

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(77) 724 final

Brussels, 28 February 1978

Proposal for a
COUNCIL DIRECTIVE

relating to the approximation of the laws, regulations and
administrative provisions of the Member States concerning
misleading and unfair advertising

(submitted by the Commission to the Council)

COM(77) 724 final

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,
and in particular Article 100 thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Parliament,

Having regard to the Opinion of the Economic and Social Committee,

Whereas the laws against misleading and unfair advertising now in force in
the Member States differ widely; whereas, since advertising reaches to a
large extent beyond the frontiers of individual Member States,

it has a direct affect

on the establishment and the functioning of the common market;

Whereas unfair and misleading advertising is likely to restrict the
establishment of a system to ensure that competition is not distorted within
the common market;

Whereas misleading and unfair advertising may cause a consumer to take
decisions prejudicial to him when acquiring property or accepting services
and the differences between the laws lead, in many cases, not only to
inadequate levels of consumer protection, but also prevent the execution
of advertising campaigns beyond national boundaries and thus
affect the free circulation of goods and provision of services;

Whereas the preliminary programme of the European Economic Community for
a consumer protection and information policy ⁽¹⁾ provides in particular
for appropriate action for the protection of consumers against false
or misleading advertising;

Whereas it is in the interest of the public in general, as well as that
of consumers and all those who, in competition with one another, carry on
a trade, business or profession, throughout the common market, to harmoni-
ze national provisions against misleading and unfair advertising;

Whereas minimum criteria for determining whether advertising is mislead-
ing or unfair should be established for this purpose;

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(1) O.J. C 92 25.4.1975, p. 1

Whereas, in view of modern techniques of communication, the definition of "advertising" must be worded broadly, but should not extend to policy statements, the publication of comparative product tests by independent organizations and any similar statements;

Whereas the concepts of "misleading advertising" and "unfair advertising" must as far as possible be defined by reference to objective criteria;

Whereas comparative advertising may be beneficial to a consumer and a competitor to the extent that it compares material and verifiable details with each other and is neither misleading nor unfair;

Whereas the laws to be adopted by Member States against misleading and unfair advertising must be adequate and effective; whereas it is a matter for the Member States whether they wish these to be matters of civil law, administrative law or criminal law or a combination thereof;

Whereas persons affected, as well as associations with a legitimate interest in the matter, must have facilities for initiating proceedings against misleading or unfair advertising and in particular for obtaining the quick cessation of misleading or unfair advertisements;

Whereas if a person advertises by making a factual claim the burden of proof that his claim is correct must lie with him;

Whereas the provisions of this Directive do not preclude Member States from adopting other measures for the protection of consumers, subject to their obligations under the Treaty establishing the EEC and in particular the rules on the free movement of goods and services and competition.

HAS ADOPTED THIS DIRECTIVE :

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Article 1

The objective of this Directive is to protect consumers, persons carrying on a trade, business or profession, and the interests of the public in general against unfair and misleading advertising.

Article 2

For the purpose of this Directive :

- "Advertising" means the making of any pronouncement in the course of a trade, business or profession for the purpose of promoting the supply of goods or services;
- "Misleading advertising" means any advertising which is entirely or partially false or which, having regard to its total effect, including its presentation, misleads or is likely to mislead persons addressed or reached thereby, unless it could not reasonably be foreseen that these persons would be reached thereby;
- "Unfair advertising" means any advertising which:
 - a) casts discredit on another person by improper reference to his nationality, origin, private life or good name; or
 - b) injures or is likely to injure the commercial reputation of another person by false statements or defamatory comments concerning his firm, goods or services; or
 - c) appeals to sentiments of fear, or promotes social or religious discrimination; or
 - d) clearly infringes the principle of the social, economic and cultural equality of the sexes; or
 - e) exploits the trust, credulity or lack of experience of a consumer, or influences or is likely to influence a consumer or the public in general in any other improper manner;
- "Goods" means property of any kind, whether movable or immovable, and any rights or obligations relating to property.

Article 3

1. In determining whether advertising is misleading or unfair, pronouncements shall be taken into consideration concerning in particular :
 - a) the characteristics of the goods or services, such as nature, performance, composition, method and date of manufacture or provision, fitness for purpose, usability, quantity, quality, geographical or commercial origin, properties and the results to be expected from use;
 - b) the conditions of supply of the goods or services, such as value and price, conditions of contract and of guarantee;
 - c) the nature, attributes and rights of the advertiser, such as his identity, solvency, abilities, ownership of intellectual property rights or awards and distinctions.

2. Advertising shall in particular be regarded as misleading when it omits material information, and, by reason of that omission, gives a false impression or arouses expectations which the advertiser cannot satisfy.

Article 4

Comparative advertising shall be allowed, as long as it compares material and verifiable details and is neither misleading nor unfair.

Article 5

Member States shall adopt adequate and effective laws against misleading and unfair advertising.

Such laws shall provide persons affected by misleading or unfair advertising, as well as associations with a legitimate interest in the matter, with quick, effective and inexpensive facilities for initiating appropriate legal proceedings against misleading and unfair advertising.

Member States shall in particular ensure that :

The Courts are enabled, even without proof of fault or of actual prejudice

- a) to order the prohibition or cessation of misleading or unfair advertising; and
- b) to take such a decision under an accelerated procedure, with an interim or final effect;

The Courts are enabled :

- a) to require publication of a corrective statement; and
- b) to require publication of their decision either in full or in part and in such form as they may judge adequate;

ensure that the sanctions for infringing these laws are a sufficient deterrent, and, where appropriate, take into account the financial outlay on the advertising, the extent of the damage and any profit resulting from the advertising.

Article 6

Where the advertiser makes a factual claim, the burden of proof that his claim is correct shall lie with him.

Article 7

Where a Member State permits the operation of controls by self-regulatory bodies for the purpose of counteracting misleading or unfair advertising, or recognizes such controls, persons or associations having a right to take legal proceedings under Article 5 shall have both that right and the right to refer the matter to such self-regulatory bodies.

Article 8

The present Directive does not prevent Member States taking or maintaining other measures for the protection of consumers against misleading or unfair advertising to the extent that these measures are in conformity with the Treaty.

Article 9

Member States shall bring into force the measures necessary to comply with this Directive within eighteen months of its notification and shall forthwith inform the Commission thereof.

Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 10

This Directive is addressed to the Member States.

Explanatory Memorandum

I. Introduction

1. Advertising is an integral part of the system of mass production and distribution serving the general public. Manufacturers of goods and providers of services need the opportunity to inform and remind the public of what they have to offer. Such a system of information is useful to the economics of production. Consumers need information on goods and services so that they can make their choice between the many alternatives.

Advertising has the additional effect of stabilizing employment by ensuring the steady disposal of production; it provides the basis for competition in the market-place, and encourages product development and innovation and the provision of low-cost goods and services previously regarded as too expensive for the mass market. In addition, advertising makes a vital contribution towards the cost of the media.

2. However, the process can give full value to the public only if advertising is honest and truthful. Should advertisers give false or misleading information, consumers might be led to buy something which they would not otherwise have bought. Furthermore, those who advertise in this way secure an advantage over competitors because consumers may leave out of consideration what the latter have to offer precisely because of this advertising's influence on them.

3. Unfair advertising makes use of inadmissible means to influence consumer behaviour in the market-place, especially by giving improper information about competitors or by exploiting the trust or credulity of consumers.

Misleading advertising and unfair advertising are improper ways of influencing the market process; consumers and also competitors and the public in general must be protected against them.

II. The legal situation in the Member States

4. Misleading and unfair advertising is generally considered illegal in the Member States. A feature of the present legal situation is that legislation on advertising, and in particular misleading and deceptive advertising, is not set out in a special law but embodied in many laws with a general or specific objective, e.g. laws on fair competition, food, cosmetics, pharmaceuticals, chemicals, etc. For this reason,

only a few of the major laws of the Member States can be cited below.

5. In France, the "Loi d'orientation du commerce et de l'artisanat" of 1973 forbids advertisements containing false or misleading statements. Infringements are prosecuted under criminal law. Injunctions may be issued against those who advertise using misleading statements. When a court takes a decision on an infringement of the ban on misleading or false advertising it may require the publication of corrective statements. Consumer associations have a right of action in the general interest of consumers. A draft law now under discussion provides for a considerable reinforcement of criminal sanctions; in future, fines could be as much as 50% of the outlay on the advertising.

6. In Belgium the "Loi sur les pratiques commerciales" of 1971 forbids the misleading advertising of movable property. Infringements are prosecuted under criminal law. Associations also have a right of action. In Belgium and in Luxembourg there are also many specific laws for special sets of circumstances. The competition legislation of both countries includes general clauses for the protection of competitors and consumers.

7. In Italy, the general clauses against unfair competition of Article 2598 No 3 and the more specific provision of Article 2598 No 2 of the Codice Civile cover individual cases of misleading advertising. The provisions seek to protect competitors rather than consumers, but there are specific provisions in economic administrative law to protect consumers.

8. In the Netherlands there is no general legislation on misleading advertising. Under Article 1404 of the Burgerlijk Wetboek misleading advertising may constitute an illicit act whereby the person responsible is liable to pay compensation. Article 328 bis of the Wetboek van Strafrecht forbids misleading the public for the purpose of gaining a competitive advantage.

A draft law, "Regelen omtrent de privaatrechtelijke bescherming tegen misleidende reclame", has been under discussion since 1975. It makes provision for the addition to the Burgerlijk Wetboek of provisions making misleading advertising illegal, requiring those responsible to pay compensation and enabling the courts to require a corrective statement to be published. Trade and consumer associations are also to have a right of action.

9. In the United Kingdom, apart from the common law, which also applies to advertising, over sixty Acts of Parliament and many regulations deal with advertising in general or with individual aspects of advertising. The main general Acts are:

- (i) the Misrepresentation Act, 1967 which grants a person led to make a contract as a result of misrepresentation concerning a product the right to apply for rescission or claim damages or both, as the case may be;
- (ii) the Trade Descriptions Act, 1968 which bans false descriptions of goods, false or misleading information about products or false statements about certain services, a ban enforced through criminal sanctions;
- (iii) the Fair Trading Act, 1973 which gives the Director-General of Fair Trading extensive powers of investigation in the field of advertising, powers which may lead to the banning of certain practices.

10. In Ireland penalties are imposed for false information about products under certain conditions under the Merchandise Marks Acts, 1887, 1931 and 1970, and there is a Bill which makes provision for banning false or misleading advertising of goods or services and for penalties for infringements.

11. In Germany the "Gesetz gegen den unlauteren Wettbewerb" lays down provisions on the problems in question; Article 3 aims at the discontinuation of misleading advertising used as an instrument of competition in business. Article 13 gives trade associations and consumer organizations a right of action against advertisements under specific conditions.

12. In Denmark the "Lov om markedsføring" has been in force since 1975. It provides for the prohibition of business acts contrary to good marketing practice. Improper, incomplete or misleading information likely to influence supply or demand is forbidden, and there are penalties for infringements. A Consumer Ombudsman monitors observance of the law.

III. Observations on the Directive

1. General

13. This Directive is based on Article 100 of the EEC Treaty. The laws of the Member States on misleading and unfair advertising directly affect the functioning of the common market.

One of the tasks of the Community is to promote throughout the Community a harmonious development of economic activities and an accelerated raising of the standard of living. Differing degrees of legal protection from country to country for consumers and competitors, whose behaviour is determined by the various rules on fair competition, hinder or prevent the achievement of these goals. Moreover, in view of the development of media techniques, advertising increasingly reaches beyond the frontiers of individual Member States and directly addresses consumers in other Member States. This is particularly true with the products of large firms. Laws which differ from country to country therefore jeopardize the effective protection of those involved in the economic process.

14. The different laws also affect the free movement of goods and services. Differences in the laws make it impossible to plan and conduct advertising campaigns beyond the frontiers of a Member State. If certain advertisements are allowed in one Member State but banned in another it is difficult, particularly in border areas between two or more Member States, to operate a uniform marketing system for goods or services. The greater expense of planning and conducting several advertising campaigns simultaneously also affects the advertiser's competitive position. Furthermore, a skilful salesman may be able to secure competitive advantages over his competitors by exploiting differences in the laws. Equality of competitive opportunities, however, is one of the prerequisites for the common market.

15. On 14 April 1975, the Council of Ministers of the European Communities adopted a "Preliminary programme of the EEC for a consumer protection and information policy"¹. In it the Council laid down the following principles, among others: no form of advertising should mislead the consumer; any advertiser should be able to justify, by appropriate means, the validity of any claims he makes; all information provided in advertisements must be accurate.

The Council instructed the Commission to continue its work on the approximation of laws and to submit to the Council appropriate proposals to protect the consumer against false or misleading advertising (Items 19(iv) and (v), 22 and 23 of the programme). The proposal for a Directive is a measure to implement this part of the programme.

¹ OJ C 92, 25 April 1975, p. 1.

16. As implementing the Directive would involve amending legislation in several Member States, the European Parliament and the Economic and Social Committee must be consulted (second paragraph of Article 100 of the EEC Treaty).

2. Commentary on the individual Articles

Article 1

This article defines the objective of the Directive, which is the protection of the consumer, persons carrying on a trade, business or profession as well as the interests of the public in general, against unfair and misleading advertising. The choice of remedy and the decision whether these measures are to be under civil law, criminal law or administrative law are left to the discretion of Member States.

Article 2

This article contains definitions of the most important concepts used in the Directive.

The definition of advertising is broad in order to cover the diversity of advertisers and media. No reference is made to the number of persons addressed by an announcement to be regarded as advertising.

Since such announcements must be made "in the course of carrying on a trade, business or profession for the purpose of promoting the supply of goods and services" neither political advertising nor advertising by private individuals falls within the scope of the Directive. The same applies to reports on comparative tests by independent organizations, since they do not have the task of promoting the sale of goods or services.

Editorial matter in newspapers, on the radio or on television will not usually be covered by the Directive either, not being designed to promote the sale of goods or services. The opposite is true where material is ordered and paid for by an advertiser. Individual cases in which an announcement presented in the form of editorial matter nevertheless has to be regarded as advertising because of its intended purpose - a purpose recognizable from the contents - are not to be singled out by means of a definition, rather will a decision on the matter be left to the discretion of the courts or other competent authorities, on the basis of an assessment of all the facts of the case.

The concept of "misleading advertising" is based on the misleading nature of the advertising, having regard to its total effect. Thus a false announcement, say, in an advertisement is not nullified by a supplementary or corrective statement elsewhere, in an out-of-the-way place.

Whether an advertisement is misleading or likely to mislead depends on who is addressed or reached by it. Provision is made for only one exception to this rule, i.e., where it could not reasonably be foreseen that certain persons would be reached by an advertisement. Advertising exclusively for a specialist audience may be presented in ways which are not readily comprehensible to the layman, and may mislead him in some circumstances. If it cannot be foreseen that such an advertisement will reach a non-specialist audience it is not to be considered misleading if nevertheless it comes to the notice of a layman.

The form of words "unless....." has been chosen deliberately in order to stress the exceptional nature of this provision.

Article 3 and Article 4 should also be considered in determining whether an advertisement is misleading.

"Unfair advertising" is considered illegal in all the Member States, although the concept has different meanings. Often, an advertisement is unfair because personal attacks are made on competitors or improper references are made to their commercial activities. However, unfair advertising also prejudices the interests of consumers. Playing on the anxieties of a consumer, or exploiting his consumer's lack of experience, for example, gives the advertiser an unjustified competitive advantage over competitors, while prejudicing the interests of consumers whose decisions are influenced by subjective factors.

The language of subparagraph (e) is general to cover cases which are not expressly mentioned in the above definition but which, at the discretion of a court or of another competent authority, must also be regarded as unfair advertising.

The definition of "goods" includes both movable and immovable property. Advertising which publicizes rights and obligations includes in particular advertising which publicizes specific trade marks or names.

Article 3

This Article contains a non-exhaustive list of aspects which are to be taken into consideration in determining whether advertising is misleading or unfair. Those called upon to assess advertising are therefore obliged to examine in each case the features of advertising mentioned in this Article.

Paragraph 2 mentions a particularly important case of misleading advertising. Indeed a false impression can equally well be produced by the omission of material information. For this reason, such omission is also to be regarded as misleading. The advertiser is at fault in this case because he could have prevented the misunderstanding by providing full information for the persons addressed or reached. An advertisement is also misleading if, because information is omitted, expectations are aroused which the advertiser cannot satisfy. This would apply, for example, to an advertisement publicising the sale of a product at a special price when the advertiser has in stock only a few of the articles concerned, but does not make this fact known and thus arouses in customers the expectation that he has a reasonable supply.

Article 4

This Article indicates that comparative advertising per se is neither misleading nor unfair. Indeed, comparative advertising may give the consumer useful and valuable information about goods and services and help him decide what to buy. Moreover, comparative advertising may also be in the interest of competitors, by giving them an opportunity to bring out more clearly the features of their products. It therefore seems appropriate for comparative advertising to be declared admissible under certain conditions.

The first condition of admissibility is that it compares material points. It is not enough to compare some insignificant aspect of two products, since such a comparison does not really give the consumer or the public in general more information. As the second condition is a comparison of "verifiable" details the advertising statement "Product X is better than product Y" would not be admissible either. Moreover, comparative advertising must also respect the general principles regarding misleading and unfair advertising.

Comparative tests carried out by consumer organisations or the editorial staff of newspapers are not "advertising" within the meaning of the Directive and so do not fall within the scope of Article 4.

Article 5

This Article relates to measures against misleading or unfair advertising. The choice of remedies is left to each Member State, insofar as these are adequate and effective measures.

The second paragraph gives those affected by misleading and unfair advertising a right of action. The same right is to be given to associations with a legitimate interest in the matter, i.e. consumer organisations and trade associations in particular. Experience shows that individual consumers are rarely prepared to take a matter of misleading and unfair advertising to court, since they do not as a rule suffer financial loss from individual advertisements.

The right of action of associations seems a suitable means of ensuring that action is taken against misleading and unfair advertising in general, thereby providing effective protection for consumers and competitors.

The third paragraph lists three of the measures which the Member States are to adopt, as a minimum requirement, in order to take effective action against misleading and unfair advertising.

Subparagraph 1 concerns decisions on the discontinuation of misleading and unfair advertising. Such decisions cannot be made dependent on whether the advertiser (culpably) acted deliberately or negligently, since - where the protection of consumers and competitors is concerned - all that matters is the effect of the advertising and not the reasons for the use of misleading or unfair advertising material. To make it possible to stop advertising campaigns quickly, if necessary, and therefore to prevent damage from arising or being aggravated, provision is made for decisions on the discontinuation of advertisements to be taken by an expedited procedure.

Subparagraph 2 enables courts to require the publication of their decisions or of corrective statements. In certain cases, corrective statements may offset the effect of a misleading or unfair advertisement, and therefore to a large extent restore the competitive situation to its state before the misleading or unfair advertisement was made. ./.

Moreover, the bad publicity attaching to a corrective statement would discourage advertisers from using misleading or unfair information. The question of when it is appropriate for courts to decide on the publication of corrective statements in specific cases must be left to their discretion.

Subparagraph 3 seeks to ensure that the civil law, administrative law or criminal law sanctions are sufficient to deter advertisers from any sort of misleading or unfair advertising. Consequently, the scale of the advertising, the extent of the prejudice and the advertiser's economic benefit are also to be taken into consideration when sanctions are imposed.

Article 6

As a general rule, the burden of proof of the misleading and unfair nature of an advertisement lies with the plaintiff. Article 6 makes an exception to this rule, by providing for a reversal of the burden of proof in one particular case. Any advertiser who makes a factual claim must bear the consequences if the validity of his claim cannot be proved. This reversal of the burden of proof is not unreasonable, since the advertiser has it in his power to avert such consequences by exercising discrimination in his choice of advertising material. Consumers or competitors, on the other hand, are in no position to prove that a factual claim is wide of the mark. An advertiser claiming, for example, that his product has no side effects or has been scientifically tested is in a better position to prove the accuracy of these claims, say by supplying research findings. If he is not in a position to do so it is therefore to be expected that he will not make such factual claims in his advertisements.

Use of the expression "burden of proof" indicates that the burden of proof is reversed only in case of dispute, i.e. in proceedings before courts, an Ombudsman, or an authority hearing complaints, etc. Of course, this provision does not in any way oblige the advertiser to provide information to a competitor or a consumer. It must not be used for discovering information or manufacturing processes or other business secrets.

Article 7

This Article specifically mentions bodies set up by business circles for the self-policing of advertising, thereby recognizing these bodies and their usefulness. Neither their existence nor their scope will be affected by the provisions adopted to implement the Directive. They will be able to go about their business exactly as before. Article 7 simply specifies that those affected by misleading and unfair advertising shall in any case have the right to refer the matter to independent courts.

Article 8

This Article allows the Member States, exceptionally, to adopt or maintain more exacting provisions to protect the consumer against misleading or unfair advertising. More exacting provisions may be justified as regards the advertising of certain products, e.g. narcotics, weapons, medicines, tobacco products, and food, or as regards advertising through certain media, e.g. on television or by telephone.
