Misleading advertisement practices

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PURPOSE: to provide increased protection for companies against misleading marketing practices by revising the provisions of Directive 2006/114/EC concerning misleading and comparative advertising.

BACKGROUND: advertising has a strong economic impact on companies. 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 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 – are particularly vulnerable to misleading marketing practices as they lack the resources to protect themselves.

A clear and efficient framework safeguarding fair competition and providing effective means to enforce it is required.

The Misleading and Comparative Advertising Directive 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** (traders who send out forms asking businesses to update details in their directories, seemingly for free, but later this is revealed to be a service which must be paid for), continue to cause considerable harm to companies, especially SMEs.

The Commission announced its intention to reassess the functioning of existing rules in its review of the Small Business Act. The Communication therefore gives an overview of how the Directive is currently implemented in the Member States, identifies problems in how it is applied and outlines plans to revise it in the future.

CONTENT: the Misleading and Comparative Advertising Directive was transposed in Member States through various legislative instruments. However, there is 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 Directive** and extended the level of protection to business-to-business relations. 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 protected to an equal degree.

Consequently, **the level of protection for European businesses remains varied** leaving businesses uncertain about their rights and obligations in cross-border situations. Furthermore, Member States currently enforce the Directive on the basis of different national systems, the key factor being whether public authorities have the power to enforce the Directive effectively.

Most common misleading marketing practices: having examined the application of the Directive, the Commission reached the conclusion that most of the misleading marketing practices operating cross-border take the following forms:

- misleading payment forms disguised as an invoice for services that the trader has purportedly already ordered, where in fact he has not ;

- offers to extend internet domain names (e.g. extension to other country domains) whereby a trader provides false information and exercises psychological pressure in order to conclude a contract ;

- 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, which may, in fact, only be granted by official bodies ;

- legal advice through an internet platform based on a marketing scheme where the service offered is purely based on publicly accessible free legal databases ;

- 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 this context, the Commission considers that even though the current Directive provides a fairly solid regulatory framework for a considerable part of the business-to-business advertising market, the Directive is **not effective against certain large-scale misleading schemes** which also affect SMEs, which are particularly vulnerable.

Proposal to revise Directive 2006/114/EC: 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.

In this context, the Commission considers that:

1) **the definition of advertising in the current Directive is not clear enough** to stop current misleading marketing practices and respond to future developments. Consequently, traders as well as national enforcers find it sometimes difficult to recognise that such practices are "advertising" within the meaning of the Directive: it is intended, then, to **clarify the scope of the Directive by introducing a new definition of misleading marketing practices;**

2) **the test for determining whether a practice is misleading does not give sufficient legal certainty for the purpose of tackling these clearly misleading schemes**, as it is broad, general and open to different interpretations and case-by-case assessment. An additional specific ban on harmful marketing practices, such 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.

Furthermore, the current Directive does not provide for a cross-border cooperation procedure and therefore, 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. In some Member States national authorities lack enforcement powers to stop such practices in business-to-business relations, particularly in cross-border cases.

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 Directive will be complemented by a forthcoming initiative addressing unfair trading practices between businesses in the retail chain.

Apart from revising the definition of advertising and establishing a black list, the revision of the Directive will:

- **clarify the interplay of the Directive** with the Unfair Commercial Practices Directive;

- **respond to businesses' needs** while at the same time not creating any unnecessary administrative burden;

- **step up enforcement** and create an ad-hoc working group of national enforcers with immediate effect;

- **introduce effective, proportionate and dissuasive penalties** for infringements of the national provisions adopted in application of the Directive.

With regard to a cooperation procedure between Member States, the revision of the Directive will:

- 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.