on which the offer ends or, where appropriate, that the special offer is subject to the availability of the goods and services, and, where the special offer has not yet begun, the date of the start of the period during which the special price or other specific conditions shall apply." Price comparisons have been found not to constitute misleading advertising as they are 'extremely useful to enable the consumer to make his choice in the full knowledge of the facts'⁴¹ nor can they *per se* entail the discrediting or denigration of a competitor's trade mark.⁴² The comparator has economic freedom in selecting which prices to compare.⁴³ A "failure to mention a better known brand name in a comparative advertisement would be contrary to the Directive if the omission significantly [affected] a consumer's choice." However, selecting the most favourable comparisons to be drawn is not contrary to the Directive as consumers reasonably expect this. Puffery is permitted.⁴⁴ In assessing if an advertisement violates the terms of the directive, the court will take account of its overall presentation and the target consumer group. In the case of a specific group of consumers with specialist knowledge, the probability of violating the directive is lower. For space tourism providers, this means that the expansion of the target consumer group beyond the limited numbers of the pioneer stage of development will affect the nature of their comparative advertising insofar as a determination may be made as to whether it infringes the directive or

not. It may also be possible for space service competitors to raise other challenges against comparative advertisements based in copyright law or in tort, for example, malicious falsehood⁴⁵ or passing off.⁴⁶

The amended Directive does not preclude voluntary controls on misleading or comparative advertising through the use of self-regulatory codes (Art.5) nor does it prevent Member States from taking measures that provides more extensive measures of protection for consumers in the case of misleading advertising (Art.7). However, while the Directive sets out only a minimum standard, "stricter national provisions on protection against misleading advertising cannot be applied to comparative advertising as regards the form and content of the comparison."⁴⁷ Therefore, any national measure regulating the form and content of comparative advertising will be assessed in light of the Directive and not Art.28.⁴⁸ Many Member States have such additional self-regulation in advertising. Member States may maintain bans on comparative advertising in the case of certain vulnerable categories of consumers or for the advertising of professional groups, although no current limitations exist for space consumers.

ACTIONS AGAINST MISLEADING AND COMPARATIVE ADVERTISERS

Member States must ensure that adequate and effective means exist for the control of misleading advertising or unpermitted comparative advertising, including legal provisions "under which persons or organizations regarded under national law as having a legitimate interest in prohibiting misleading advertising" may take legal action or bring the matter before a competent administrative authority. The Court /administrative body is empowered under the directive to order the cessation of, or to institute appropriate legal proceedings for an

order for the cessation of, misleading advertising, or to order the prohibition of, or to institute appropriate legal proceedings for an order for the prohibition of the publication of an advertisement where this had not yet occurred but is imminent without proof of actual loss or damage or of intention or negligence on the part of the advertiser. Actions for an injunction may also be brought by qualified entities, such as consumer organisations, as provided for by Directive 98/27/EEC.⁴⁹ The measures taken may also amount to unfair commercial practices under Directive 2002/65/EC which includes misleading and comparative advertising as such.⁵⁰

OTHER DIRECTIVES⁵¹

The directive on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the pursuit of television broadcasting activities⁵² as amended is also of interest for space tourism operators. Television advertising is defined as 'any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking in connection with a trade, business, craft or profession in order to promote the supply of goods' and therefore will encompass the advertisement of space services. It must be 'readily recognizable' as such and kept separate from other parts of the programme service. Art.10 prohibits both surreptitious and subliminal advertising.⁵³ Art. 12 provides that television advertising must not prejudice respect for human dignity, include any discrimination on the grounds of race, sex or nationality, be offensive to religious or political beliefs or encourage behaviour prejudicial to health or to safety or the protection of the environment. It must no cause physical detriment to minors. (Art.16). The Directive does not prohibit a Member State from taking general measures

in the interest of consumer protection from misleading advertising as long as the retransmission of advertisements from another Member State is not prohibited and no secondary control applies to such advertisements.⁵⁴

The Distance Contracts directive⁵⁵ also has a bearing on advertising where done through the telephone and facsimile machines. Art. 10(1) prohibits the use of automatic calling systems without human intervention without the prior consent of the consumer. Where space service providers resort to direct mail advertising that leads to a contract, this will also be regulated by the Distance Contracts directive. Consumers under such contracts are given a seven-day cooling-off period with a right of withdrawal. This right to withdraw as well as the identity of the supplier, the main characteristics of the service and the cost (inc. taxes) should be provided in a clear and comprehensible manner but this is not applicable where the contract is for a service to be supplied only once and invoiced by the operator through distance communication. The consumer is entitled to know the geographical address of the supplier and has a non-waivable right of cancellation. Those consumers that do not wish to receive direct mail advertising must be removed from the mailing list under Art.8 of Directive 9/46/EC.

The Package Holidays Directive⁵⁶ also prohibits misleading advertising and requires that the price be clearly disclosed. Additional details relating to the package holiday such as the transportation, accommodation and visa and passport requirements must be provided.

OTHER NATIONAL LAWS

In addition to the Community laws, Member States have their own national laws governing advertising that impose additional limitations.⁵⁷ France also imposes 'an absolute obligation of truthfulness for advertising of

every kind'.⁵⁸ The law on the discounts that may be advertised with any service or product also varies among States. In England, the Trade Descriptions Act 1968 prohibits any person in the course of their trade or business from making a statement which s/he knows to be false, or recklessly make a statement which he knows to be false, including statements concerning the examination, approval or evaluation of any services, accommodation or facilities.⁵⁹ Germany, Austria, Belgium and Italy have fairly strict regimes. Cold-calling is also another area without uniformity with outright bans operating in Germany to countries with no specific legislation (Spain). The law on promotional gifts also varies among states. Germany restricts promotional gifts⁶⁰; in France, this is banned unless identical to the service sold or if low value.⁶¹ Promotional gifts are permitted in Ireland⁶² and subject to only a few limitations in the Netherlands. Again, as above, reference should be made to the law in which the advertisement is made in order to ensure compliance.

CHALLENGING NATIONAL ADVERTISING LEGISLATION

National legislation that restricts or prohibits certain forms of advertising may limit the volume of imports by affecting the marketing opportunities for the imported service and amount to a measure equivalent to a quantitative restriction thus contravening Art.28 (ex.30) of the Treaty of Rome.⁶³ However, while art 28 is applicable to commercial communications, it is also limited by the *Keck* proviso⁶⁴ which permits certain selling arrangements provided they apply to all relevant traders within the national area and affect them all equally in law and in fact.⁶⁵ This approach was adopted by the ECJ in the advertising field.⁶⁶ If the measure taken is not discriminatory, the national court will be left to decide if the measure is necessary in order to meet the overriding requirement of

general public importance or one of the Art.36 aims and the test of proportionality.

Restrictions on advertising in national law may also be challenged directly by space service providers as a restriction on the freedom to provide services within the Community as prohibited in Art.49 (ex.59) of the Treaty as occurred in *Bond van Adverteerders v The Netherlands*⁶⁷ where the ECJ held that the Kableregeling in question discriminated against broadcasters established in other Member States by prohibiting them from advertising on their station intended for the Dutch public. Most restrictions imposed on the basis of residence have been held by the ECJ to operate contrary to Art.49.⁶⁸ However, it is essential that there is some inter-state element; the ECJ have held that “the provisions of the Treaty on the freedom to provide services cannot be applied to activities whose relevant elements are confined to a single Member State.”⁶⁹ But where the prospective consumer moves between Member States before the completion of the contract, the matter will cease to be solely internal⁷⁰. The focus is arguably ‘on the mobility and availability of the service in question rather than emphasising the person.’⁷¹ Art.49 covers both discriminatory and non-discriminatory restrictions in the same fashion as the free movement of goods under Art.28 following the *Cassis de Dijon* jurisprudence because “[t]here might be a variety of restrictions in different Member States, none of them intrinsically justified, which collectively might wholly frustrate the aims of [Art.49] and render impossible the attainment of a single market in services.”⁷²

Where a challenge is made to a discriminatory restriction, Member States may be able to justify the restriction within the exemptions provided in Art.49, as amended by the Treaty of Amsterdam, viz public policy, security or health. Economic aims do not constitute grounds of public policy.⁷³ In addition, such restrictions may also be objectively justified

by reference to certain ‘imperative requirements’. The ECJ set down the requirements in *Van Binbergen*⁷⁴. First, the restriction in national law must pursue a legitimate public interest which is not at variance with the objectives of the Community, a determination of which is to be made by the national court.⁷⁵ Public interest objectives include the protection of workers⁷⁶, consumers⁷⁷, intellectual property⁷⁸ and fair trading. Second, the restriction must be equally applicable to all persons on undertakings operating within the particular Member State and be applied without discrimination.⁷⁹ Third, the measure must be proportionate to its aim, i.e. it must be an appropriate means of attaining the aim and no less restrictive measure must be available. If the restriction duplicates a condition in the Member State where the provider of the service is established, thus imposing a double burden, it will not be found to meet the test of proportionality.⁸⁰ Finally, the restriction must respect fundamental rights, particularly freedom of expression as embodied in Art.10(1) of the European Convention on Human Rights⁸¹ and Art.19 of the UN International Covenant on Civil and Political Rights.⁸² Where these conditions are satisfied, the restriction will be upheld.

The approach to non-discriminatory restrictions may be seen in *Alpine Investments*⁸³ where a Dutch measure prohibiting unsolicited commercial calls was found to constitute a restriction although it was a general measure that did not seek to provide an advantage to the national market. It was not analogous to measures taken in *Keck*. The provision affected not only offers made by the provider of services to the addresses established in the Netherlands or those who moved there to receive services but also offers made to potential recipients in another Member State directly affecting access to the market and hindering intra-Community trade.⁸⁴

Where a national measure relates to both the free movement of goods under Art.28 and freedom to provide services under Art.49, the Court will, in principle, “examine it in relation to one only of those two fundamental freedoms if it appears that, in the circumstances of the case, one of them is entirely secondary in relation to the other and may be considered together with it.”⁸⁵ In the event that the dissemination of advertising is not an end in itself, but a secondary element in relation to the sale, the free movement of goods aspect will prevail over the freedom to provide services aspect. The question should not be viewed in the abstract but in the context of the case⁸⁶

CONCLUSION

Community advertising law provides protection to consumers by safeguarding their economic welfare and their right to information at the inducement stage. In doing so, advertising law may be seen to protect the interests of space consumers in addition to the protections provided by national space law measures. Space service providers should be aware that their advertisement policies, whether through broadcasting or direct mail, will attract the provisions of a number of directives as incorporated into domestic law as well as additional national measures, such as self-regulating codes. Advertisements should not be misleading. Comparative advertisements are permitted provided they do not create confusion in the market place between the brand names of the advertiser and those of a competitor, discredit or denigrate the brands of a competitor nor take unfair advantage of the reputation of a competitor's brand. The protection afforded in the regulation of comparative commercial space service advertising safeguards the free economic choice of the space consumer, regardless of whether a contract is entered into or not. Courts of Member States are empowered to order the cessation of publication of any advertisement breaching

the law. Service providers may challenge unduly restrictive laws under the Treaty of Rome as a restriction on the freedom to provide services under Art.49. Such challenges extend to both discriminatory and non-discriminatory measures, by analogy to the case law on the free movement of goods.

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¹ K.P.E. Lasok, *Law and Institutions of the European Union*, 7th ed., (Butterworths, London, 2001), ch.34 p.800 et seq; Kendall, V., *EC Consumer Law*, (Wiley Chancery, London, 1994); Weatherill, S. “Consumer Policy” in Craig, P. and De Búrca, G., *The Evolution of EU Law*, (OUP,1999) at pp. 693-720, Weatherill, S., *EC Consumer Law and Policy*, (Longman, London, 1997), Quinn, A., “Consumer Policy – No Longer the EC Cinderella,” (1990) 18 *ILT* 171 and *Green Paper on European Union Consumer Protection*, Brussels, 2.10.2001, COM (2001) final.

² On 1st January 2005. Excludes DOMs. Schäfer, Gunter (ed.), *Key Figures on Europe: Statistical Pocketbook 2006*, Eurostat, Luxembourg, 2006, p.39.

³ On the E.U. and tourism in general, see Bovagnet, F-C., *Statistics in Focus*, 18/2006 and Dimitrakopoulou, C., *Statistics in Focus*, 19/2006, Eurostat, 2006.

⁴ Campbell of Alloway and Yaqub, Zahd (eds), *The European Handbook on Advertising Law*, Cavendish Publishing Ltd., London, 1999, p.1.

⁵ See generally Craig, Paul and De Búrca, Gráinne, *EU Law: Text, Cases and Materials*, 3rd ed., OUP, 2003, pp. 800-824, Crown, Giles, *Advertising Law and Regulation*, Butterworths, London, 1998, ch.12 and C-299/89 *Stichting Collectieve Antennevoorziening Gouda and Others v Commissariat voor de Media* [1991] 1 ECR 4007.

⁶ C-33/74 *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299, para. 26.

⁷ C-52/79 *Procureur du Roi v. Marc JVC Debauvée and Others* [1980] ECR 833; C-155/73 *Re Giuseppe Saachi* [1974] 1 ECR 409.

⁸ See C-159/90 *SPUC v. Grogan* [1991] ECR I-4685.

⁹ C-263/86 *Belgium v. Humbel* [1988] ECR 5365 para.18 but see C-186/87 *Cowan v. Le Trésor Public* [1989] ECR 195 and C-45/93 *Commission v. Spain* [1994] ECR I-911.

¹⁰ C-275/92 *HM Customs and Excise v. Schindler* [1994] ECR 1039, paras 33-4.

¹¹ C-352/85 *Bond van Adverteerders v. The Netherlands* [1988] ECR 2085.

¹² C-186/87 *Cowan v. Le Trésor Public* [1989] ECR 195.

¹³ See generally, K. Mortelmans, "Minimum Harmonization and Consumer Law," [1988] *ECLJ* 2.

¹⁴ OJ No C 133, 3. 6. 1981, p. 1.

¹⁵ OJ No L 250, 19.9.1984, p.17.

¹⁶ Kendall, *supra*, ch.7.

¹⁷ The Commercial Space Launch Act 1984 (US), s.70112(b).

¹⁸ *Dunnes Stores v Mandate* [1996] 1 ILRM 384; [1996] E.L.R. 56 (Irish Supreme Court applying the definition of advertising in Council Directive 84/450/EEC as incorporated into Irish law by the European Communities (Misleading Advertising) Regulations 1988 (SI No. 134 of 1988)).

¹⁹ Para.34 Case C-71/02 *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH*. [2004] ECR I-3025. See also Case C-23/99 *Commission v France* [2000] ECR I-7653, paragraph 33).

²⁰ Crown, Giles, *op cit*, p.2.

²¹ *Ibid*.

²² Art.23 of the Trade Practices Act.

²³ Cass. Crim. De Mars 4, 1976, Bull. Crim. 199.

²⁴ Peri Athemitou Antagonismou, Art.3.

²⁵ Sale of Goods and Supply of Services Act 1980 (IR) s.8.

²⁶ Olivier, Peter, *Free Movement of Goods in the European Community*, 4th ed., (Sweet and Maxwell, London, 2003), para. 8.146. See Case C-220/98 *Estée Lauder Cosmetics GmbH & Co. OHG v Lancaster Group GmbH* [2000] ECR I-0117.

²⁷ Ohly, Ansgar and Spence, Michael, *The Law of Comparative Advertising: Directive 97/55/EC in the United Kingdom and Germany*, Hart Publishing, Oxford, 2000, pp. 61-65.

²⁸ See Ohly, *supra*.

²⁹ On the implementation, see generally, *Report from the Commission to the European Parliament on Consumer Complaints in Respect of Distance Selling and Comparative Advertising*, Brussels 10.3.2000, COM (2000)127 final, p.28 *et seq*.

³⁰ Case C-112/99 *Toshiba Europe* [2001] ECR I-7945, paragraphs 30 and 31. See Kelly, Gerard, "Comparative Advertising – Bringing the Advertising War into the Enemy Camp," (2005) 12(10) *Commercial Law Practitioner* 281; Carey, "Comparative Advertising – European Harmonisation" [2000] *Ent. L.R.* 21.

³¹ See Case C-44/01 *Pippig Augenoptik GmbH and Co. KG v Hartlauer Handelsgesellschaft mbh*. [2004] E.T.M.R. (5) 65; [2003] ECR I-3095, para. 44.

³² Recital 11 of the Directive; Spink and Petty, "Comparative Advertising in the European Union" [1998] 47 *I.C.L.Q.* 855 at p.858.

³³ Case C-63/97 *BMW* [1999] ECR I-905, paras 58-60.

³⁴ Council Directive 89/104/EEC to approximate the laws of the Member States relating to trade marks

[1989] O.J. L40/1. See Case C-44/01 *Pippig Augenoptik GmbH and Co. KG v Hartlauer Handelsgesellschaft mbh*. [2004] E.T.M.R. (5) 65; [2003] ECR I-3095, paras 49-51.

³⁵ Recital 15 of the Directive. See Ohly, pp.52-55.

³⁶ By analogy to *Testpreis-Angebot* BGH GRUR 1998, 824.

³⁷ U.K. Radio Authority's Advertising and Sponsorship Code RAC 9. See Ohly, pp.80-81.

³⁸ Ohly, p.81.

³⁹ Kelly, *op cit*.

⁴⁰ Case C-112/99 *Toshiba Europe GmbH v Katun Germany GmbH*. [2002] F.S.R. 39, para.38.

⁴¹ C-126/91 *Scutzverband gegen Unwesen in der Wirtschaft eV v. Yves Rocher GmbH* [1991] 3 ECR I-2361 of 18.5.93.

⁴² Case C-44/01 *Pippig Augenoptik GmbH and Co. KG v Hartlauer Handelsgesellschaft mbh*. [2004] E.T.M.R. (5) 65, [2003] ECR I-3095.

⁴³ *Id.*, para 49.

⁴⁴ *Erven Warnink BV v J. Townend and Sons (Hull) Ltd.* [1979] A.C. 731.

⁴⁵ See *Vodafone Group PLC v Orange Personal Communications Services Ltd.* [1997] FSR 34 where Jacob J. observed that to succeed Vodafone had to show: '(1) the word complained of where false (2) they were published maliciously; and (3) they were calculated to cause the plaintiff pecuniary damage.'

⁴⁶ See Kelly, *op cit*.

⁴⁷ Case C-44/01 *Pippig Augenoptik GmbH and Co. KG v Hartlauer Handelsgesellschaft mbh*. [2004] E.T.M.R. (5) 65; [2003] ECR I-3095, para.44.

⁴⁸ Case C-150/88 *Parfümerie-Fabrik 4711* [1989] ECR 3891, paragraph 28, Case C-37/92 *Vanacker and Lesage* [1993] ECR I-4947, paragraph 9, and Case C-324/99 *DaimlerChrysler* [2001] ECR I-9897, paragraph 32.

⁴⁹ OJ No.L166, 11.6.1998, p.51.

⁵⁰ See generally, Reilly, N., "The Unfair Commercial Practices Directive and the Average Consumer" (2005) 12 (5) *Commercial Law Practitioner* 125.

⁵¹ Schothöfer, Peter and Maxeiner, James R., "European Union", in Maxeiner and Schothöfer, *op cit*, p. 557 *et seq*.

⁵² Directive 89/552/EEC as amended. See Crown, Giles, *supra*, p.108 *et seq*.

⁵³ Surreptitious advertising as defined in Art.1(c).

⁵⁴ *Konsumentombudsmannen v De Agostini (Svenska) Forlag AB* [1997] All ER (EC) 697.

⁵⁵ Directive 97/7/EC as amended by Directive 2002/65/EC [1997] OJ L144/19.

⁵⁶ Directive 90/314/EEC on package travel, package holidays and package tours (OJ L 158 of June 23rd 1990, pp. 59-64). See Saggeron A., *Travel Law and Litigation*, 2nd ed. (CLT Professional Publishing, 2000), ch. 1 and Buttimore J, *Holiday Law in Ireland*, 1992.

⁵⁷For example: Austria: Gesetz gegen den unlauteren Wettbewerb BGBl 1988 No.422; Zugabengesetz BGBl 1971 II No.196; Gesetz über Preisnachlässe; (Rabattgesetz) RGBl 1933 I 1011; Mediengesetz Belgium: Wet betreffende de handelspraktijken en de voorlichting en bescherming van de consument, Luxembourg: Law of November 27, 1986 on Unfair Competition, Denmark: Marketing Practices Act, Finland: Kuluttajansuojalaki; Laki sopimattomasta menettelystä elinkeinotoiminnassa, France: Art.121.1 CdC, Germany: Gesetz gegen den unlauteren Wettbewerb, Greece: Peri Athemitou Antagonismou 146/1914, the Netherlands: Gedragsregelen voor het Reclamewezen, Portugal: Lei de Defesa do Consumidor Law 29/81 of August 21, 1981.

⁵⁸ Art. L. 121.1 CdC.

⁵⁹ S.14.

⁶⁰ Zugabeverordnung.

⁶¹ Decree Law (Ordonnance) of December 18, 1986.

⁶² Code of Advertising Standards for Ireland, para. B (8).

⁶³ C-286/81 *Re Oosthoek's Uitgeversmaatschappij* [1982] 4 ECR 4575 of 15.12.1982.

⁶⁴ Reich, "The November Revolution of the European Court of Justice: *Keck*, Meng and Audi Revisited" (1994) 31 *CMLRev* 459, Maduro, "Keck: The End? The Beginning of the End? Or just the End of the Beginning?" (1994) 3 *IJEL* 30; Travers, Noel J., "The Keck Legacy," (1995) 13 *ILT* 39.

⁶⁵ C-267 and 268/91 *Re Keck and Mithouard* [1993] 7 ECR I-6097 of 24.11.93; [1995] 1 *CMLR* 101; Case C-292/92 *Hünemund and Others* [1993] ECR I-6787, paragraphs 21 and 22; Joined Cases C-401/92 and C-402/92 *Tankstation 't Heukske and Boermans* [1994] I-2199, paragraphs 12 to 14.

⁶⁶ *Konsumentombudsmannen v De Agostini (Svenska) Forlag AB* [1997] All ER (EC) 697; C-71/02 *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH*. [2004] ECR I-3025 C-320/93 *Lucien Ortscheit GmbH v Eurim-Pharm Arzneimittel GmbH* [1994] ECR I-5243. C-152/78 *Commission v France* [1980] ECR 2299.

⁶⁷ C-352/85 [1988] 2 ECR 2085 ; [1989] 3 *CMLR* 147.

⁶⁸ C-350/96 *Clean Car Autoservice v Landeshauptmann von Wien* [1998] ECR I-2521; C- 224/97 *Giola v. Land Vorarlberg* [1999] ECR I-2517.

⁶⁹ C-52/79 *Procureur du Roi v. Debauvée* [1980] ECR 833, para. 9.

⁷⁰ C-15/78 *Société Générale Alsacienne de Banque S.A. v. Koestler* [1978] ECR 1971.

⁷¹ Craig and De Búrca, p.805.

⁷² C-76/90 *Säger v. Dennemeyer* [1991] ECR I-4221 per Advocate General Jacobs.

⁷³ Case 352/85 *Bond van Adverteerders* [1988] ECR 2085 para 34.

⁷⁴ C-33/74 *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299.

⁷⁵ C-49/98 *Finalarte Sociedade Construção Civil v. Urloabs- und Lohnausgleichskasse der Bauwirtschaft* [2001] ECR I-7831.

⁷⁶ C-279/80 *Re Alfred John Webb* [1981] ECR 3305; C-62-63/81 *Seco SA and Desquenne and Giral SA v Etablissement d'Assurance contre la Vieillesse et l'Invalidité* [1982] 1 ECR 223.

⁷⁷ C-220/83 *Commission v France* [1986] 4 ECR 3663.

⁷⁸ C-6/9 SA *Compagnie Générale pour la Diffusion de la Télévision Coditel and Others* [1980] ECR 881.

⁷⁹ C- 279/80 *Criminal Proceedings against Webb* [1981] ECR 3305, para.17. See also C-110-111/78 *Ministère Public v. Van Wesemael* [1979] ECR 35

⁸⁰ C- 279/80 *Criminal Proceedings against Webb* [1981] ECR 3305.

⁸¹ *Groppera Radio AG and Others v. Switzerland Series A No. 173* of 28.3.10 (ECtHR); C-260/89 *Elleniki Radiophonia Tilèorassi AE v. Dimotiki Etaireia Pliroforissis and Sotiros Kouvelas* [1991] ECR I-2925; C-71/02 *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH*. [2004] ECR I-3025, para.48-52.

⁸² C-4/73 *Nold KG v. Baustoffgroßhandlung v Commission* [1974] 1 ECR 491; [1974] 2 *CMLR* 338..

⁸³ C-384/93 [1995] ECR I-1141. See also Hilson, C., "Discrimination in Community Free Movement Law" (1999) 24 *European Law Review* 445.

⁸⁴ C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141, paras 36-38.

⁸⁵ C-71/02 *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH*. [2004] ECR I-3025, para.46; Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 22; and Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 31.

⁸⁶ C-71/02 *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH*. [2004] ECR I-3025, see the Advocate General's opinion para. 91-93.