

## **The Principle of Legality of Comparative Advertising**

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### **Abstract:**

This research offers an informed examination of comparative advertising using analysis as a research approach. The research's principal goal is to form a legal framework for the use of comparative advertising that includes marketing and promoting goods and the company's advertising. Comparative advertising influences consumer decision-making, behavior, and consumerism through the ethical principles of advertising. To establish rules for utilizing the names of other products, this research intends to investigate the moral requirements of comparative advertising as well as the effects of direct comparison advertising on customer behavior.

Advertising is significant in a competitive activity where it is necessary to decide between misleading information. Moreover, several fairness and objectivity requirements have been developed at the EU level through laws to distinguish between truthful and comparative advertising encourage free competition and consumer welfare, and avoid misleading the public about the origin of the goods or services offered. It is a tool for enhancing consumer trust and fostering free trade. This study explains and analyzes the legality of comparative advertising, a concise analysis of the law and the case. It considers legal defenses against unfair competition, and proceedings and analyzes the implications of applicable state law and various required amendments.

This study will divide into sections; the first section is divided to the extent of the legality of comparative advertising in legislation, jurisprudence, and the judiciary. The second is the condition one deals with for the validity of comparative advertising. Finally, it will evaluate the legal controls of comparative advertising.

**Key Words:** Comparative Advertising, Misleading Advertising, Legality of Comparative Advertising, Non-confusing and Truthful comparisons.

### **المخلص:**

يقدم هذا البحث فحصاً مستنيراً للإعلان المقارن باستخدام المنهج التحليلي كنهج بحثي. وان الهدف الرئيسي للبحث الحالي هو تشكيل إطار قانوني لاستخدام الإعلانات المقارنة التي تشمل كل من تسويق السلع والترويج وإعلان الشركة. حيث يؤثر الإعلان المقارن على اتخاذ قرارات المستهلك، والسلوك، والنزعة الاستهلاكية من خلال المبادئ الأخلاقية للإعلان. وكي يتم وضع قواعد لاستخدام أسماء المنتجات الأخرى، يسعى هذا البحث إلى التحقيق في المتطلبات الأخلاقية للإعلان المقارن وكذلك آثار إعلانات المقارنة المباشرة على سلوك العملاء.

يعد الإعلان مهماً في نشاط التنافسي فضلاً عن انها ضروري عند الاختيار بين المعلومات المضللة. علاوة على ذلك، تم تطوير العديد من متطلبات الإنصاف والموضوعية على مستوى الاتحاد الأوروبي من خلال قوانين للتمييز بين الإعلان الصادق والمقارن الذي يشجع المنافسة الحرة ورفاهية المستهلك، ويتجنب تضليل الجمهور بشأن منشأ السلع أو الخدمات المقدمة. كما يعد الاعلان أداة



## 1. Introduction

Regarding the legality of comparative advertising, we need to explain the position of the state's regulations. In this regard, it should be noted that the position of states about the legitimacy of comparative advertising differs from one state to other between prohibition and legalization. On the one hand, some states do not allow comparative advertising because they lack neutrality and objectivity.<sup>1</sup> On the other hand, other states allow it to be practical to the consumer as it<sup>2</sup> provides them with important information on the advantages and disadvantages of goods and services in the marketplace, and subjects them to certain conditions and restrictions.

## 2- The Legality of Comparative Advertising

### A. The legality of comparative advertising in France

Since France is one of the countries that deal with and organize comparative advertising, the question of the legality of this type of commercial declaration has endured many doctrinal discussions and has been issued by many judicial decisions in French courts.<sup>3</sup> Moreover, we are interested in talking here about the position of the French judiciary and jurisprudence before and after the French Comparative Declaration Act of 1992.

Before the enactment of that law, judicial decisions of French courts prohibited comparative advertising because they were illegal competition, the injured trader could sue for compensation against the advertiser, who sought to attract customers to his item or service advertised by misleading the rival's customers. This action entitles the affected competitor to sue him.<sup>4</sup> On this basis, the French Court ruled that this case involved acts that affect the confidence of consumers and constitute an illegal competition of violent and unjustified criticism. The trader who distributes in his advertisements a list of comparative prices and shows the high prices of competing goods compared to his prices makes a default and therefore the competing trader has the right to sue him.

Despite this position on comparative advertising by the French courts at that time, it should be noted that some of the provisions implicitly authorized comparative advertisements by tightening them to be comparative advertisements and not by authorizing that type of advertisement directly. For example, the Dijon court ruling (Cassis de Dijon case) that the announcement of the numbers sold from a newspaper compared to the numbers sold from other newspapers in the same region is not a comparative commercial declaration. Concerning the position of jurisprudence before the

<sup>1</sup> Jozef Andraško & Soňa Ralbovská Sopúchová, Limitations of Comparative Advertising Permissibility: Denigration/Disparagement, Comenius University in Bratislava, Faculty of Law, Slovak Republic, ICLR, Vol. 16, No. 2., 2016, P. 123. available at:

<[file:///C:/Users/IT/Downloads/Limitations\\_of\\_Comparative\\_Advertising\\_Permissibil.pdf](file:///C:/Users/IT/Downloads/Limitations_of_Comparative_Advertising_Permissibil.pdf)> accessed on 28 June 2022.

<sup>2</sup> Hala Miqdad Al-Jalili, 'Announcement', Ph.D dissertation submitted to the College of Law - University of Mosul -2002, p.170.

<sup>3</sup> Marc Ancel, 'Case Law in France', (1934) 16 (1) Journal of Comparative Legislation and International Law Cambridge University Press 1-17

<sup>4</sup> Dr. Ahmed Ali Suleiman, 'Consumer Protection', (2004) first edition, dar al-kitab for publishing and distribution Alexandria p.421.

passage of the Comparative Advertising Act on (1/18/1992), the majority of French jurisprudence,<sup>5</sup> together with consumer-supporting associations, went far in support of comparative commercial advertising, as since (1970), French jurisprudence has been inclined to accept this type of commercial because the trader who resorts to it seeks to deceive the public and not to mislead them. Comparative advertising plays a major role in educating consumers.<sup>6</sup>

In this regard, Professor J. Calais Auloy noted that comparative commercialization would provide real information to the consumer by comparing different brands, as the Committee for the Review of French Consumer Law indicated to its full support for comparative commercial advertising, as well as criticized judicial decisions that did not permit that type of commercial and stated that the prohibition of comparative commercial advertising by the judiciary is not supported by any legislative text.<sup>7</sup> Others had a different view and stated that the prohibition of comparative commercial advertising was based on an explicit provision in the French Penal Code, namely, article (2/622) of the French Penal Code, which prohibits the use of the trademark without the owner's permission,<sup>8</sup> and that comparative commercial advertising necessarily includes the use of the trademark of the competing trader when comparing goods or services owned by the advertiser with other goods or services owned by competing traders.<sup>9</sup> However, it should be noted that this opinion is under consideration, as the correct interpretation of the legal texts that prohibit the use of trademarks owned by others is that the law punishes the use of trademarks owned by others if the purpose of its use is to confuse the public, and it seems that this intent does not exist in the case of using the mere comparative trademark to familiarize the consumer with the goods and services included in the advertisement and not to confuse them.

Regardless of the scope of the dispute between jurisprudence and the judiciary regarding comparative advertising, it was quickly settled by the French Consumer Law, which laid the frameworks and foundations for the legitimacy of comparative advertising by requiring that real and objective data shall not create confusion and ambiguity for the consumer. Comparative advertising is focused on the essential characteristics of the product or services and responds to the wondering of whether the advertised goods or services are similar to each other or not. French legislators regarding

<sup>5</sup> Theo Bodewig, *The Regulation of Comparative Advertising in the European Union*, Tulane European & Civil Law Forum, Vol. 9, 1994. Available at: [file:///C:/Users/IT/Downloads/kchrist6,+06+c9Bodewig%20\(3\).pdf](file:///C:/Users/IT/Downloads/kchrist6,+06+c9Bodewig%20(3).pdf) accessed 16 may 2021. Also see: michal bejot, caroline bouvier, Bernard-Hertz-Béjot, *Advertising & Marketing in France*, lexology, law business research 2021. Available at: [https://www.bhbfrance.com/publications/bejot-bouvier/advertising-marketing2021\\_france.pdf](https://www.bhbfrance.com/publications/bejot-bouvier/advertising-marketing2021_france.pdf) accessed 16 may 2021

<sup>6</sup> Dr. Muhammad Yassin Ahmed, *Consumer Protection*, House of Culture, 1st edition, Khartoum, p. 131.(Arabic)

<sup>7</sup> Amanj Rahim Ahmed, *Consumer protection within the scope of the contract, a comparative analytical study in civil law*, Al-Iraqi, Publications Company for Distribution and Publishing, Beirut, Lebanon, first edition, 2010, p66.

<sup>8</sup> Dr. Muhammad Yassin Ahmed, *ibid*, p. 138.

<sup>9</sup> It states that the French Penal Code is regarding the prohibition of the use of the trademark without the owner's permission is matched by the provisions of the Iraqi legislator as well, in article (30) of the Trademarks and Trademarks Act, which requires that anyone who has placed in bad faith on his product be held responsible for a trademark owned by others.

the validity of the comparative advertisement stipulated that the other competitor should be informed of the content of the advertisement within an appropriate period, otherwise the advertisement is not legitimate, but an unlawful competition.<sup>10</sup>

## **B. The legality of comparative advertising in the USA and EU**

Comparative advertising in the USA is regulated by a combination of federal state and local laws as self-regulatory codes of conduct.<sup>11</sup> Meanwhile, European law is skeptical regarding comparative advertising, but US law welcomes it unless it does not confuse or mislead the public. American advertisers have great freedom to use competitors' trade names, trademarks, or other distinguishing features in comparative advertising. US law and customary law prohibit false advertising, recognize it as long as it is true, and consider Ads as unfair if they analyze or criticize someone else's product. The Federal Trade Commission and U.S courts encourage comparative advertising, which is considered commercial according to the US Constitution.<sup>12</sup>

## **3. A General Overview of the Most Important Principles of the Legality of Comparative Advertising**

The legality of comparative advertisements has sparked countless disputes and discussions.<sup>13</sup> Typically, comparative advertising include more or at least appear to contain more information than 'regular' comparative advertising, and the risk of misuse or benefit to the general population is higher.<sup>14</sup> Furthermore, consumers seem to consensus greater significance to comparative claims than to non-comparable ones.<sup>15</sup>

The advertiser, the competitor being compared, and the customer are all participants engaged in comparative advertising.<sup>16</sup> The most important conflict is between the competitor and the advertiser.<sup>17</sup> On the one hand, the advertiser's goal is to inform the public about the benefits of his products or services in a way that encourages customers to purchase them. He wants to use the most efficient method of advertising.<sup>18</sup> The competitor, on the other hand, wants to prevent his competitors from criticizing his trademarks or products, or from claiming that they satisfy the same standards. As

<sup>10</sup> Judgment of the Court (Paris) on August 26, 1980, Dr . Ahmed Al-Saeed Al-Zaqard, Legal Protection from Advertising Deception in Kuwaiti and Comparative Law, Research published in the Journal of Law, College of Law, Kuwait University, Issue No. 4, Year 9, 1995, p. 268. (Arabic)

<sup>11</sup> John E. Villafranco, Kelley Drye & Warren LLP, Comparative Advertising Law in the US, practical law company, Available at: <[file:///C:/Users/IT/Downloads/Comparative-Advertising-Law-in-the-US%20\(3\).pdf](file:///C:/Users/IT/Downloads/Comparative-Advertising-Law-in-the-US%20(3).pdf)> accessed on (may 12 2021).

<sup>12</sup> Jeremy Phillips, Trade Marks at the Limit, University of London, Cheltenham UK and Northampton USA, 2006, P. 25.

<sup>13</sup> See, e.g., André Bertrand, *Peut-on vraiment légaliser la publicité comparative?*, 38 Revue du Droit de la Propriété Intellectuelle 23 (1991).

<sup>14</sup> Stewart E. Sterck, *the Law of Comparative Advertising: How Much Worse Is "Better" than "Great,"* 76 Colum. L. Rev. 80, 80-81 (1976).

<sup>15</sup> *ibid*, at 81 n.6.

<sup>16</sup> Theo Bodewig, *The Regulation of Comparative Advertising in the European Union*, 9 Tul. Eur. & Civ. L.F. 179, 187 (1994).

<sup>17</sup> *ibid*, P.188.

<sup>18</sup> *ibid*, P. 185-86.



a result, the rival has a strong interest in prohibiting comparable advertising. At the absolute minimum, he wants to be able to prohibit his competitors from making false or misleading representations about his products or services.<sup>19</sup> For clarity's sake, it should be highlighted that the competitor is sometimes also the advertiser (and vice versa) so that each party has a dual interest.<sup>20</sup> However, when it comes to comparison advertising, the established rival, or the one with the best market position, has a stronger interest in prohibiting it since he is more likely to be regarded as an example by other manufacturers in the market. In the midst of these competing interests is the consumer's need to be fully informed about the characteristics of the goods and services offered on the market.<sup>21</sup>

There is a tight interdependence between the aforementioned specific interests. The goal pursued by each country in terms of competition has traditionally served as a guideline in determining the individual weighting of each of them: if the goal is to protect each competitor from his rivals' aggressive business practices and to promote competitor welfare, comparative advertising will be limited.<sup>22</sup> On the other hand, if the goal is to boost the competitive process by fostering open competition and improving consumer welfare in the marketplace,<sup>23</sup> the advertiser's interests must be prioritized. Both the US and EU as France now want to encourage free competition and consumer welfare. As a result, the policies of both nations promote comparable advertising.<sup>24</sup>

Comparative Advertising is a way to improve consumer welfare and encourage free competition. Consumers' costs when purchasing a product are divided into two categories: the price of the product and the so-called "consumer search cost," which includes the time, energy, effort, and money spent gathering pricing and quality information about the product before purchasing it.<sup>25</sup> As Professor McCarthy points out:

*If the consumer knows quite a bit about brand A... and relatively little about brand Z, then purchasing brand Z will appear to be a risky choice. "The ideal solution in such a case would be to somehow fully inform consumers, so that they know as much about the second brand as they do about the first. The problem is that such a process costs money. It takes time and effort for consumers to*

<sup>19</sup> *ibid*, P. 187.

<sup>20</sup> Gary M. Armstrong, et.al, Principles of Marketing, Pearson Australia, 2017 - Customer relations, p1641. (book)

<sup>21</sup> *ibid*, P. 188.

<sup>22</sup> Barbara Lippert and Volker Perthes, Strategic Rivalry between United States and China, SWP, 2020/RP 04, 06.04.2020, P. 53 doi:10.18449/2020RP04. Available at: <<https://www.swp-berlin.org/en/publication/strategic-rivalry-between-united-states-and-china>> last accessed (April 12<sup>th</sup> 2021).

<sup>23</sup> See, e.g., Spectrum Sports, Inc. v. Mc Quillan, 506 U.S. 447 (1993) (stating "a anticompetitive" has a special meaning: it refers not to actions that merely injure individual competitors, but rather to actions that harm the competitive process, a process that aims to bring consumers the benefits of lower prices, better products, and more efficient production methods."

<sup>24</sup> Natrona Serv., Inc., v. Cont'l Oil Co., 598 F.2d 1294 (10th Cir. 1979) (declaring that antitrust laws were enacted for the protection of competition, not for the protection of competitors).

<sup>25</sup> Sherman Hanna, The Economics of Information. Available at <<http://www.hec.osu.edu/people/shanna/741/stigler.pdf>> last accessed 6 Jan 2021; see also Andrew B. Whrnston et.al, the Economics of Electronic Commerce 256 (Macmillan Technical Publishing 1997).

*acquire information about the other brands for themselves, and they may rationally value the benefits of finding a lower-priced equivalent brand less than the effort required to find it.”<sup>26</sup>*

It may be necessary to visit stores, which incurs time and transportation expenditures, make phone calls, and purchase magazines to get information about the product. Comparative advertising provides in this setting as a practical way to inform consumers about the similarity or superiority of a given product's qualities to those of rival goods. The wide variety of goods and services currently offered, comparative advertising helps consumers choose between products by giving them a framework for comparing the benefits of related commodities.

Only non-confusing and truthful comparative advertising contribute to consumer-free competition and welfare in the marketplace. False advertising has an impact on "decision-making quality" and<sup>27</sup> is widely acknowledged.<sup>28</sup> Professor Lillian BeVier states that it would increase doubt and impede knowledgeable decision-making. It is highly connected with consumers' disappointment and dissatisfaction.<sup>29</sup> The main purpose of the trademark is impaired by confusing comparative advertising which means consumers cannot differentiate between brands and products. In other words, the welfare of the consumers and competition in the market needs to be preserved such as in the *Chanel* case.<sup>30</sup> The primary legally important purpose of a trademark is to provide information about the product's source or sponsorship.<sup>31</sup> The Lanham Act and common law both serve the public essential interest by preserving the trademark as a way of identifying the trademark owner's products. It allows for successful competition in a complicated, economy by allowing consumers to pick things that appeal to them.<sup>32</sup>

In the USA and some EU countries like France, non-confusing and truthful comparative advertising is managed or encouraged to be used as a marketing tactic. These states have that exception and set out identical limits on the use of advertising tools by prohibiting the use of false and confusing claims. However, Iraq and Egypt have another approach as they have codified non-confusing and truthful comparative advertising in the unfair competition law. Furthermore, the U.S. and France have an extremely dissimilar positions because comparative advertising has been permitted for a long time in the US but accepted only recently in France.

<sup>26</sup> McCarthy, *supra* note 14, § 2:5 (quoting F.T.C. Office of Policy Planning, F.T.C. Policy Planning Issues Paper: Trademarks, Consumer Information and Barriers to Competition 22 (1979) (The Craswell Report)).

<sup>27</sup> See, e.g., Rhone-Poulenc Rorer Pharms., Inc. v. Marion Merrell Dow, Inc., 93 F.3d 511, 516 (8th Cir. 1996), See, e.g., Castrol, Inc. v. Pennzoil Co., 987 F.2d 939, 941, 946 (3d Cir. 1993).

<sup>28</sup> Jeffrey P. Singdahls, *The Risk of Chill: A Cost of the Standards Governing the Regulation of False Advertising Under Section 43(a) of the Lanham Act*, 77 Va. L. Rev. 339, 340 (1991).

<sup>29</sup> Fred S. McChesney, Deception, Trademark Infringement, and the Lanham Act: A Property-Rights Reconciliation, (1992) 78(1) Virginia Law Review Symposium on the Law and Economics of Intellectual Property, pp. 49-56

<sup>30</sup> Smith v. Chanel, Inc., 402 F.2d 562 (9th Cir. 1968).

<sup>31</sup> Graeme B. Dinwoodie and Mark D. Janis, Trademarks and Unfair Competition: Law and Policy, Aspen publishing, fifth edition, 2018, p. 18. (book)

<sup>32</sup> Ibid, p.566.

Consumers' welfare has been the keystone of the governmental approach towards the business scene in the US.<sup>33</sup> Hence, the use of comparative advertising has rapidly become a primary goal of judicial and legislative authorities in the area of advertising law.

The legality of truth in comparative advertising has been recognized by U.S. courts. Despite this, industry self-regulatory standards generally limit competitive advertising. In the *Chanel* case, for example, courts allowed a person who had copied an unpatented product sold under a trademark to use that trademark in advertising to identify the copied product, as long as the advertisement was truthful and did not cause confusion about the source or contain misrepresentations.<sup>34</sup> According to the (Federal Trade Commission) FTC, truthful comparative advertising is a vital source of information for customers that may help them make reasonable purchasing decisions.<sup>35</sup> This type of marketing drives product improvement and can result in lower costs in the marketplace. Nonetheless, the FTC mandated clarity and, if required, disclosure to avoid consumer deception due to the harmful repercussions of false and confusing comparative claims.<sup>36</sup> As a result, comparative advertising's benefits are frequently emphasized in court, because customers can see at a glance what sort of product is for sale and how it varies from an established benchmark.<sup>37</sup>

Comparative advertising is restricted in France, and legal precedents give useful guidance for interpreting the existing comparative advertising statute. The basic concept was that companies must protect themselves against dishonest outsiders who do not follow the rules.<sup>38</sup> As a result, even if referring to the trademark owner without generating misunderstanding as to its source, the use of another's trademark in advertising was regarded as unfair trading on the owner's reputation and goodwill, or going beyond the bounds of commercial fairness.<sup>39</sup> The courts have ruled that comparable advertising is illegal. Even honest and non-critical comparable assertions, such as the advertiser's goods being as good as or equal to those of his competition, were considered unfair commerce.<sup>40</sup>

<sup>33</sup> McCarthy, *supra* note 14, § 1:1 (citation and footnotes omitted). U.S. courts regularly declare that consumer welfare is the guiding objective in the competition law area. *See supra* note 13.

<sup>34</sup> Smith, 402 F.2d 562. *See infra* note 86, and accompanying text, for a description of the facts of the Smith case.

<sup>35</sup> 16 C.F.R. § 14.15(c).

<sup>36</sup> 16 C.F.R. § 14.15(b).

<sup>37</sup> August Storck K.G. v. Nabisco, Inc., 59 F.3d 616, 618 (7th Cir. 1995). *See also* Deere & Co v. MTD Prods., Inc., and 41 F.3d 39, 44 (2d Cir. 1994) (stating “as long as the mark is not altered [comparative advertising] serves the beneficial purpose of imparting factual information about the relative merits of competing products”).

<sup>38</sup> Bodewig, *supra* note 8, at 190.

<sup>39</sup> Luby, *supra* note 5, at 12-18. *See generally* Pirovano, *supra* note 38 (analyzing extensively and criticizing previous case law which prohibited comparative advertising as impairing the competitor's interest).

<sup>40</sup> CA Paris, Dec. 10, 1963, Ann. Prop. Ind. 1964, 67 (considering unlawful the comparison with one's competitor's products as likely to capture the competitor's potential customers), cited in Pirovano, *supra* note 38.



In addition, the courts barred advertisements from denigrating items made by rivals that did not comply with rules<sup>41</sup> or comparing the quality of their products to that of their competitors.<sup>42</sup> Comparative advertising, fortunately, is a useful tool for consumer knowledge.<sup>43</sup> While comparative advertising was designed to safeguard competitor welfare, the consumer was supposed to be protected indirectly, but effectively, by rivals' activities upholding these high standards of market 'morals'.<sup>44</sup> This type of indirect consumer protection was proved to be ineffective. While both the customer and the competitor have an interest in preventing false and misleading comparison advertising, their interests vary when it comes to true comparative advertising.

The customer appreciates accurate comparative advertising, but the competition does not. As a result, competitive advertising presents a unique challenge when the laws against unfair competition have as their primary goal the protection of rivals from unfair acts, based on the notion that consumers and competitors have similar interests. Indirect consumer protection through rival activities [doesn't] function.<sup>45</sup>

The evolution of the French approach to comparative advertising has been influenced by European institutions. The European Economic Community's Council approved a policy encouraging comparison advertising as a method of making product selection easier for consumers. It passed a resolution outlining five fundamental consumer rights, including the right to knowledge.<sup>46</sup> This right was founded on the idea that enough information should be made available to allow the general public to assess the basic characteristics of the goods and services being sold, such as their nature, quality, quantity, and price, and to make an informed decision between competing products and services.<sup>47</sup> Likewise, the European Commission's proposal for a Directive on Comparative Advertising in the European Council<sup>48</sup> supported the requirement of harmonizing this advertising format in the Community.<sup>49</sup> Comparative advertising, in particular, was highlighted as a technique for both increasing consumer knowledge and fostering competition.<sup>50</sup> The position taken by European institutions has caused that several consumer groups in France, as well as some scholars and practitioners, oppose the country's longstanding anti-comparative advertising attitude. According to several academic opinions, the interests of competing businesses should not take precedence over the

<sup>41</sup> See, e.g., CA Paris, June 6, 1964, D. 1964 somm., 103 (holding that defendants cannot inform the buying public that the methods used by their competitors do not comply with the regulation enacted by the public health ministry).

<sup>42</sup> See, e.g., Pirovano, *supra* note 38, citing Cass. com., July 19, 1973, D. 1973, 587; CA Paris, Jan. 24, 1967, Ann. Prop. Ind. 1967, 112 (ruling that one cannot compare his products to his competitor's products in ways that put the competitor at a disadvantage, even when scientific evidence supports the comparison).

<sup>43</sup> See, e.g., Calais-Auloy & Steinmetz, *supra* note 13, at 123 - 126

<sup>44</sup> See Bodewig, *supra* note 8, at 190.

<sup>45</sup> *ibid*, p. 188.

<sup>46</sup> Council Resolution of Apr. 14, 1975 on the Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy, 1975 O.J. (C 92) 1 [hereinafter Council Resolution].

<sup>47</sup> *ibid*, p. 34.

<sup>48</sup> Commission Proposal of May 28, 1991 for a Council Directive Concerning Comparative Advertising and Amending Directive 84/450/EEC Concerning Misleading Advertising, 1991 O.J. (C 180) 14.

<sup>49</sup> See generally Rafael Cepas Palanca, *The directive on comparative advertising*, 3 Revue des Affaires Européennes 195, and 198 (1998).

<sup>50</sup> *ibid*, p.197.

need to promote market transparency and inform customers.<sup>51</sup> The leading French consumer groups also backed this proposal, announcing a policy promoting the use of comparative claims as a way to improve consumer protection by providing them with information and increase the competition.<sup>52</sup>

In France, the country has implemented European Directive (97/55/EC) on comparative advertising.<sup>53</sup> As a result, the legality of comparative advertising was somewhat modified in this application of Community legislation:<sup>54</sup>

Statement of policy regarding comparative advertising in the U.S.A states that industry self-regulation, should not prevent advertisers from using accurate comparison advertising. The FTC has found that restating its present comparative advertising policy will benefit advertisers, and disclosure to avoid consumer deception. The Federal Trade Commission protecting America's consumers supports the use of brand comparisons.

When honest and non-misleading, comparative advertising provides valuable information to consumers and aids them in making reasonable buying decisions. Comparative advertising fosters product development and innovation, as well as reduces market prices. As a result, the Commission will continue to review restrictions on its use with great caution.

Comparative advertising has a two-edged sword: when utilized properly, it promotes competition between producers of products and services, which benefits customers. Meanwhile it may be harmful to rivals and harm customer choice if used unfairly. Comparative advertisements must strike a balance between these opposing viewpoints. The use of another's trademark in a comparison advertisement is authorized in the EU if it meets the requirements outlined in the regulation on misleading and comparative advertising.<sup>55</sup>

#### **4. The Conditions for the Legality of Comparative Advertising**

##### **1. The comparative advertisement must be honest and not of a nature that harms the consumer.**

Under this condition, comparative advertising is not allowed unless it is real and truthful, because if unreal facts enter into the concept of advertising it is converting to illegal and malicious.<sup>56</sup> A

<sup>51</sup> Paul-Philippe Massoni, *Publicité comparative*, 5 *Juris-classeur Contrats-Distribution*, fascicule 4140, 4 (1994). See, e.g., Pirovano, *supra* note 38.

<sup>52</sup> See Massoni, *supra* note 56, 4. The proposal for a new Consumer Code prepared by the Commission for the Rewriting of Consumer Law in 1990 also suggested that comparative advertising be liberally permitted in order to stimulate competition and facilitate consumer information.

<sup>53</sup> Council Directive 97/55/EC of 6 October 1997 Amending Directive 84/450/EEC Concerning Misleading Advertising so as to Include Comparative Advertising, 1997 O.J. (L 290) 18; D.L. 1997, 358 [hereinafter the 1997 European Directive].

<sup>54</sup> French Consumer Code [hereinafter C. con.]. The new regulation defines comparative advertising as any advertising that expressly or implicitly identifies a competitor or goods or services offered by a competitor. Article L.121-8, Article L.121-9, Article L.121-10, Article L.121-12, see *infra* Part III. For an analysis of the limits on comparative advertising established by the 2001 Decree, see *infra* Part II.B.3. and Part III.

<sup>55</sup> EU. 2006/114/EC.

<sup>56</sup> Paragraph 8 of Article (121) of the French Consumer Code.

comparative advertisement can be condemned even if it is not wrong, but because that leads to misleading the consumer,<sup>57</sup> as in the case claimed that comparisons are between the prices of goods and that makes us believe that it is better to buy it from a specific store and not from other competing stores, according to what was stated in the advertisement, but the comparisons are about to compete between a certain number of materials, not all of them.

## **2. The comparative advertisement should be objective**

This condition means that the comparison must be objective and deals only with the essential characteristics and not be based on individual, subjective or collective opinions or a matter that is difficult to appreciate,<sup>58</sup> such as taste, which must be excluded from the comparison. Therefore, ambiguous or subjective comparisons must be avoided because they are not considered objective.<sup>59</sup> This is equivalent to declaring that his commodity is significantly superior to his competitor's commodity without demonstrating the aspects of quality and substantiating his claim. A comparative commercial advertisement must be based on the comparison of meaningful and verifiable basic elements and not only on the claim of superiority of commodities over other commodities.

## **3. The advertiser must prove the validity of what he claims**

Under this condition, the advertiser must, within a short period, be able to prove that what he claims in his advertisement is considered valid and legitimate.<sup>60</sup> Otherwise, the judge has the authority to stop the commercial advertisement that compares goods with those of competing traders without the advertiser being able to prove the validity of what he claims.<sup>61</sup>

## **4. The announcement should be preceded by the knowledge of the competitors**

The advertiser must inform the competitor of the content of his advertising message before publishing it, to allow an objective discussion about this advertisement even if that leads to non-publication of his Ad because a negotiation may prevent the occurrence of damage from this type of commercial advertisement.<sup>62</sup>

## **5. Banning the use of some advertising tools**

Under this condition, it is forbidden to use advertising means that are difficult to check and verify, such as invoices, packages, transport receipts, payment methods, and tickets for shows.<sup>63</sup> This ban

<sup>57</sup> Dr. Abdul-Majid Al-Hakim, et.al, *The Brief in Commitment Theory - Part 2* - Baghdad University Press - Baghdad -1986 - p. 287.

<sup>58</sup> Vogel, *Comparative advertising – FR, Competition French Law, Unfair Competition*. Available at: <<https://www.vogel-vogel.com/faq-items/comparative-advertising-fr/?lang=en>> accessed 13 July 2022.

<sup>59</sup> Article 8 (121) of the French Consumer Code .

<sup>60</sup> Article (121/12) of the French Consumer Code.

<sup>61</sup> Cass.Com 18 mai 1993: Bull. Civ, IV,n 199; D.1994.Somm, 172. obs.

<sup>62</sup> Jeann Calais - Auloy et Frank Steinmetz - *Droit de la Consommation* - 4 edition - Dalloz - Paris, 1996 - p.121.

<sup>63</sup> Article (121/ 11) of the French Consumer Code.

aims to prevent confusion between new statements about products and the materials used in them, i.e., on the information cards with which the public is familiar.<sup>64</sup>

The European directive was issued on 6/10/1997 and permitted advertisers to use comparative advertisements, as it defined and specified the conditions for its validity in a very close manner to the conditions included in the French Consumer Code that we talked about above, and the European Directive of 1997 that introduced into French law by an order issued on 8/23/2000.<sup>65</sup>

The majority of European Union member's laws have permitted comparative commercial advertising under nearly identical conditions that have been permitted by the majority of international advertising businesses.<sup>66</sup> Article (5) of the International Chamber of Commerce states that when an advertisement includes a comparison between products or producers, this comparison must not mislead or harm the public.<sup>67</sup> As a result, the comparison must be based on real, quantifiable objective elements, and respect the principles of unfair competition specific if the comparison are based on the price component. The comparison must be related to similar products sold under the same conditions, and include the period during which the price remains valid.<sup>68</sup>

Concerning the position of the Iraqi and other Arab legislation, we find that there is no law regulating comparative advertising or setting any controls for it, despite the great role played by this type of commercial advertisement in educating consumers as well as igniting the flames of commercial competition among traders. We do not agree with those who believe that advertising with comparative commercials leads to misleading and deceiving the consumer, as the relationship between it and misleading the consumer is not inevitable and it is not correct to link them in all cases. When the advertisement is objective and honest, it is considered an important source of informing the consumer of the reality of the goods and services offered in the markets and knowing their advantages and disadvantages by comparing them to each other.

As a result, the failure to refer to this type of commercial advertisement, which has become rampant in our media in a hidden and public way, represents a legislative shortcoming that legislators in every state should pay attention to, in order to ensure the stability of commercial competition and the greatest degree of legitimacy and transparency, as well as educate consumers and provide them with the most information about the offered goods and services and technical information that is made by specialized experts and represented through comparative commercial advertisements.

Based on the above, we call on the legislators of the Arab countries among them, the Iraqi legislature to add another article to their consumer protection laws, to regulate commercial advertising

<sup>64</sup> Serandour(Y); La avenement de La Publicite Comparative en France; J.C.P. 1992, P.36.

<sup>65</sup> Ulf Bernitz, The EC Directive on Comparative Advertising and its Implementation in the Nordic Countries: Especially in Relation to Intellectual Property, Stockholm Institute for Scandianvian Law 1957-2009. Available at: < <https://www.scandinavianlaw.se/pdf/42-1.pdf> > accessed on 12 May 2021.

<sup>66</sup> Dr. Muhammad Yassin Ahmed, ibid, p. 144.

<sup>67</sup> ICC Advertising And Marketing Communications Code, 2018 Edition, Building consumer trust through responsible marketing, Document No. 240-46/745, Article 5— Truthfulness. Available at: < <https://iccwbo.org/content/uploads/sites/3/2018/09/icc-advertising-and-marketing-communications-code-int.pdf> > accessed 23 May 2022

<sup>68</sup> Feral – Schuhl (ch). Cyperdroit. le droit a lepreuve de linternet. 2oed. Dalloz. 2000. p.271.

in general, including comparative advertising. In this regard, we propose the following text: *Comparative advertising is any advertisement that is exposed to the goods or services provided by competitor, and it is not legitimate unless it is objective and honest and does not aim to harm others, whether it is a competing trader or a regular consumer.*

## 5. The Judicial Common Approach in Courts for Determining the Legality of Comparative Advertisements

While determining the legality of comparative advertisements in the courts, these are the principles:

- 1- An advertiser and tradesman one entitled to *declare their goods* to be the best in the world, even though the declaration is untrue.<sup>69</sup>
- 2- Even if the assertion is false, a tradesman/advertiser might claim that his goods are superior to those of his competitors.<sup>70</sup>
- 3- To demonstrate that his items are superior to those of his competitors, the tradesman/advertiser might compare the benefits of his goods to those of others.<sup>71</sup>
- 4- The advertiser/tradesman *cannot*, while talking about his goods, say that his *competitors' goods are bad*, as it may amount to defamation/ slander his competitors and their goods, that is not permissible.<sup>72</sup>
- 5- There is no action if there is no defamation of the goods or the maker of such goods, but if there is defamation, there is an action, and if an action for defamation exists, the Court is also competent to give an order of injunction restricting the recurrence of such defamation.<sup>73</sup>
- 6- An advertisement is careful to be *defaming if it is undervaluing, dishonoring or bringing discredit* upon the competitor's product.<sup>74</sup>
- 7- An advertiser or businessman may brag that his goods are the best in the world, and this does not give rise to a cause of action against any other trader, advertiser, or rival unless it causes the aggrieved to be disparaged or defamed.<sup>75</sup>
- 8- Glorifying one's product was allowable provided the *rival's product was not disparaged*.<sup>76</sup>

<sup>69</sup> Reckitt & Colman of India Ltd vs. M.P.Ramachandran & others [1999 PTC (19) 741]

<sup>70</sup> The false or misleading claims were made about the water resistance of the S7, S7 Edge, A5 (2017), A7 (2017), S8, S8 Plus and Note 8 Samsung Galaxy phones (Galaxy phones). There were more than 3.1 million of these Galaxy phones sold in Australia. In 2019 the ACCC instituted proceedings against Samsung Electronics Australia Pty Ltd in the Federal Court for false, misleading and deceptive representations in advertising the water resistance of various 'Galaxy' branded mobile phones.

<sup>71</sup> Procter & Gamble Home Products Private Limited v. Hindustan Unilever Ltd.[ Decided on February 17, 2017]. In the High Court of Delhi at New Delhi No. 459/2016 & IA No. 11244/2016 (u/o XXXIX R-1&2 CPC)

<sup>72</sup> Reckitt & Colman of India Ltd vs. M.P.Ramachandran & others [1999 PTC (19) 741]

<sup>73</sup> Govind Yadav, Comparative Advertisement: A Comparative Analysis of Law on in UK USA and India, (2019) 7(1) International Journal of Reviews and Research in Social Sciences 57-63.

<sup>74</sup> Pepsi Co. vs. Hindustan Coca Cola Ltd. Pepsi Co [2001 (21) PTC 722]

<sup>75</sup> Karamchand Appliances Pvt. Ltd Vs. Sh. Adhikari Brothers and Ors. (2005 (31) PTC 1 (Del)

<sup>76</sup> Dabur India Ltd. vs. Colortek Meghalaya Pvt. Ltd. & Anr., 167 (2010) DLT 278 (DB)



- 9- In a comparative ad, a certain amount of disparagement is implicit and providing the *ad is limited only to puffing*, provided that *the comparison does not show the competitor's goods in a bad light*, there could be no actionable claim against the same.<sup>77</sup>
- 10- Comparative ad is permitted if the criteria are met, as goods or services that are designed to suit the same demands or serve the same goal; one or more material are *verifiable*, relevant and representative features; products having the same origin designation.<sup>78</sup>
- 11- It is necessary to ensure that comparisons to rivals' products are not defamatory, libelous, confusing, or misleading.<sup>79</sup>

## 6. The Legal Controls of Comparative Advertisements

### A. Legal controls on the use of comparative advertisements

Despite the importance of comparative advertising and its advantages to different parties, at the same time, it involves some risks, both for the consumer and for the competitor referred to the ad. Deliberately stating false or misleading statements in the ad, undoubtedly affects the competitor and consumers' demand for their goods and services, Article (4) of the European Guidance No (114/2006), which replaced European Guidance (No. 450/84), and European Guidance No (55/97) states that many legal controls should be available in comparative commercials so that they can be considered.

### B. Legal controls related to the comparative advertisement itself

The controls for comparative advertising itself relate to the comparative advertising and should not be misleading. Comparative advertising is also required not to adversely affect the competitor referred to in the ad by not including a derogation or distortion of the trademark, trade name, or other trademarks of the competitor, and that the advertiser does not take advantage of the advantages enjoyed by the competitor or the goods or services offered by the competitor.

While various legislations have agreed to prohibit comparative advertising containing false or misleading statements as well as anything that would detract from or distort the competitor or its products,<sup>80</sup> they have disagreed on disinformation criteria, particularly about claims of parity and standards of derogation or distortion, as well as what constitutes illegal exploitation of the competition's advantages, particularly when advertising counts.

This control is divided into two subsections, first, the comparative advertisement should not be misleading, and we devote the second to showing that the comparative advertisement does not negatively affect the competitor. Comparative advertising should not be misleading, the desired purpose of allowing comparative commercials and balancing the interests of the relevant parties, particularly concerning protecting the competitor and providing the consumer with the information

<sup>77</sup> Colgate Palmolive Company & Anr. vs. Hindustan Unilever Ltd., 2014 (57) PTC 47 [Del](DB)

<sup>78</sup> Paul Spink and Ross Petty, Comparative Advertising in the European Union, (1998) 47(4) The International and Comparative Law Quarterly, Cambridge University Press 855-876

<sup>79</sup> Havells India Ltd & Anr vs Amritanshu Khaitan & Ors DelHC CS(OS) 107/2015

<sup>80</sup> Competition Law, Misleading and unlawful comparative advertising in UE. Truth In Advertising, legal news. Available at: <<https://damianianddamiani.com/misleading-and-unlawful-comparative-advertising/>> accessed on (may 23 2021).

they need about the goods and services offered on the market, is not achieved unless the data contained in these advertisements are correct and not deceptive to the target audience, because misleading comparative advertising increases the wrong decisions made by the consumer. It also affects the competitor's reputation to an unacceptable extent.<sup>81</sup>

Given the importance of this requirement,<sup>82</sup> most legislation has been careful to prohibit misleading comparative commercials, including the text of Article 1/43 of the American Trademark Act, which determines the civil liability of any person who makes false statements in commercials, about the nature, characteristics, quality or geographical origin of goods or services.<sup>83</sup> The (Federal Trade Commission) FTC act also requires it to intervene to prevent illegal competition methods and other unfair and misleading practices that affect trade.<sup>84</sup>

As for the European level, the European legislator was keen to establish this ban, stipulating in Article (4/1) of European Directive No (114/2006) that comparative commercial advertisements should not be misleading.<sup>85</sup> According to Article (L. 121-8(1)) of the French consumer code conditions, the comparison must be truthful and not misleads the consumer. This text does not differ much from what was stipulated in Article 10 of the 1992 Law, which regulated comparative declarations in France before the adoption of the provisions of the European Directive.<sup>86</sup>

### C. Legal controls related to the comparison contained in the advertisement

Comparing advertised and competing goods and services is the most important element in comparative advertising, distinguishing it from other traditional advertising forms that include promoting the advertiser's goods and services without referring to the competitor or its products.

Given the importance of the comparison made by the advertiser, the various legislation seeks to be surrounded by many controls that ensure its intended purpose of providing consumers with the information they need about the goods on the market, on the one hand, and preventing the advertiser from using the comparison as a tool to mislead consumers and influence their decisions, on the other.

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<sup>81</sup> Ibid.

<sup>82</sup> It should be noted that this requirement is not only specific to comparative advertising, but is one of the conditions that must be met in all forms of advertising.

<sup>83</sup> Section 43(a) of the Lanham Act reads in the pertinent part: (1) Any person who ...(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act. 15-U.S.C. 1125(a), (2004).

<sup>84</sup> Spink (M. P.) and Petty (D. R.), *ibid*, P. 313; See also: The Federal Trade Commission Act; 15 U.S.C. 45 (a -1).

<sup>85</sup> Official Journal of European Community, L 376/21, 27.12.2006. <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AL%3A2006%3A376%3ATOC>> accessed 5 May 2021.

<sup>86</sup> Law No. 92-60 of Jan. 18, 1992 Reinforcing the Protection of Consumers, O.J., Dec. 21, 1992.

## 7. Conclusion

It became clear during this research that comparative advertising is legally permissible under certain conditions. In French law and some other countries, there are two types of protection available first when a comparative advertisement has been violated a process of comparing a violation should be implemented, which is an unfair competition suit, and another protection is available in-kind enforcement that the consumer raises on an advertiser.

Many concepts of comparative advertisement that are almost similar in substance have been stated by jurisprudence, even though they vary in terminology. French jurisprudence centered on an advertiser's comparison of the goods or services manufactured by rival merchants with the products and services of another individual omit it to persuade customers that the benefits they receive from their goods and products outweigh those of the competing merchant to increase demand for their goods and services.<sup>87</sup>

From the above mentioned presentation a comparative advertisement is an advertisement that objectively compares alternative brands through their prices, or according to measurable criteria and characteristics. It also defines the alternative current mark through the name, illustrations, or other distinctive information. This advertisement highlights the competitive spirit among merchants, as it shows the characteristics of the advertisement site, by comparing it with competing or alternative products<sup>88</sup>. The deal is comparative advertising depending on the legislator, for instance in Europe for a long time, where it was illegal to mention the competing commodity in commercial advertisements until the late 1990s, the European Union was allowed that 1997.<sup>89</sup>

The conditions for limiting the space of tolerance of comparative advertising, especially regarding the false accusation, confusion, and different ratings of truth in certain jurisdictions are important. On the one hand, the EU's legal framework states that it cannot undermine or despise the credibility of its competitors and their products. On the other hand, there is a clear lack of harmony in comparative advertising in various member countries. Comparative Advertising Law in the United States is governed by federal and state and self-regulatory laws that establish dreading as a limitation of comparative advertising.

In some cases, issues related to trademark infringement, malicious, misleading, and false comparative advertising were analyzed. In light of the cases analyzed, it must be stated that accusation or contempt is perceived as the limit of the admissibility of comparative advertising by EU national courts, French courts, and US courts. However, the de facto differences in the application of the law are considerable.

<sup>87</sup> Peter Miskolczi-Bodnar, Definition of comparative advertising, European Integration Studies, Miskolc, Volume 3. Number 1. 2004, p. 25.

<sup>88</sup> Dr. Ibrahim Ali, Comparative Commercials between the Right to Advertising and Unfair Competition: A Comparative Study, Journal of Legal and Economic Research, Issue 54, Mansoura University, Faculty of Law, 2013, p. 238. (Arabic)

<sup>89</sup> Dr. Howaida Mustafa, Advertising in Contemporary Media Systems, Atlas for Publishing and Media Production. Giza Egypt First Edition. 2017. p. 211. (Arabic)

First of all, French case law limited comparative advertising to disparaging the rival's product and making fun of or criticizing it. However, national courts have given different interpretations of how to apply the requirement for denigration as a result of the lack of comparative advertising harmonization. US case law is more tolerant of comparison advertising; it acknowledges comments made in comparative advertising that might give rise to legal action for disparagement.

We would like to comment on the most effective strategy taking into account the aforementioned legal frameworks and case law on denigration or disparagement as boundaries of comparative advertising permissibility. From our perspective, the EU states prevent the adoption of stronger criteria in national legislation by providing a clear legal definition of comparable advertising and an extensive list of its limitations. It is important to note that this approach stresses the right of trademark proprietors when balancing between trademark protections with the freedom of comparison advertising, although EU case law might give varied interpretations of comparative advertising, particularly denigration.

The Federal Trade Commission (FTC), which oversees comparative advertising concerns, finds the strategy "beneficial" to advertisers, agencies, broadcasters, and consumers. Comparative advertising, when real and non-deceptive, supplies customers with useful information and assists them in making rational purchasing decisions. Comparative advertising fosters product development and innovation, as well as reduced market prices. Despite these benefits, the strategy has the potential to backfire. When brands disobey the law, the consequences may be serious.

We recommend the issuance of a commercial law regulating all types of commercials, as we urgently need such a law at the moment because of the large number of deceptive commercials that we see, hear or read constantly in our media and which need to be addressed quickly legally, and to confuse them with comparative commercials in many cases. Although the Iraqi Consumer Protection Act has referred to the advertiser and commercial advertising in some articles, it did not give it the importance they deserved, so the subject of commercials must be regulated by a special law. Moreover, - We call on the Iraqi legislator to add another paragraph to Article (5) of the Consumer Protection Law regarding defining the tasks and competencies of the Consumer Protection Council, according to which it decides to establish national laboratories for testing and qualitatively working under the supervision and control of the Said Council.

To the consumer public to provide them with the necessary information and warn them of inferior goods that do not conform to the required standard specifications, similar to what is available in most countries at the moment.

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