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### 1. The concept of advertising

Advertising is one of the market activities commonly used by entrepreneurs to persuade customers to buy their goods or use their services.

Advertising today goes beyond the press or street posters. Much of it takes place through the radio and television. Moreover, the Internet is an increasingly important medium.

Legal rules for such an activity differ not only according to the nature of the advertised product or service but also to the entity that carries it out and the medium through which it reaches the public.

The European legal system does not offer a single definition of advertising. The concept appears in many legal acts, which define it differently.

The term is used to denote:

- 1. both commercial advertising, i.e. a communication whose subject matter is products or services and purpose the increase in the demand for them (inducing the recipients to buy the products or use the service),
- 2. and non-commercial (public, non-profit) advertising, i.e. communications whose purpose is to promote a cause or an idea (e.g. an anti-mobbing campaign).

Restrictions and bans usually concern advertising activities in the first of the two categories.

Advertising should be distinguished from commercial communication[s1], trade information and sponsoring.

### 2. Sources of advertising regulation

Advertising is regulated in many European legal acts which can be divided into two groups:

- 1. advertising 'in general',
- 2. sector advertising.

The main legal acts in the first group are the following:

- 1. Council Directive of 10th September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising ([84/450/EEC](#)<sup>1</sup>, amended by [Directive 97/55/EC](#) of the European Parliament and of the Council of 6th October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising, and [Directive 2005/29/EC](#) concerning unfair business-to-consumer commercial practices and
- 2. [Directive 2005/29/EC](#) of the European Parliament and of the Council of 11th May 2005 concerning unfair business-to-consumer commercial practices.

These regulations encompass the overall conditions that advertising should respect (e.g. it cannot be misleading), regardless of its subject matter (e.g. adverts of sports equipment, periodicals, medicines, alcohol - of course only within limits of permissibility).

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### **3. Misleading advertising**

The directive concerning misleading advertising and comparative advertising defines advertising as any 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.

Misleading advertising is any advertising which in any way, including its presentation, deceives or is likely to deceive the person 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.

This sort of advertising is prohibited. It may cause an addressee (e.g. a consumer) who follows the information provided to take decisions prejudicial to him when buying goods or other property or using services.

In determining whether a specific advertisement is misleading, all of its features should be taken into account, particularly any information it contains concerning execution, method and date of manufacture, quantity, geographical origin, price, conditions on which the goods are supplied and services provided, the nature, attributes and rights of the advertiser, identity, qualifications, ownership rights or awards and distinctions received by the advertiser.

An example of misleading advertising is advertising in which the advertiser promises that the advertised sun protection lotion protects against sunburn when it does not.

### **4. Comparative advertising**

Comparative advertising is any advertising that explicitly or by implication identifies a competitor or goods or services offered by a competitor.

Since comparative advertising usually helps objectively demonstrate the merits of the products or services being compared, it stimulates competition, which is to the consumer's advantage as it may help him choose a good or a service from among those offered on the market.

Entrepreneurs may use comparative advertising provided that certain conditions are met.

Consequently, comparative advertising is permitted if:

1. it is not misleading,
2. it compares goods (or services) satisfying the same needs or intended for the same purpose,
3. it objectively compares one or more material, relevant, verifiable and representative features of the goods (services), e.g. their price, composition or quantity
4. it does not discredit or denigrate the distinguishing marks (e.g. trade marks) of goods (services), activities or circumstances of a competitor,
5. in the case of products with designation of origin, it applies in each case to products with the same designation,
6. it does not take unfair advantage of the reputation of distinguishing marks (e.g. a trade mark) of a competitor or of the designation of origin of competing products,
7. it does not present goods (or services) as imitations or replicas of goods (or services) bearing a protected trade mark or trade name,
8. it does not create confusion in the marketplace between the advertiser and a competitor or between the advertiser's distinguishing marks (e.g. trade marks) of goods or services and those of a competitor.

Comparative advertising which does not comply with any of the indicated conditions is prohibited. The reason is that it distorts competition, is detrimental to competitors (e.g. by taking advantage of their reputation or market position) and has an adverse effect on the choices made by consumers.

Because the conditions for comparative advertising are numerous and must all be met, this type of advertising is rarely used.

It should be emphasized that these conditions do not have to be fulfilled if the competitor is not recognizable ('all-other-shampoos' type of advertising).

### **5. Unfair commercial practices**

[Directive 2005/29/EC](#) prohibits unfair commercial practices, including unfair advertising.

Such practices are:

1. misleading commercial practices. Misleading advertising includes misleading advertising, which deceives the consumer to prevent him from making an informed and efficient choice (e.g. advertising a product that is similar to a product of a specific manufacturer in a way that deliberately suggests to the consumer that the product was made by that manufacturer when it is untrue),
2. aggressive commercial practices (e.g. directly urging children to buy the advertised products or to persuade parents or other adults to buy them the advertised products).

### **6. Sector advertising**

Aside from the legislation concerning all advertising, regardless of its subject matter, many EC legislative acts impose bans or restrictions on advertising for:

1. a product or service (e.g. medicinal products, tobacco, foodstuffs, life insurance),
2. the advertising entity (e.g. in some of the EC Member States there are restrictions on legal professions advertising),
3. the form of communication (e.g. a ban on tobacco advertising on the radio and on TV).

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1. The Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version) (Text with EEA relevance) which replace Directive 84/450/EEC will apply from 12 December 2007.