

HILLMAN

Brussels, 6th July 1979

MAR 3 1980

AMENDMENT TO THE PROPOSAL FOR A COUNCIL DIRECTIVE
RELATING TO THE APPROXIMATION OF LAWS, REGULATIONS AND
ADMINISTRATIVE PROVISIONS OF THE MEMBER STATES
CONCERNING MISLEADING & UNFAIR ADVERTISING

(submitted by the Commission to the Council
pursuant to Article 149(2) of the EEC Treaty)

Amendment to the proposal for a Council Directive relating to the approximation of laws, regulations and administrative provisions of the Member States concerning Misleading & Unfair Advertising (submitted by the Commission to the Council pursuant to Article 149(2) of the EEC Treaty)

Explanatory Memorandum

I. Introduction

The amendments in the text which follows reflect certain requests resulting from the Opinion of the Economic & Social Committee¹ and the Resolution of the European Parliament².

II. Comments on the Articles

Article 1

Parliament has requested that the expression "objective of this Directive" should be replaced by "the purpose of this Directive" in the English text only of the Directive. It is considered unnecessary for the Commission to introduce the amendment under the Article 149(2) procedure. Although this ^{drafting} is more elegant, it does not change the meaning of the original text. In this case, as with other suggested drafting improvements of the same nature, it could be implemented in the Council when revised texts are prepared.

Article 2

"Advertising"

In order to clarify the point that advertising may be oral or in writing, or represented pictorially, it is proposed to amplify the text to indicate that for the purposes of the Directive advertising means the making of a representation in any form.

10
9
8
7
6
5
4
3

¹Dated 5 April 1979, OJ No

²Dated 8 May 1979, OJ No

Parliament has also requested an amendment to indicate that advertising is directed at the general public or a part thereof. However, this is inconsistent with Article 1, which also refers to other interests, and would thus lead to difficulties of interpretation. It is, therefore, proposed not to incorporate this amendment.

"Misleading advertising"

In the view of the Economic & Social Committee, this definition should not be subject to a limitation excluding persons who would not foreseeably be reached by the advertising in question. However, it would seem better to retain the definition in its present form. In the case of trade or specialised advertising, advertisers are reasonably entitled to assume a certain degree of knowledge on the part of the persons addressed and should not have to frame their advertisements on the assumption that they might be seen by a member of the general public.

"Unfair advertising"

- (a) Parliament requests the deletion of "improper" from the original text, so that any reference to nationality etc, which casts discredit on another person, falls within the definition of unfair advertising. This amendment clarifies the text and it is proposed that it should be adopted.
- (c) Both the Economic & Social Committee and Parliament have made the point that appeals to sentiments of fear may be justifiable to indicate to the public the need to take certain protective measures, for example, to acquire accident or life insurance. Only where such sentiments are abused is advertising unfair. It is proposed that the text be amended in this sense.
- (d) Parliament has requested that this part of the definition, which was omitted in error from the original text in the French version, should specifically relate to discrimination on the grounds of sex, and should also incorporate forms of discrimination included in paragraph (c) of the original text. It is proposed to accept this precise re-formulation, which also complies more closely with existing laws in some Member States and in this respect responds to the view expressed by the Economic & Social Committee.

(e) In the original text, this paragraph referred to exploiting the trust, credulity or lack of experience of a consumer. However, the term "exploits" is neutral and both Parliament and the Economic & Social Committee request that the text should indicate that advertising is unfair where it abuses the trust, credulity or lack of experience of consumers. It is proposed to adopt this amendment.

Parliament has also requested that the second part of paragraph (e) should be deleted altogether. The effect of the paragraph is to introduce a general definition of unfair advertising, which on one view is too broad and vague. On the other hand, others take the view that the definition of unfair advertising should be expressed in general terms so as to permit the law some scope for development. Since this is a point of principle for some Member States, it is proposed that it should be left for discussion in the Council.

"Goods"

The Economic & Social Committee has also called for the inclusion in the Directive of a definition of services. However, since the word 'services' is used in the Directive in its natural and ordinary meaning, it is not proposed to adopt this request.

Article 3(1)

The English text only should be amended to be consistent with the revised definition of "advertising" in Article 2.

Article 3(2)

Both Parliament and the Economic & Social Committee have requested that an advertisement shall be regarded as misleading when it is not readily recognisable as an advertisement. It is proposed to adopt this amendment.

The original text indicates that an advertisement is to be regarded as misleading when by omission it arouses expectations which the advertiser cannot satisfy. As such expectations may be entirely subjective, it is proposed to amend the original text to refer to reasonable expectations which the advertised goods or services cannot satisfy.

Article 4

This Article concerns comparative advertising, which the Economic & Social Committee requests should be authorised for a trial period. It is not proposed to adopt this request. Comparative advertising is already legal in a number of Member States. The question of authorisation, therefore, does not arise for those countries and a limited authorisation only for Member States which do not recognise comparative advertising as legal would be inappropriate in a Directive for the approximation of laws.

Article 5

The original text of the Directive proposed that persons or associations concerned by misleading advertising should be able to seek recourse in a court of law. However, some countries prefer to exercise control through an administrative authority. This is already the case, for example in Denmark where the Consumer Ombudsman has this task, and in the United Kingdom, where the Independent Broadcasting Authority has a statutory duty to control broadcast advertising. Parliament has proposed that this system should continue to be possible under the Directive as an alternative to litigation at first instance, provided that certain conditions are fulfilled. They are detailed in the proposed Parliamentary amendments to Article 5, and make it clear that if the administrative authority fails to fulfil or abuses its function, the courts shall have the last word.

It is proposed to adopt the Parliamentary amendment with two reservations. The first concerns the proposal that an administrative authority may be the chosen means of control only in those countries where it already exists. However, if control by an administrative authority is viable, it should be open to any Member State to choose it. Secondly, it would be desirable to clarify the text by indicating that an administrative authority must apply reasonable standards. In its present form, the Parliamentary amendment refers to the improper exercise of powers and this could be understood as limited to procedural abuses only.

The original text was intended to exclude the need to prove that a misleading advertisement had been published intentionally or negligently. However, in referring to the absence of fault it has been misunderstood and it is proposed to clarify the text accordingly.

Article 6

Parliament has proposed that this Article should be renumbered 7, and that the original Article 7 should be renumbered Article 6. Nothing in the Directive is intended to damage the self-regulatory system of control operated by the advertising industry in several Member States, and Article 7 is to this effect. To clarify the point, Parliament has proposed that the original Article 7 should stand next to Article 5 in the revised text. It is proposed to follow this request.

Article 7

The original Article 6 now becomes Article 7. Because of the implications of the reversal of the onus of proof proposed in this Article, Parliament requests that its provisions be limited to civil and administrative cases. This amendment should be accepted. In some Member States it is a fundamental principle of criminal law that the prosecution must prove the guilt of the accused and that the accused should not be obliged to prove his innocence. However, even in its amended version, the Directive does not oblige Member States to refrain from reversing the burden of proof in criminal cases.

Article 9

The Economic & Social Committee recommends that the Directive should allow Member States 24 months to comply with its provisions. It is, therefore, proposed to amend the text in this sense. It is also proposed to accept the Parliamentary amendment which would require Member States to communicate to the Commission the texts of all provisions of national law which they adopt in the field covered by the Directive.

COMMISSION

Amendment to the Proposal for a Council Directive relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading and unfair advertising¹

Original text

Amended text

Article 2

Article 2

For the purpose of this Directive:

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;

- "Advertising" means the making of a representation in any form in the course of a trade, business or profession

for the purpose of promoting the supply of goods or services;

unchanged

¹OJ No C.70, 21 March 1978, p.4

Original text

Amended text

- "Unfair advertising" means any advertising which:

- "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

(a) casts discredit on another person by (1 word deleted) 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

(b) unchanged

(c) appeals to sentiments of fear, or promotes social or religious discrimination; or

(c) abuses or unjustifiably arouses sentiments of fear; or

(d) clearly infringes the principle of the social, economic and cultural equality of the sexes; or

(d) promotes discrimination on grounds of sex, race or religion; 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;

(e) abuses the trust, credulity or lack of experience of a consumer, or influences or is likely to influence a consumer or the public in general in any other improper manner;

- "Goods" means property of any kind, whether movable or immovable, and any rights or obligations relating to property.

unchanged

Original text

Amended text

Article 3

Article 3

1. In determining whether advertising is misleading or unfair, pronouncements shall be taken into consideration concerning in particular:

1. In determining whether advertising is misleading or unfair, representations shall be taken into consideration concerning in particular:
(English text only)

(a) The characteristics of the goods or services, such as nature, performance, composition, method and date of manufacture of provision, fitness for purpose, usability, quantity, quality, geographical or commercial origin, properties and the results to be expected from use;

unchanged

(b) the conditions of supply of the goods or services, such as value and price, conditions of contract and of guarantee;

unchanged

(c) the nature, attributes and rights of the advertiser, such as his identity, solvency, abilities, ownership of intellectual property rights or awards and distinctions.

unchanged

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.

2. Advertising shall in particular be regarded as misleading when it is not readily recognisable as an advertisement or when it omits material information, and, by reason of that omission, gives a false impression or arouses reasonable expectations which the advertised goods or services cannot satisfy.

10
9
8
7
6
5
4
3
2
1

Original text

Amended text

Article 5

Article 5

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

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.

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 either

- (a) initiating appropriate legal proceedings against misleading or unfair advertising or
- (b) bringing the matter before an administrative authority with adequate powers.

Member States shall in particular ensure that:

Member States shall in particular ensure that:

- the courts are enabled, even without proof of fault or of actual prejudice.

- the courts or the administrative authority, as appropriate, are enabled, even without proof of intention or negligence 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;

- (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:

- the courts or the administrative authority, as appropriate, 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;

- (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;

Original text

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.

Amended text

Member States shall ensure that the consequences of infringing laws and decisions in the field of misleading and unfair advertising take into account the extent of the harm.

Where the abovementioned powers are entrusted to an administrative authority, the authority shall not be controlled by advertising interests, shall be obliged to give reasons for its decisions, and shall be under a duty to exercise its powers so as effectively to control misleading and unfair advertising; and procedures shall exist whereby improper exercise by the authority of its power or improper failure by the authority to exercise its powers or to apply reasonable standards can be reviewed by the courts at the request of the parties.

Article 6

Originally Article 7 - unchanged.

Article 7
(Originally Article 6)

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

Original text

Amended text

Article 9

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 bring into force the measures necessary to comply with this Directive within twenty-four 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.

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