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from: Secretary-General of the European Commission,  
signed by Mr Jordi AYET PUIGARNAU, Director

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to: Mr Uwe CORSEPIUS, Secretary-General of the Council of the European  
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the Council, the European Economic and Social Committee and the Committee  
of the Regions  
Protecting businesses against misleading marketing practices and ensuring  
effective enforcement  
Review of Directive 2006/114/EC concerning misleading and comparative  
advertising

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Delegations will find attached Commission document COM(2012) 702 final.

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**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN  
PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL  
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

**Protecting businesses against misleading marketing practices and ensuring effective  
enforcement**

**Review of Directive 2006/114/EC concerning misleading and comparative advertising**

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**1. INTRODUCTION**

The EU's Single Market is a motor for growth and provides consumers with greater choice and better prices. Smart, sustainable and inclusive growth is the objective of the Europe 2020 strategy<sup>1</sup> aimed at helping Europe and its businesses emerge stronger from the crisis and create new jobs. All EU policies are geared towards this objective.

Advertising has a strong economic impact on companies as it is a key element of any business strategy. It allows traders to present their goods and services and is an important element for commercial success. It can also enhance competition by providing customers with better information and the possibility to compare products. In the Single Market, businesses can reach customers from every corner of Europe with a commercial message.

In business relations, customers and competitor firms expect companies to use truthful marketing communication and to act with professional diligence. Small businesses – the mainstay of Europe's economy<sup>2</sup> – are particularly vulnerable to misleading marketing practices as they lack the resources to protect themselves. They need a clear and efficient framework safeguarding fair competition and providing effective means to enforce it.

EU rules on business-to-business (B2B) advertising aim to ensure that companies use truthful advertising or marketing. Such provisions create a necessary regulatory framework in business-to-business marketing where companies enjoy a high degree of contractual freedom. In particular, the Misleading and Comparative Advertising Directive<sup>3</sup> provides a common minimum level of protection against misleading advertising for traders across the EU and also regulates comparative advertising.

As more and more advertising moves online, advertising and marketing practices are changing and may affect thousands of businesses worldwide. Misleading marketing practices, such as misleading directory companies<sup>4</sup>, continue to cause considerable harm to companies

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<sup>1</sup> Europe 2020, A strategy for smart, sustainable and inclusive growth, COM(2010)2020

<sup>2</sup> Small and medium-sized enterprises, 9 out of 10 of SMEs are micro-enterprises with less than 10 employees.

<sup>3</sup> Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (referred to in this Communication as "the Directive"); OJ L 376 of 27.12.2006, p. 21,

<sup>4</sup> See section 3.2. Misleading directory companies are traders who use misleading marketing practices and send out forms asking businesses to update details in their directories, seemingly for free. If the targeted business signs the form, they are however told that they have signed a contract and will be charged a yearly sum.

and especially small businesses. The Commission therefore announced in its Review of the Small Business Act<sup>5</sup> its intention to reassess the functioning of existing rules.

More generally, misleading marketing practices generate market failure by impairing businesses' ability to make informed, and hence efficient, choices. The distortion of businesses' economic decision-making also gives rise to distortions of competition. This is either because the trader who is acting unfairly manages to win customer businesses away from honest competitors or because affected businesses are forced to pay for useless services of no value. In addition, misleading marketing practices have a knock-on effect on consumers as they have to pay more for products and services.

This Communication therefore gives an overview of how the Misleading and Comparative Advertising Directive is currently implemented in the Member States, identifies problems in how it is applied and outlines plans to revise it in the future.

## **2. THE DIRECTIVE AND ITS IMPLEMENTATION IN THE MEMBER STATES**

### **2.1. Development and scope of EU rules on advertising in business relations**

The Misleading and Comparative Advertising Directive is a horizontal instrument which applies to all advertising between businesses. It defines advertising very broadly as any communication or representation to promote goods and services, without specifying its form. This therefore includes both classical advertising and other types of marketing practice. The Directive sets a minimum legal standard of protection applying to misleading advertising in any business-to-business transaction across the EU, while leaving the Member States the flexibility to set a higher level of protection.

The Directive also lays down uniform rules on comparative advertising<sup>6</sup>, setting conditions for assessing when such advertising is permitted<sup>7</sup>. The aim is to ensure that comparative advertising compares "like with like", is objective, does not denigrate or discredit other companies' trademarks and does not create confusion among traders.

EU action in the area dates back to 1984 when the first Directive on misleading advertising was adopted<sup>8</sup> to protect both consumers and businesses. Out of the much more extensive field of unfair competition and unfair commercial practices law, the Directive was originally limited to the important area of advertising. However, many Member States already had provisions against misleading advertising and the changes brought by the Directive in their legal systems were limited. The rules were amended in 1997 to include fully harmonised provisions on comparative advertising<sup>9</sup> given the fact that Member States' provisions on

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<sup>5</sup> Review of the Small Business Act for Europe, COM(2011)78

<sup>6</sup> Any advertising which explicitly or by implication identifies competitor or goods or services offered by a competitor.

<sup>7</sup> According to its Article 1, the Directive protects only businesses against misleading advertising but sets conditions for comparative advertising targeting both consumers and businesses.

<sup>8</sup> 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 advertising; OJ L 250 of 19.09.1984, p. 17

<sup>9</sup> Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC

comparative advertising differed widely<sup>10</sup>, thus entailing an obstacle to the free movement of goods and services and creating distortions of competition.

In 2005 the Unfair Commercial Practices Directive<sup>11</sup> created a separate comprehensive legal framework protecting consumers against all forms of unfair commercial practices, before, during and after a commercial transaction, and applicable also to all advertising practices which harm the economic interests of consumers, irrespective of whether it affects the interests of a competitor. The Unfair Commercial Practices Directive reduced the scope of the Misleading and Comparative Advertising Directive to situations where advertising is addressed solely to businesses. However, comparative advertising provisions remained relevant to business-to-consumer transactions because they provide a general test for assessing whether comparative advertising is lawful.

The original Misleading and Comparative Advertising Directive and its subsequent amendments were consolidated in a new directive in 2006<sup>12</sup>.

## 2.2. Overview of how the Directive is implemented in the Member States

The Misleading and Comparative Advertising Directive was transposed in the Member States through various legislative instruments, such as commercial codes, general consumer legislation and marketing laws. While the fully harmonised rules on comparative advertising have been transposed in a uniform manner, there is, according to the information gathered by the Commission on all Member States' legal systems, **a great variety of rules going beyond the minimum EU-wide protection** against misleading advertising.

Some Member States decided to go beyond the minimum legal standard enshrined in the Misleading and Comparative Advertising Directive and extended the level of protection granted by the Unfair Commercial Practices Directive to business-to-business relations, either partly or in its entirety. In particular, in Austria, Denmark, Germany, France, Italy and Sweden the national legislation protecting consumers against unfair commercial practices also applies either partly or entirely to marketing practices affecting businesses. Other Member States emphasise contractual freedom and the higher degree of diligence expected in transactions between businesses instead, and do not consider it appropriate that businesses and consumers should be equally protected. For example in the Czech Republic, Poland and the United Kingdom the relevant legislation on business-to-business advertising grants only the minimum protection laid down in EU rules. In general, the Member States chose many different models to transpose the Directive<sup>13</sup>.

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<sup>10</sup> While in Denmark, Sweden or the United Kingdom comparative advertising was relatively widely used and in France, Germany and Italy it was explicitly allowed by national case-law, albeit in a restrictive manner, in Luxembourg it was considered as an act of unfair competition and in Portugal it was subject to an ad hoc authorisation scheme.

<sup>11</sup> Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) 2006/2004 of the European Parliament and of the Council (The Unfair Commercial Practices Directive), OJ L 149 of 11.06.2005; p.22

<sup>12</sup> Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising; OJ L 376 of 27.12.2006; p. 21

<sup>13</sup> In Bulgaria provisions on misleading and comparative advertising are included in the Competition Protection Act. In Cyprus there is a separate Law on the Control of Misleading and Comparative Advertisements. Hungary in business-to-business situations distinguishes between misleading advertising, regulated by the Act on the Basic Requirements and Certain Restrictions of Commercial

Consequently, the **level of protection for European businesses remains varied** leaving businesses uncertain about their rights and obligations in cross-border situations. The differences between consumer and business protection systems further blur the picture.

With regard to **enforcement systems**, the requirements introduced by the Misleading and Comparative Advertising Directive are rather limited. In general terms, Member States need to ensure that adequate and effective means exist to combat misleading advertising and to enforce compliance with the provisions on comparative advertising. This includes the obligation to introduce the possibility of legal action against non-compliant advertising, granting courts powers to order cessation or prohibition of such advertising and enabling them to require the advertiser to furnish evidence as to the accuracy of factual claims in advertising<sup>14</sup>. Member States currently enforce this Directive on the basis of different national systems. The crucial difference concerns the **possibility of public enforcement**. In some Member States, authorities can take action against rogue traders, while in other Member States only victims can seek redress. Especially in cross-border advertising such disparities substantially change the effective level of protection.

An enforcement by public authorities against a trader using misleading marketing practices is possible in countries such as Bulgaria, France, Italy, Latvia, Lithuania, Romania and the United Kingdom<sup>15</sup>.

In other Member States only affected companies or specific associations can seek court action. For example, Austria and Germany have a system of private self-regulatory associations which can bring cases against traders in courts. The enforcement is based on civil law actions and sanctions can involve order for removal, injunctive relief or damage compensation. In Poland, Czech Republic and Ireland it is up to the affected company to seek remedies in courts, and the public authorities intervene only in cases where unfair practices constitute an offence under criminal law<sup>16</sup>.

Furthermore, there is a significant jurisprudence of the European Court of Justice in the area of misleading and comparative advertising<sup>17</sup>. Since 1984, when the first Misleading Advertising Directive was adopted, the judgments of the Court have provided several important clarifications. Importantly, the Court started developing the notion of the "average consumer". This term was later, in 2005, codified by the Unfair Commercial Practices Directive, which now governs advertising in business-to-consumer relationships.

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Advertising, and other unfair practices, regulated by the Act on the Prohibition of Unfair Trading Practices and Unfair Competition. Latvia, Lithuania and Slovakia have separate advertising laws.

<sup>14</sup> Article 5 par. 1 and 3, and Article 7 of Directive 2006/114/EC

<sup>15</sup> In France, the consumer protection authority can conduct investigations against rogue traders and some offences may involve criminal sanctions. The Italian Antitrust Authority has powers to investigate cases of misleading advertising affecting businesses and to impose fines. In Lithuania, the Competition Council can impose administrative penalties. Similarly, Romania has an enforcement system where the Directorate General for State Aid, Unfair Practices and Regulated Prices can impose fines on traders. In the United Kingdom, the Office of Fair Trading can begin court proceedings for a civil injunction, but misleading advertising is also a criminal offence which can lead to up to two years imprisonment.

<sup>16</sup> Some cases of large-scale clearly misleading advertising practices were tackled under national criminal legislation against fraud.

<sup>17</sup> See in particular cases C-362/88 GB-INNO-BM; C-373/90 Criminal proceedings against X; C-126/91, Schutzverband gegen Unwesen in der Wirtschaft; C-210/96 Gut Springenheide and Tusky; C-220/98 Estee Lauder; C-112/99 Toshiba Europe; C-44/01 Pippig Augenoptik; C-71/02, Herbert Karner Industrie-Auktionen; C-228/03 Gillette; C-59/05. Siemens; C 533/06 O2 Holdings; C-487/07, L'Oréal; C-414/06 Lidl Belgium; C-159/09 Lidl.

Moreover, the conditions under which comparative advertising is permitted were examined by the Court on several occasions. This is due to the fact that comparative advertising constituted a new form of marketing in many Member States and its boundaries had to be drawn. For example, the Court outlined the condition for comparison of general price levels<sup>18</sup> and interpreted the provisions regarding the comparison of products with a designation of origin<sup>19</sup>.

### 3. PUBLIC CONSULTATION AND THE IDENTIFIED PROBLEMS

To gather more specific information on misleading marketing practices, the Commission published a public consultation and requested detailed information from the Member States in the form of a questionnaire<sup>20</sup>.

As part of this review, the Commission has not only gathered data on the overall effectiveness and existing problems in application of the Directive, but also collected information on wider issues concerning marketing practices. The assessment covered different types of commercial communications in business-to-business relations which have as their objective the promotion of goods and services<sup>21</sup>.

This Communication focuses on misleading marketing practices which also include misleading advertising and marketing techniques which are not under the present definition easily classified as advertising. For example, it concerns situations where a commercial intent or identity of a trader is hidden and the communication pretends to be a simple update of information or a communication from the authorities.

The public consultation took place between 21 October 2011 and 16 December 2011, attracting considerable attention and a total of 280 responses. A good balance was achieved, both as regards the geographical coverage<sup>22</sup>, and the type of respondents (16 European associations, 10 national authorities, 41 business organisations, 142 companies including 126 SMEs and 38 citizens)<sup>23</sup>.

#### 3.1. Most common misleading marketing practices

The vast majority of stakeholders focused their concerns on a number of **misleading marketing practices which are very often operated cross-border** (sometimes referred to as mass-marketing frauds or scams)<sup>24</sup>.

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<sup>18</sup> C-356/04 Lidl Belgium.

<sup>19</sup> C-381/05 De Landtsheer Emmanuel SA.

<sup>20</sup> 21 Member States responded to the questionnaire.

<sup>21</sup> This included online advertising, environmental claims, comparative advertising, etc. The Communication does not address certain contractual practices between companies mostly in the retail sector which can possibly be considered unfair due to an unbalanced relation resulting from a considerable bargaining-power of some market players. These issues will be addressed in the forthcoming initiative on unfair trading practices between businesses in the retail chain.

<sup>22</sup> The Commission received stakeholders' responses from all Member States apart from Latvia, Lithuania and Malta.

<sup>23</sup> The results of the public consultation:

<http://ec.europa.eu/yourvoice/ipm/forms/dispatch?userstate=DisplayPublishedResults&form=MisleadingAd>

<sup>24</sup> The Finnish Federation of Enterprises notes that, according to a survey, 60% of self-employed traders received disturbing advertising in 2010. The German Association against Economic Crime (DSW) estimates the potential yearly businesses' losses resulting from those practices in Germany at around € 340 million.

In addition to the most prominent misleading directory company schemes<sup>25</sup>, the following common practices were reported:

- **Misleading payment forms** disguised as an invoice for services that the trader has purportedly already ordered, where in fact he has not, or payment requests purporting to come from public authorities, e.g. official trade register.
- Offers to extend **internet domain names** (e.g. extension to other country domains) whereby a trader, through mass-marketing techniques provides false information and exercises psychological pressure in order to conclude a contract. The trader pretends to offer a distinctive service but in fact requests abusive prices for a simple domain registration that can be easily obtained through official providers at much lower prices.
- Offers to extend **protection for trademarks** in other countries employed by traders who use misleading advertising and provide untruthful information about the nature of the service. In fact such protection of trademarks can only be granted by official bodies and the trader offers mere listing in a directory.
- Legal advice through an internet platform based on a marketing scheme where the service offered is purely based on publicly accessible free legal databases and the trader provides misleading information about the features of the service. There is therefore hardly any added-value offered by the trader, although the charged price is high.
- Misleading marketing concerning advertising on social networks based on a practice involving abusive prices (e.g. very expensive pay per click), whilst actually this service is offered by the social networks themselves at much lower rates.

In some Member States there is a problem of traders sending invoices for services purportedly ordered over the phone, where in fact no contract was concluded.

A limited number of companies responding to the Commission's consultation complained also about misleading environmental claims<sup>26</sup>, unfair comparative advertising practices and, more generally, about lack of sufficient information at the pre-contractual stage in relations between businesses where one of them wields important market power.

Furthermore, stakeholders considered that misleading marketing practices in the on-line context are a significant problem and that there is an increase in misleading cross-border advertising affecting businesses. A growing number of online schemes which affect businesses worldwide have been identified as a new trend.

## 3.2. Misleading directory companies

### 3.2.1. History of the problem

Among the misleading marketing practices that cause most problems to businesses in Europe, the issue of misleading directory companies seems to be of particular concern. Employed on a large scale and causing considerable economic damage, these schemes are by no means

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<sup>25</sup> See section 3.2

<sup>26</sup> A practice whereby traders falsely claim that their products have beneficial effects on the environment, e.g. in relation to energy efficiency.

new<sup>27</sup>. Nevertheless, the Internet, new mass marketing tools<sup>28</sup> and low publication costs have changed the scale of the problem in recent years. The most notorious operators of this kind of mass-marketing techniques can reportedly send up to 6 million forms a year.

This issue forms the basis of two resolutions of the European Parliament adopted on 16 December 2008<sup>29</sup> and on 9 June 2011<sup>30</sup> which have vigorously called for improved cooperation between the Member States, review of the Misleading and Comparative Advertising Directive and better protection of businesses.

The schemes can take various forms. The most frequent practice is that misleading directory companies send out forms asking businesses to update details in their directories, seemingly for free. If the targeted traders sign the form, they are then told that they have signed a contract and will be charged a yearly sum. Attempts to withdraw from the contract are usually refused and the companies are often pursued for the amount purportedly owed through debt collection agencies.

The specific issue of misleading directory companies is a good example of a larger problem of various misleading schemes aimed at traders, in particular small businesses and independent professionals, such as doctors or plumbers.

### 3.2.2. *Data on the extent of the problem*

A survey for the report commissioned by the European Parliament in 2008 documented more than 13,000 complaints from 16 Member States and suggested that these numbers are just the "tip of the iceberg"<sup>31</sup>.

Several Member States clearly consider the problem of misleading directory companies to be a serious one<sup>32</sup>. Nevertheless, only a few have reliable data on its real extent. In Belgium the authorities received 460 complaints in 2008, 1165 in 2009 and 1258 in 2010. In the United Kingdom there were 1318 complaints in the period 2008-2010. The Czech authorities provided numbers from their national business protection association, which estimates that around 2000 people were victims of various scams of this type between 2007 and 2010. In Hungary only recently a large scale directory company scam received considerable media attention. At the same time, in some Member States, such as Bulgaria, Cyprus, Latvia and Romania the problem is seemingly non-existent or unreported.

Businesses also see the problem as very significant: almost half of the replies to the public consultation came from companies directly affected by misleading directory schemes. SMEs and independent professionals are most vulnerable but other types of businesses and

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<sup>27</sup> The European Association of Directory and Database Publishers (EADP), which represents the directories industry, notes this type of unfair practices were reported even 40 years ago and one of the reasons for the creation of their member associations was precisely to distinguish legitimate from rogue traders.

<sup>28</sup> Such as direct e-mailing, websites or social media advertising, text messages.

<sup>29</sup> European Parliament resolution of 16 December 2008 on misleading directory companies 2008/2126 (INI) A6-0446/2008.

<sup>30</sup> European Parliament resolution of 9 June 2011 on misleading directory companies 2011/0269 B7-0342/2011.

<sup>31</sup> "Misleading practices of directory companies in the context of current and future internal market legislation aimed at the protection of consumers and SMEs" IP/A/IMCO/FWC/2006-058/LOT4/C1/C6.

<sup>32</sup> In particular Austria, Belgium, Czech Republic, Germany, France, Luxembourg, Poland, Portugal, Sweden, Slovakia and the United Kingdom.

organisations are also affected. It is very difficult to assess the financial damage to individual companies but it can be estimated at between €1000 and €5000 per year for each company.

Many small businesses also underline having suffered constant psychological harassment. For several years, they face a struggle under threat of legal action in a foreign jurisdiction, with rising "administrative costs" and constant phone calls from debt collectors, described by the victims as close to threats. Some respondents were also able to provide specific data to show the scale of the problem<sup>33</sup>.

### 3.2.3. *Legislative and enforcement actions against misleading directory companies*

The Misleading and Comparative Advertising Directive covers misleading directory schemes but some enforcement authorities raised doubts as to whether these practices are advertising as, in reality, hardly any goods or services are promoted and there is only appearance of a commercial relation. Therefore, the application of the Directive and its effectiveness remain a problem. Some schemes have been taken to court, but it seems that results were varied. In Denmark and Austria, thanks to effective cooperation between business organisations and the police, as well as consistent case-law from the courts, these schemes have almost been eradicated at national level, but cross-border practices remain an issue. Authorities in Belgium, France and Spain have also taken action to enforce the rules, but again, these were mainly at national level.

Austria<sup>34</sup> in 2000 and Belgium<sup>35</sup> in 2011 introduced specific legal provisions in their legislation targeting the practices of misleading directory companies. Austria reduced the problem significantly at national level but Austrian companies are still targeted by misleading marketing practices originating from other Member States. In the Netherlands a help-point for marketing fraud was established and provides legal advice for victims.

### 3.3. **General feedback from the consultation**

Legislative action is widely supported by stakeholders. In the public consultation there was a **very strong call for increased protection for small companies and independent professionals** against misleading marketing practices<sup>36</sup>. Furthermore, there is a virtual consensus that a cooperation procedure needs to be developed for cross-border cases of misleading advertising, as the majority stated that existing enforcement procedures are not effective.

This was recurring message, raised equally by small businesses, chambers of commerce and public authorities<sup>37</sup>. There was similarly strong support for an EU-wide instrument to protect businesses against the most harmful misleading marketing practices<sup>38</sup>.

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<sup>33</sup> For example, the Danish Federation of Enterprises has been receiving at some point 200 calls per month regarding this problem. A Spanish advertising self-regulatory body has received 902 complaints over the last 5 years. The Belgian authorities report that over 9% of all complaints (from consumers and businesses) concern misleading directory companies.

<sup>34</sup> UWG (Unfair Competition Law) Section 28a.

<sup>35</sup> Art 95-99 of the Belgian Law of 23 June 2011 on commercial practices and the protection of the consumer. Chapter 4 Section 2: Unfair market practices in relation to persons other than consumers.

<sup>36</sup> 79% of respondents were in favour of strengthening the protection of small businesses, especially in cross-border transactions.

<sup>37</sup> 85% of respondents supported the creation of a cooperation procedure in cross-border cases.

<sup>38</sup> 84% of respondents support EU-wide legislation against most harmful commercial practices affecting businesses.

The consultation also shows that almost no Member States have so far taken cross-border action regarding misleading advertising. Several Member States consider that this is the result of a lack of a structured cooperation system and the weakness of the Misleading and Comparative Advertising Directive, which contains only general clauses for assessing whether a commercial communication is misleading<sup>39</sup>.

#### 4. THE COMMISSION'S ASSESSMENT

The Commission conducted a thorough investigation of the issues in relation to the marketing practices based on the public consultation, information gathered from the Member States and several complaints, and has come to the following conclusions:

- The Misleading and Comparative Advertising Directive<sup>40</sup> and the existing systems of self-regulation foreseen in Article 6 of the Directive appear to provide a rather solid regulatory framework for a considerable part of the business-to-business advertising market. In several Member States businesses have created voluntary self-regulatory codes and standards for advertising, which do help in creating a level playing field for fair competition, in defining good business practices and in offering alternative ways of solving disputes.
- However, the persistence of certain large-scale misleading schemes shows that the existing mixture of the EU-wide rules combined with self-regulation needs to be strengthened to address certain clearly identifiable scams. Small businesses are most affected by such practices, as their vulnerability is not much different from that of consumers. At the same time, in business-to-business relations the same level of diligence is expected from small businesses and large corporations.
- Furthermore, specific consideration should be given to the interpretation of comparative advertising rules where significant case-law has been developed by the Court of Justice of the EU.

##### 4.1. Marketing practices that require legislative action at EU level

The scale, persistence and financial detriment resulting from certain, clearly misleading marketing practices both at cross-border and national level need to be addressed in a more targeted and efficient manner at EU level.

Primarily, the **definition of advertising in the current Directive is not clear enough** to stop current misleading marketing practices and respond to future developments. The Directive defines advertising in broad terms as a representation made in any form in order to promote goods or services but this definition can be imprecise as regards marketing practices disguised as an invoice or an obligatory payment. Consequently, affected traders as well as national enforcers find it sometimes difficult to recognise that such practices are "advertising" within the meaning of the Misleading and Comparative Advertising Directive and hence fail to make proper use of it as a legal basis for action.

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<sup>39</sup> The weakness of substantive provisions concerns mainly the criteria for assessing whether advertising is misleading as outlined in Article 3 of the Directive.

<sup>40</sup> Broad definition of advertising (Article 2a), misleading advertising (Article 2b) and grounds for assessing whether advertising is misleading (Article 3).

Furthermore, **the test for determining whether a practice is misleading does not give sufficient legal certainty** for the purpose of tackling these clearly misleading schemes<sup>41</sup> as it is broad, general and open to different interpretations and case-by-case assessment. An additional specific ban on harmful marketing practices, as for example the fact of concealing the commercial intent of a communication, in the form of a "black-list" would strengthen legal certainty and the level of protection, without unduly affecting the contractual freedom in business-to-business relations.

The current Directive **does not provide for a cross-border cooperation procedure**<sup>42</sup> and therefore the national authorities have no formal basis to request an enforcement action from their counterparts in other Member States. Moreover, there are no established tools to share information about marketing practices affecting businesses in Europe.

Furthermore, in some Member States<sup>43</sup> **national authorities lack enforcement powers to stop such practices in business-to-business relations.** Consequently, in cases of cross-border misleading practices victims need to bring costly civil actions in foreign jurisdictions. Even if misleading marketing practices are of a large-scale and have significant overall financial detriment, the only administrative response is through criminal investigations concerning fraud which do not seem to bring sufficient results. It is often difficult to prove that misleading practices are fraud in the criminal sense as it may well appear that there is a service provided in return.

National authorities lack **a system of mutual cooperation and are not able to request enforcement action from their counterparts in other Member States** where misleading marketing practices endanger the collective economic interest of businesses. The purpose is not to engage in commercial disputes and enforce the rights of individual companies but to intervene in cases of serious market failure, when widespread practices cause harm to European businesses.

## 4.2. Comparative Advertising

Although in comparative advertising there is an inherent risk of deception with regard to compared products and their prices, this type of advertising can also promote market transparency and competition. A respectable body of case-law on the scope of comparative advertising has evolved since the enactment of the Directive on Comparative Advertising<sup>44</sup>.

Based on that case-law, the Commission intends to look into the scope of the definition of comparative advertising and its relation with certain intellectual property rights of competitors. Areas that might require further clarification are related to the use of a competitor's trademark in comparative advertising, the comparison of products with designation of origin with those without such designation as well as the conditions under which a trader's advertising can lawfully be based on a price comparison solely concerning certain product groups.

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<sup>41</sup> Article 2 (b) and Article 3 of Directive 2006/114/EC

<sup>42</sup> For instance, a procedure similar to the mutual assistance obligations laid down in Regulation (EC) No 2006/2004 on consumer protection cooperation.

<sup>43</sup> E.g. Czech Republic, Ireland, the Netherlands and Poland.

<sup>44</sup> C-112/99 Toshiba Europe, C-44/01 Pippig Augenoptik, C-356/04 Lidl Belgium, C-59/05 Siemens AG; C-381/05 De Landtsheer Emmanuel, C-533/06 O2 Holdings; C-487/07 L'Oréal SA and C-159/09 Lidl.

## 5. FUTURE STEPS

The Commission's assessment of problems around the Misleading and Comparative Advertising Directive shows that **legislative action is necessary** as the current legislative framework has several deficiencies, both as regards substantive rules and enforcement (procedural rules). The Commission therefore intends to table a proposal to strengthen the protection of businesses against cross-border misleading marketing practices. This proposal, to amend the Misleading and Comparative Advertising Directive, will be complemented by a forthcoming initiative addressing unfair trading practices between businesses in the retail chain.

This revision of the Directive will **target specific areas of concern**. It will clarify the interplay of the Directive with the Unfair Commercial Practices Directive. It will also focus on improving the effectiveness of cross-border enforcement, including cooperation among competent authorities of Member States, and strengthening the key substantive provisions. It will respond to businesses' needs while at the same time not creating any unnecessary administrative burden<sup>45</sup>. The Commission will also step up enforcement and create an ad-hoc working group of national enforcers with immediate effect.

### 5.1. Stepping up enforcement of existing rules as an immediate action

Notwithstanding the limitations of the current legislative framework on misleading marketing practices in business-to-business, the Commission will push for better enforcement on the basis of **existing provisions**.

As a first step and in parallel with its legislative work, the Commission will **step up enforcement** of the Misleading and Comparative Advertising Directive. To this end, it will explore with the Member States what measures can be taken within the existing provisions to improve the situation of businesses before a new proposal enters into force.

In order to facilitate the cooperation of Member States, the Commission will create within the next months an **ad-hoc working group of national enforcers** and key authorities to exchange information on large-scale misleading marketing practices and to further coordinate enforcement activities.

#### **The European Commission will:**

- Set up, as from now, an ad hoc network of authorities to step up enforcement of the Misleading and Comparative Advertising Directive and share information.

### 5.2. Putting forward a legislative proposal

#### 5.2.1. *New substantive rules on misleading marketing practices*

Alongside better enforcement and cooperation, businesses clearly also need additional substantive rules clarifying the legal position and targeting the most harmful misleading marketing practices affecting them across Europe.

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<sup>45</sup> The foreseen actions will be subject to a full impact assessment and to the rules set in the financial framework proposed by the Commission.

In particular, the scope of the Directive should be clarified so that a general clause unambiguously covers and prohibits all different types of misleading marketing practices.

The introduction of a new **definition of misleading marketing practices** will clarify the scope of the Directive and better serve the purpose of business protection as it would better cover situations where a marketing practice is not easily recognised as typical advertising. This will eliminate confusion and establish legal certainty. Some specific advertising practices, such as green claims<sup>46</sup>, could also require additional, clear definitions in view of the reported misleading practices in this area<sup>47</sup>.

Moreover, the Commission envisages strengthening the protection granted by the general clauses in the Directive by introducing an additional layer of protection, which will also facilitate clearer enforcement, in the form of a **black-list of banned misleading marketing practices**. Consequently, the future legislative instruments would be based on a two tier system of prohibition with a general clause covering all misleading marketing practices and a specific black-list of the most harmful schemes in business-to-business relations.

In particular such a black-list would entail an upfront ban on misleading marketing practices such as concealing the commercial intent of a communication, the identity of a trader or material information on the consequences of the reply to a communication. Additionally, disguising a commercial communication as an invoice or obligatory payment should be clearly prohibited. The Commission will also examine solutions at national level, such as in Austria and Belgium, where specific provisions prohibit either a number of misleading marketing practices or solely the practices of the misleading directory companies.

The Commission intends to examine the possibility of **strengthening penalties** for infringements of national provisions applied under the Directive. Any such new proposal would require Member States to ensure that penalties for misleading marketing practices in business-to-business relations are effective, proportionate and dissuasive<sup>48</sup>.

The Commission also envisages further **clarifying rules on comparative advertising**, in particular as regards price comparison and the relation between comparative advertising and intellectual property rights.

**The European Commission intends to revise the Directive in order to:**

- Clarify its scope by introducing a clearer definition of misleading marketing practices;
- Introduce a black-list of the most harmful misleading marketing practices;
- Introduce effective, proportionate and dissuasive penalties for infringements of the national provisions adopted in application of the Directive;
- Clarify certain aspects of comparative advertising based on the jurisprudence of the Court of Justice.

<sup>46</sup> Advertising claims that the product is more beneficial or less harmful to the environment than products offered by competitors.

<sup>47</sup> In parallel, the Commission intends to recommend best practices based on a life cycle approach and adequate methodologies, like the upcoming European harmonised methodologies for the calculation of the Environmental Footprint of Products (PEF) and Organisations (OEF)

<sup>48</sup> Similar to Article 13 of Directive 2005/29/EC on Unfair Commercial Practices.

### 5.2.2. *New enforcement cooperation procedure*

In order to address the divergent national enforcement systems and the absence in the existing Directive of a basis for efficient cross-border cooperation, the Commission intends to create an enforcement cooperation procedure in this field that, whilst creating minimal additional costs, allows enforcers to efficiently react whenever cross-border problems become systemic, affect the collective interest of businesses in Europe and evidently breach the rules of fair trading and good commercial practices.

The Commission therefore intends to propose **an enforcement cooperation procedure** that will serve the purpose of business protection in the area of misleading marketing practices..

In order to establish a clear basis for cross-border enforcement action, an **explicit mutual assistance obligation** would be introduced in the legislative proposal. Moreover, specific provisions will require Member States to designate **authorities with *ex officio* enforcement powers** for the correct and effective implementation of the Misleading and Comparative Advertising Directive. This means that the Member State could also extend powers of existing authorities in the field of consumer protection or competition<sup>49</sup> and not necessarily introduce new administrative bodies. An online application for exchange of requests would ensure swift, secure and cost-effective cooperation without much additional burden and costs for the Member States. The existing Internal Market Information System (IMI) could be used for this purpose.

Finally, the Commission will also seek cooperation at the international level to ensure that European businesses are not targeted by misleading marketing practices originating from outside Europe<sup>50</sup>.

**In the context of the legislative revision, the European Commission intends to:**

- Create an enforcement cooperation procedure (enforcement network) grouping national enforcement authorities in charge of the legislation protecting businesses to cooperate in cases of cross-border misleading marketing practices;
- Introduce mutual assistance obligations for the Member States entailing the explicit possibility of requesting enforcement measures in cross-border situations;
- Introduce provisions that will require Member States to designate an enforcement authority in the area of business-to-business marketing.

<sup>49</sup> The viability of extending the scope of existing cooperation procedure such as the mechanism established by Regulation (EC) No 2006/2004 on the Consumer Protection Cooperation to some business-to-business practices or the option of establishing a new dedicated cooperation procedure will be assessed.

<sup>50</sup> For example such cooperation could take place in the framework of the International Consumer Protection and Enforcement Network (ICPEN)

## 6. CONCLUSIONS

Small and medium-sized enterprises created 85% of net new jobs in the EU between 2002 and 2010<sup>51</sup>. They hold the potential to grow and create new jobs, which is exactly what Europe needs in times of economic uncertainty. In order to flourish and expand in the Single Market, all businesses need a friendly regulatory environment that will not only secure their economic freedom but also guarantee security in transactions with other traders. Small businesses, in particular, also need basic security against misleading marketing practices.

The Commission therefore intends to propose specific changes to the Misleading and Comparative Directive with a view to eliminate harmful misleading marketing practices in the business-to-business sector, such as the schemes of misleading directory companies. For this purpose, the Commission will present a targeted legislative proposal and will step up actions to ensure that existing rules are properly enforced.

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<sup>51</sup> "Do SMEs create more and better jobs?", A study on SMEs' impact on the EU labour market prepared by EIM Business and Policy Research with financial support from the European Commission. Zoetemeer, November 2011.