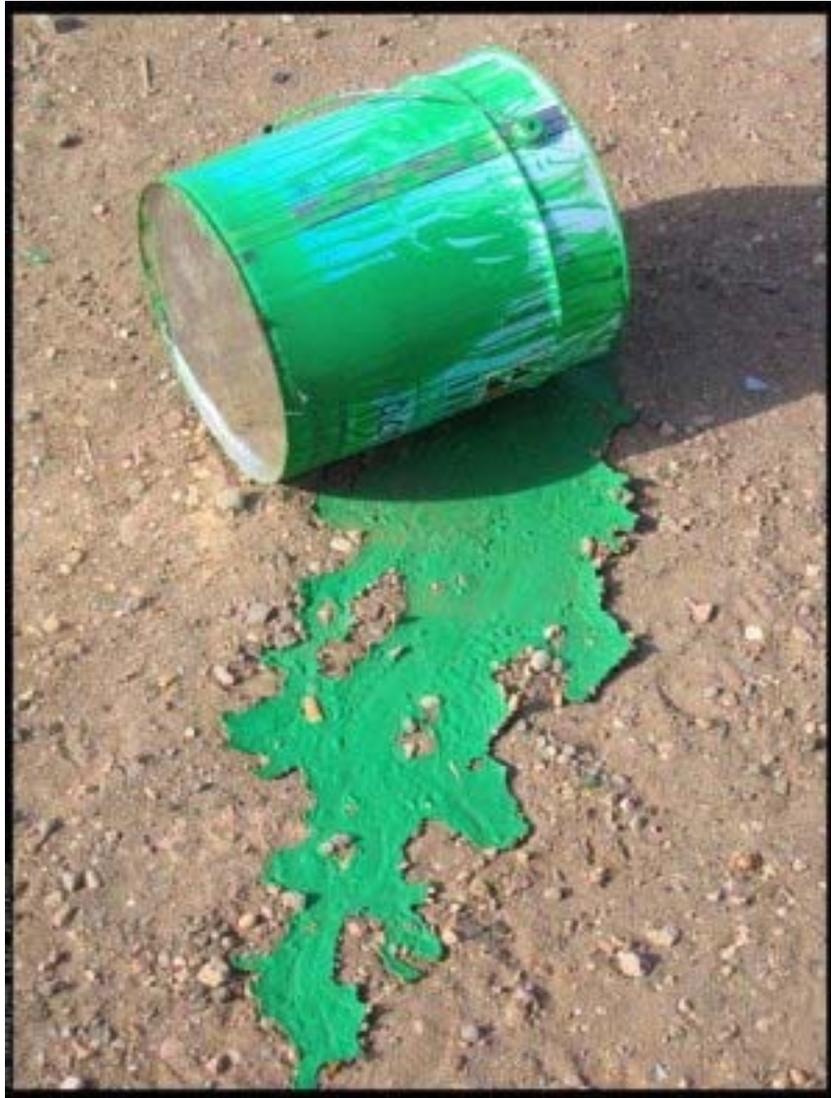


Greenwash Confronted

Misleading Advertising Regulation in the EU and its Member States



**Friends of
the Earth
Europe**

for the planet
for people
for a sustainable future

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Friends of the Earth Europe campaigns for sustainable and just societies and for the protection of the environment, unites more than 30 national organisations with thousands of local groups and is part of the world's largest grassroots environmental network, Friends of the Earth International.

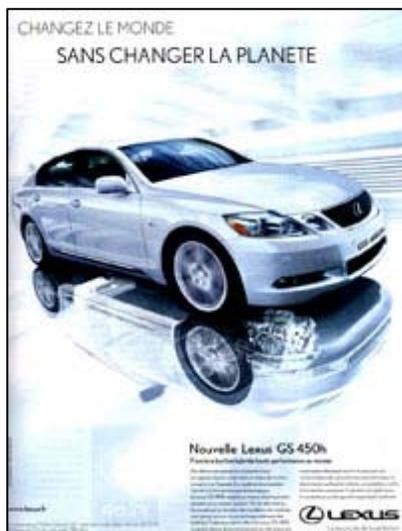
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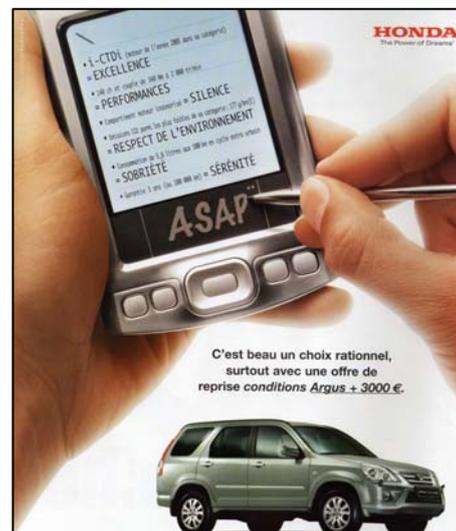
Executive Summary

Gone are the days when companies have only price and quality to worry about. Instead, a company today must present itself as a good corporate citizen to be successful. Not surprisingly, this has factored into advertising strategy, as companies in recent years have begun making environmental and social claims in advertisements to exploit public awareness on issues like climate change and sustainable development.

Unfortunately, governments, civil society and the public have been caught off guard, and the mechanisms to prevent companies from making exaggerated or even false environmental and social claims are underdeveloped. The result of that can be seen in our media today. Many companies are getting involved in greenwash: they advertise themselves as being green, but this is not at all in line with the environmental impacts of their core businesses. Instead, companies make exaggerated, false and often absurd statements about their environmental performance.



This Lexus advertisement, released in France is typical. Although the car is a hybrid model that is cleaner than some others, no car is clean enough to claim that does not change the planet.



This advertisement, for a Honda SUV, implies that purchasing the big 4x4 would be respectful of the environment, despite high CO2 emissions of 177 g/km

Until recently, the European Union (EU) promoted minimum standards and definitions for the enforcement of misleading advertising regulations, through legislation passed in 1984, in order to develop the single market. Each Member State then developed its own system for dealing with misleading advertising. Methods differed greatly, with the Nordic countries opting for government enforcement through a consumer ombudsman, the Netherlands opting for a self-regulatory body with no state involvement, and most Member States falling somewhere between.

Now, the Unfair Commercial Practices Directive (UCPD), a new piece of European legislation from 2005, dealing with a wide array of business-to-consumer practices including misleading advertising, has called for maximum

harmonisation of consumer protection legislation. Though this will not, as it might have been expected, result in a common European system for dealing with misleading advertising, it will lead to a much needed rethink of consumer legislation and it will result in more closely aligned rules than before, introducing at least some level of state control.

The first chapter of this report will assess both the previously existing European legislation, which will provide a basis for understanding the national systems currently in place, and the UCPD, with a view to what kinds of changes it can be expected to bring in. The next chapter will examine the different national laws used to prevent misleading advertisements under both previous and new legislation. The third chapter will focus on self-regulation, the method by which many Member States delegate enforcement of misleading advertising regulations to voluntary complaint mechanisms set up by the advertising industry. This chapter is followed by detailed case studies of Sweden, France, the Netherlands, Belgium, the United Kingdom, Ireland and the Czech Republic, which will give an in depth look at the different types of national system described in the report.

Chapter one – Overview of European legislation on misleading advertising, present and future

The 1984 Misleading Advertising Directive lays down minimum standards, as part of the EU's internal market project. It vaguely defines misleading advertising and outlines some possible measures to combat it. Member States are free to choose between methods of enforcement and to pursue more rigorous regulation. It does lay down some important principles, including that the burden of proof shall be on advertisers to prove their claims and that recourse to the courts must be provided as a last resort, even in Member States that choose to enforce the Directive through self-regulation rather than government control.

The UCPD, passed in 2005, is much more prescriptive and calls for maximum harmonisation, meaning that in theory an advertisement should be considered either lawful or misleading in each Member State. The aim here is to overcome a gap in the internal market and increase legal certainty. It also gives some legal standing to codes of conduct, such as those used by self-regulatory bodies. However, Member States are still free to use self-regulation as their principal method of enforcement, though the notion of state control as a last resort is strengthened. There is also a blacklist of prohibited practices that must be incorporated into legislation, including provisions against claiming to be a signatory of a code of conduct when it is not the case; displaying a quality mark without authorisation; and claiming that a code of conduct or product has been endorsed by a public body when it has not.

The principal additions the UCPD makes to misleading advertising regulation are as follows: a general clause that prohibits unfair practices in general, which will lead all countries to adopt a consumer-first approach; a practice is considered misleading if incorrect information is provided or important

information omitted; there are stricter definitions of misleading advertising; there are more prescriptive remedies; code of conduct breaches can constitute a misleading practice; state involvement is more pronounced than in previous legislation.

Altogether the UCPD will slightly improve the existing systems to prevent misleading advertising, it will not result in a harmonised Europe-wide system that protects consumers and the general public effectively. Different systems (mostly based on self-regulation of the advertising industry) will continue to exist in the Member States. The EU did not opt for a system such as the one that is applied in the Nordic countries. This system combines strong state involvement, through a Consumer Ombudsman and a special Market Court system, with easy and fast procedures, effective sanctions and legal certainty.

Chapter two – National misleading advertising legislation

Misleading advertising legislation in the Member States can be divided into four groups.

The first group is made up of countries that have legislation designed specifically to protect consumers, and contains the Nordic countries, Belgium, Germany, Austria, Greece, Luxembourg and Spain. However, they can be further divided. The Nordic countries, as shown in the case study on Sweden, use state authority to enforce their legislation. A consumer ombudsman polices advertisements and responds to complaints, issuing fines to noncompliant advertisers and prohibiting further publication of their advertisements. Controversial cases end up at the special market court, which with its rulings sets jurisprudential precedents, thus elaborating more specific rules.

Belgium's legislation protects both consumers and competitors from unfair practice, but enforcement of the rules on misleading advertising, at least so far as environmental and social claims are concerned, is delegated to a self-regulatory body. The Minister for Economic Affairs can bring proceedings if self-regulation is shown not to work in a given case, although this is seldom used. Importantly, implementing legislation of the UCPD will give the state more authority, including a provision specifically giving the Minister for Economic Affairs the power to prohibit an advertisement in order to protect the environment. There will also be more government participation in issuing environmental claims rules.

Germany, Austria, Spain and Luxembourg only have legislation protecting competition, which in theory protects consumers as a side-effect. However, this has not proven effective as consumers have very little right to complain about misleading advertisements. The situation may be improved with the UCPD, but none of these countries have yet implemented it.

The second group of countries have consumer protection legislation integrated into general private law legislation, and includes France, the

Netherlands and Italy. All of these countries rely on self-regulation for enforcement, though implementation of the UCPD will introduce an extra element of state control in France, while in the Netherlands the newly established Consumer Authority will have the power to intervene in case self-regulation is not effective.

The third group includes common law countries the United Kingdom and Ireland. Neither had comprehensive consumer protection legislation before the UCPD, thus a completely new law has been written in Ireland and one is being written in the UK. Though both countries have a long tradition of self-regulation, legislation implementing the UCPD will strengthen state authority to enforce self-regulatory rulings.

The fourth group of countries includes the new Member States of central and Eastern Europe, all of whom have less developed systems for dealing with misleading advertisements than most other Member States. As shown in a case study on the Czech Republic, court cases on the topic tend to centre on unfair competition rather than the environment, though implementing the UCPD will provide an incentive to put the focus more on consumer protection.

Chapter three – Self-regulation

Advertising self-regulation is a system by which the advertising industry polices itself, through issuing codes of practice, ruling in cases of alleged misleading advertisements and sanctioning non-compliant advertisers. Though all Member States have misleading advertising legislation, they often delegate enforcement to such self-regulatory bodies. All self-regulatory bodies are set up and funded by the advertising industry, meaning that none of them are independent. They all use codes inspired by the International Chamber of Commerce Code and all contain relevant chapters on environmental claims. All Member States have quite complete codes. Efficacy is determined by other factors than the codes themselves, such as the level of independence, the time needed to handle a complaint, stakeholder involvement and use of sanctions.

The benefits of the self-regulatory system, if it is effective, include: ease with which complaints can be made; not time-consuming or expensive for the complainant; adverse media attention for offending companies.

The drawbacks include: decisions are taken too slowly to stop a running advertising campaign; sanctions are very weak and do not prevent future offences; lack of independence from the advertising industry and lack of stakeholder involvement; lack of legal certainty and jurisprudence;.

There are big differences between self-regulatory bodies, with the United Kingdom, Ireland and the Netherlands operating with a higher degree of independence and stakeholder involvement than the others. They also publicise their decisions, giving advertisers an incentive to follow the rules.

France and Belgium are notable for the lack of inclusiveness. They also do not publicise their decisions.

Conclusions

In the report we see that there are substantial differences among countries in how well the self-regulatory complaint mechanisms work. In some countries this has resulted in interesting cases where self-regulatory authorities found advertisements misleading and campaigning groups were able to use the system successfully. Nevertheless, the voluntary mechanisms have a number of fundamental flaws. Most important is that, due to the long procedures, in most cases they are not effective at stopping an advertisement time to make an impact: the advertisement has finished its run before a case is closed. Moreover, their ability to sanction errant advertisers is weak or non-existent; their lack of jurisprudence provides no preventive impact (so even if an advertisement is found to be misleading, nothing stops the advertiser from launching a similar advertisement the next day); and it does not exercise independence from the advertising industry.

The best existing systems of protection against misleading advertisements can be found in the Nordic countries, which keep the state involved through the Consumer Ombudsman and a special Market Court system. This functions best because the authority entrusted to the Ombudsman allows him to act quickly, while the controversial cases that make it to the Market Court provide jurisprudence, legal certainty, effective sanctions and fines, publicised rulings and an appeals process which guides future corporate behaviour and Ombudsman action. Since the Consumer Ombudsman is the head of a state authority, his independence is unquestionable.

Friends of the Earth Europe favour a system of strong government involvement, such as the Nordic system which currently functions best overall.

However, the following characteristics are all important and can be advocated in all countries:

- **True independence of juries, boards, ombudsmen etc;**
- **Short procedures, including a fast track for extraordinary situations;**
- **Effective sanctions, including fines, with more severe penalties for repeat offenders;**
- **Publicised rulings;**
- **An appeals procedure;**
- **Binding rules;**
- **Accumulation of jurisprudence;**
- **Stakeholder involvement.**

Introduction

Companies say they want to go green. The intention is clear, and they want to get the word out. The public is no longer content with a good deal and a useful product. Companies need to portray themselves as good corporate citizens in order to make sales. So they have taken to advertising their behaviour as well as their products. Environmental and, albeit to a lesser extent, social claims in advertising have become ubiquitous. Cars are purported to be environmentally friendly, airlines boast of their low emissions, pesticides are biodegradable and electricity renewable. Companies stir up images of themselves growing flowers instead of digging up black gold. The list goes on and would be uplifting if half of it were true. Unfortunately this is not the case.

Keen to exploit the upsurge in public awareness on such issues as climate change and sustainable development, companies have taken to making exaggerated or even false claims in their advertisements. To give some recent examples, Shell implied that it uses all its excess CO₂ to grow flowers, Ryanair lied about the level of British CO₂ emissions attributable to the airline industry and Lexus asserted that driving its hybrid SUV would result in 'Zero Guilt'. All these advertisements were later declared misleading. Governments, civil society and the public have been lethargic and unsure in their reactions. In many European Union (EU) Member States, the advertising sector has long been a bastion of self-regulation, a system in which the advertising industry is allowed to police itself rather than face intrusive and costly state investigations. Though consumers and civil society organisations can file complaints, the system has not adapted itself to handle such complaints effectively.



This Shell advert implied that it used all its excess CO₂ to grow flowers, even though Shell's flower-growing programme only uses 0.325% of its CO₂ emissions. It was found misleading in the Netherlands but not Belgium. For more on this case see pages 58 and 64.



HIGH PERFORMANCE.
LOW EMISSIONS. ZERO GUILT.

V8-LIKE POWER WITH CLASS-LEADING CO₂ EMISSIONS.

THE RX 400h. LEXUS HYBRID DRIVE - PUSHING BOUNDARIES.

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Tel 01202 667575

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Model shown RX 400h with metallic paint £36953 OTR. RX range prices start from £32,023 to £45,819 OTR. Prices correct at time of going to press and include VAT, delivery charges, number plates, full tank of fuel, one year's road fund licence and first registration fee. RX 400h fuel economy figures: extra-urban 37.2mpg (7.6L/100km), urban 31.0mpg (9.1L/100km) combined 34.9mpg (8.1L/100km). CO₂ emissions 192g/km.

Even though this SUV still produces high emissions, because it is a hybrid model Lexus claimed that its emissions were low. Details on page 76.

THE GREAT PLANE ROBBER

NOT EVEN RONNIE NICKED THIS MUCH!

£1BN SWAG BAG

- GORDON BROWN HAS DOUBLED APD TAX ON PASSENGERS TO £10
- HE CLAIMS THIS IS FOR THE ENVIRONMENT - THIS CLAIM IS RUBBISH
- AVIATION ACCOUNTS FOR JUST 2% OF CO₂ EMISSIONS
- THIS YEAR, GREEDY GORDON WILL NICK **£1BN** FROM PASSENGERS

HANDS OFF OUR HOLIDAYS!
Send him your protest: ministers@hm-treasury.gsi.gov.uk

Paid for by Ryanair - fighting for tax free travel.

Here Ryanair implies that aviation only accounts for 2% of British CO₂ emissions. In reality it accounts for nearly 5%. Despite being ruled against, Ryanair says it will continue to use the figure. See page 76-77 for more.

The EU itself has not been absent from the debate. Since 1984 common minimum standards and definitions of misleading advertising have been promoted as part and parcel of the creation of a single market. In this vein, recent European legislation goes even farther, with a new Directive passed in 2005 calling for maximum harmonisation of consumer protections laws. Misleading advertising has now been described in detail and all Member

States should adopt the same definitions, to be enforced by adequate and dissuasive measures.

This by no means will result in a uniform system in Europe for dealing with misleading advertising. Member States are still permitted to employ “established means”, whether they be self-regulatory bodies, the courts or consumer ombudsmen, all described in this report, to enforce the provisions of the new Directive. However, what the Directive does provide is an opportunity to take a step back and reflect on the way misleading environmental and social claims are handled in the EU. No Member State is handling this problem perfectly. After all, it is a new problem and companies are two steps ahead of regulators and civil society organisations. They have spotted an opportunity and are quick to exploit it. This report seeks to unearth the challenges now facing regulators and civil society. At least in several Member States, part of the problem has already been solved: the public is catching onto the fact that many environmental claims made in advertising are bogus and something has to be done about it. In other Member States this is not the case. Whichever authority is assigned the task of policing the advertising community, rules on environmental claims have been set up in all Member States. The disparity is in enforcement. This report seeks to discover why this is, identifying positive and negative markers of effective and insufficient regulation.

The report will be organised in the following manner. First, the EU factor will be discussed. The intentions, details and effects of both previous and new European legislation will be examined, providing the backdrop for all national legislation. For the first time, consumer legislation calls for maximum harmonisation, a clear break from the tradition of minimum standards which dominated the past.

The next chapter will show the myriad ways this European legislation has been and is being adapted to various national frameworks. National methods for dealing with misleading advertising vary widely. Some Member States assign authority exclusively to the state while others farm it out to self-regulatory bodies. Others opt for something in between.

Since self-regulation plays such a pre-eminent role in misleading advertising regulation in Europe, the next chapter will discuss it exclusively. By no means a monolith, self-regulation takes many forms, with varying levels of public confidence, independence from the advertising industry, ability to sanction and, ultimately, effectiveness.

The background information provided in these chapters will then be fleshed out in detailed case studies from a cross section of EU Member States. Though not all 27 Member States have been examined in depth, the case studies capture the different national methods for dealing with misleading advertising. Sweden represents the Nordic countries, which all use a Consumer Ombudsman to deal with complaints and issue rulings. Belgium has specific consumer protection legislation, though it assigns enforcement to a self-regulatory body. France and the Netherlands both use private law

legislation to protect consumers and, though they both rely on self-regulation for enforcement, the self-regulatory bodies differ considerably. The UK and Ireland, adherent to the common law tradition, combine a light regulatory touch with self-regulation. The Czech Republic is representative of the new Member States. Though this report does not delve into the legal systems of Germany, Austria, Spain, Greece and Luxembourg they all protect consumers only as a by-product of legislation protecting competition and do not have well developed self-regulatory or legal systems for protecting consumers from misleading advertisements.

The case studies will look in depth at national legislation, court proceedings and statistics, providing a practical touch to the rest of the report and showing how each method described plays out on the ground.

Finally, taking all this into account, some conclusions will be drawn. Rather than condemning any one method of regulation, specific aspects of individual regulatory systems will be identified as contributors to or detractors from a well functioning system, leaving us better able to act in the present and the future.

Chapter one – Overview of European legislation on misleading advertising, present and future

Introduction

The pursuit of a truly single market has led the European Union (EU) to deal in many areas of policy as it has sought to eradicate barriers to trade. After all, how can a business be expected to take advantage of the lack of borders if it has to adapt to a distressing and costly array of national standards each time it wants to operate away from home? This logic clearly applies to the field of misleading advertising. A company wanting to market products outside its home Member State is clearly at a disadvantage when it has to comb through national law in order to figure out whether or not its advertisements will be permissible. If standards are high at home, a company risks being undercut if it adheres to the same standards abroad. Moreover, vastly differing standards inadvertently inhibit multi-national companies from conducting Europe-wide marketing campaigns. As far as misleading environmental and social claims in advertising, the topic of this report, are concerned, common advertising standards, so long as they are high, can help civil society and consumer groups to share information and attack this growing problem coherently.

It is thus no surprise that the EU has been working to bring in a common scheme to deal with misleading advertisements for a long time. Its principal piece of legislation on this issue was passed in 1984. However, there were vast differences between the Member States' legal systems, attitudes towards state intervention in the market and ideas about what kinds of advertisements should be prohibited. For this reason, the 1984 legislation, titled "Council Directive 1984/450/EC on the approximation of laws, regulations and administrative provisions of the Member States concerning misleading advertising" does nothing more than lay down minimum standards. Misleading advertising is defined, albeit vaguely, and measures to combat it are outlined, but each Member State is free to set more rigorous standards. Remedies, including the courts and pure self-regulation, with all that falls in between, are permitted. This has not done much to further the single market cause, because the minimum standards did not force many Member States to qualitatively alter the status quo. It also does not specifically address environmental or social claims which were not being widely made by companies at the time.

Finally, 21 years later, a much bigger step has been taken. This results in part from the European Commission's new consumer-law strategy, outlined in its 2001 Green Paper on Consumer Protection. The paper highlights that European consumer legislation was of a fragmentary nature and did not constitute a "comprehensive regulatory framework for business-consumer commercial practices, the central aim of consumer protection"¹. The effect of wide variations in national legislation and practice was leading to a "consumer internal market that has not achieved its potential".² The paper thus set in

¹ Green Paper on European Union Consumer Protection, European Commission, 2001, pg 4.

² Ibid, pg 9

motion the consultation that eventually led to European legislation of a horizontal, cross-cutting nature setting out to further the internal market and increase consumer protection, known as the Unfair Commercial Practices Directive (UCPD). It offers a more specific definition of misleading advertising and more prescriptive remedies than previous legislation, as well as bringing codes of conduct under the legal gaze. Most importantly, the UCPD calls for maximum harmonisation. In other words, once this legislation takes effect, location should not influence whether or not an advertisement is considered misleading. In addition, some rules are laid down on the legal implications of codes of conduct, forcing member states at least to hear evidence of code breaches as evidence in legal proceedings.

This chapter will offer analysis on and commentary of these two pieces of European legislation. Comparing and contrasting them, it will highlight the practical implications of the “minimum standards” set down in the older law and the “maximum harmonisation” required by the UCPD. The new legislation is sure to bring a stricter and more coherent system for dealing with misleading advertisements, especially in the Member States that have not been active on the issue, but it will still allow some flexibility and will not force current methods to be completely abandoned.

I. Previous legislation – Council Directive 84/450/EEC (Misleading Advertising Directive 1984)

A. Spirit of the Directive³

The preamble to the Misleading Advertising Directive 1984 states the logic behind setting minimum standards in this field. The first reason listed is that, “since advertising reaches beyond the frontiers of individual Member States, it has a direct effect on the establishment and the functioning of the common market”. Other motives are the adverse effects misleading advertising has on competition, then consumers, then free movement of goods and services. “Minimum and objective criteria” for fulfilling the purposes of the Directive are advocated, but the stress is put on the considerable latitude the Member States have to deal with misleading advertisements however they see fit.

For example, still in the preamble, the Directive states that “persons or organisations regarded under national law as having a legitimate interest in the matter must have facilities for initiating proceedings against misleading advertising, either before a court or before an administrative authority which is competent to decide upon complaints or to initiate appropriate legal proceedings”. Thus, not only can the Member States decide what kinds of courts or administrative authorities (ex self-regulatory bodies) are competent to handle complaints, but they can also decide what kind of people and organisations have a “legitimate interest in the matter”. This does not necessarily include individual consumers or civil society organisations, though their participation is welcomed in many Member States.

³ Council Directive 84/450/EEC, preamble

On several points the preamble does make concrete statements. It insists that courts and administrative authorities must have powers enabling them to order cessation of misleading advertisements; that there should be accelerated procedures with interim decisions; that there must be access to judicial review and that the burden of proof shall be on advertisers to prove their claims.

However, it is still makes clear that the Member States are free to do as they please. It is left to the Member States to decide whether primary responsibility is given to “established means” for dealing with complaints; whether vetting advertisements prior to publication is desirable or not and whether or not there should be publication of decisions. Of course, because this Directive lays down only minimum standards, Member States are free to offer more extensive protections, as several Member States do.

B. Substance of the Directive

The Directive concentrates on economic behaviour, defining misleading advertising as advertising that “by its deceptive nature, is likely to affect their [persons’] economic behaviour or which, for those reasons, injures or is likely to injure a competitor”.⁴

The Directive also states that all features of advertising are to be taken into account when deciding whether or not it is misleading. Although environmental and social claims are not specifically mentioned, the following provision applies most directly to them:

“the characteristics of goods or services, such as their availability, nature, execution, composition, method and date of manufacture or provision, fitness for purpose, uses, quantity, specification, geographical or commercial origin or the results to be expected from their use, or the results and material features of tests or checks carried out on the goods or services;

and:

“the nature, attributes and rights of the advertiser”.⁵

Obviously, this definition is open to interpretation, since it mentions qualities that should be taken into account without being specific as to what kind of faulty arguments would constitute a breach of the Directive.

The required enforcement of misleading advertising regulations is similarly vague. Again, while the Directive lays down minimum standards, it leaves the Member States plenty of options. Thus, Member States must ensure that there are “adequate means” to control misleading advertising which include legal provisions under which those having a legitimate interest under national law can take legal action or bring a complaint to an administrative body such

⁴ Ibid, Article 2.2

⁵ Ibid, Article 3

as a self-regulatory body.⁶ These competent authorities must have the power to order the cessation of (or initiate legal proceedings to stop) misleading advertising, or if its publication is imminent, to stop it from being published. Actual loss by a consumer or competitor does not need to be shown, nor do malicious intentions. There also need to be accelerated procedures for emergency situations. Publication of decisions and corrective statements is suggested but not mandated.

Importantly, failure of an administrative body to carry out its duties must be subject to judicial review. Court proceedings must always be present as a final option, even if a self-regulatory body enforces the Directive completely on its own. However, in practice this fall-back option has often been poorly implemented, as will be seen in the chapter on self-regulatory methods for dealing with misleading advertisements.

The key points to remember from this Directive are the following:

- **It lays down minimum standards;**
- **Burden of proof is on the advertiser;**
- **Misleading advertising is broadly defined, allowing Member States to interpret as they see fit;**
- **Almost any kind of enforcement mechanism is permissible;**
- **Recourse to the Courts must be available as a last resort.**

II. New legislation – the Unfair Commercial Practices Directive (2005/29/EC)

New European legislation is much more specific and prescriptive, though it still leaves room for interpretation. An overview of the Unfair Commercial Practices Directive will now be presented, followed by analysis and commentary of the changes it is likely to bring.

Passed in 2005, the Unfair Commercial Practices Directive (UCPD) marks a big change in the EU's approach to misleading advertising. The first big change is qualitative. Though furthering the single market is a primary goal of the Directive, it seeks not to protect competition but to protect consumers. Here, consumer protection is the goal while promoting fair competition is a side-effect (albeit a desired one), rather than the inverse as in the past. This piece of legislation covers not only misleading advertising but also all practices which can potentially mislead consumers. Since it only applies to business-to-consumer (B2C) marketing, separate legislation was passed to deal with business-to-business (B2B) marketing, after which the old Directive

⁶ Ibid, Article 4

on misleading advertising was repealed⁷. Although the Member States will retain some freedom in how they deal with misleading advertisements, a stated motive behind the UCPD is to lessen the vast disparity between systems for protecting against misleading advertising in different Member States. As with the previous legislation, the spirit and content of the UCPD will now be examined.

A. Spirit of the UCPD⁸

In the preamble to the UCPD, developing the internal market is the first reason given to justify new legislation, especially in light of persisting national differences for controlling misleading advertisements. It correctly states that uncertain rules harm consumer welfare and create barriers to the exercise of internal market freedoms, undermining consumer confidence and leaving consumers unsure of their rights to complain and seek redress. According to European treaties, such national differences can be justified on public interest grounds in the absence of harmonising legislation, thus the Directive was designed with this in mind and seeks to increase legal certainty in addition to improving consumer protection.

A chief aim of the Directive is to create a single prohibition of all commercial practices defined as unfair. Thus, an advertisement should in principle be considered acceptable in all Member States or misleading in all Member States, rather than, as is now the case, a mixture of the two. In order to achieve this, Member States must replace their various general clauses and legal principles with the common prohibition found in the Directive. More detailed definitions are also given, and a blacklist of prohibited actions is provided in the Directive's annex. Codes of conduct, such as those used by self-regulatory bodies, are given some legal standing. Moreover, it introduces the idea that, given the importance of codes of conduct, consumers' organisations should be informed and involved in their drafting.

Despite calling for maximum harmonisation, the Directive makes clear in its preamble that it is not setting out to interrupt the several regulatory options open to Member States for enforcing consumer legislation, thus giving its approval to "light-touch" self-regulatory regimes. However, responsibility lies with the Member States themselves to ensure that all penalties are enforced. Failing to do so would constitute a community infringement.

In order to fulfil its stated aims, the Directive's drafters were quite ambitious with its provisions, as outlined here.

B. Substance of the UCPD

Although the Directive covers a wide range of unfair commercial practices, this section will only concern itself with those parts which pertain to misleading

⁷ Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising

⁸ Unfair Commercial Practices Directive (2005/29/EC), preamble

advertising. Important to note is that the Directive calls for maximum harmonisation, meaning not only that looser methods of regulation must be strengthened in line with the Directive, but that overly rigorous regulation must be toned down, though in this specific case there is a six-year grace period.⁹ In a style similar to legislation in several Member States, the UCPD begins with a general clause prohibiting unfair commercial practices, later moving on to more specific issues.

Like previous legislation, economic reasoning is used to underpin the Directive. Thus, a practice is seen as unfair if it “materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer”.¹⁰

Section 1 of the Directive defines what kinds of commercial practices are misleading. It is more specific than previous legislation. It states that “a commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct”.¹¹

The Directive reiterates provisions from previous legislation, mentioning the main characteristics of the product, benefits, risks, execution, composition, method and date of manufacture or provision, usage, specification, geographical or commercial origin and the results to be expected from use as areas where advertisers might mislead consumers. However, it goes further. Specifically mentioned are the extent of the trader’s commitments and the motives for the commercial practice.¹² This provision could plausibly be used to thwart an advertiser seeking to exaggerate the relative importance of environmental or social programmes in which it participates. This is reinforced in another provision which prohibits misleading information regarding the “nature, attributes and rights of the trader or his agent”.¹³ Although the Directive is not specific enough to define advertising, any activity demonstrably aimed at promoting a trader or his products to consumers should fall under the scope of the Directive. The courts and/or the Member States will have to determine whether this includes grey areas, such as information on a company’s own website. It is also worth noting that the lack of specificity in this field is intended to make the Directive “future proof” against ever evolving marketing practices.

A big improvement is contained in Article 2, paragraph 6. It states that “non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound”, so long as the commitment is firm and capable of being verified, rather than aspirational, is misleading. However, this only applies if the trader indicates in a commercial practice that he is bound by such a code. In theory, this puts some legal force behind the

⁹ Ibid, Article 3.5

¹⁰ Ibid, Article 5.2(b)

¹¹ Ibid, Article 6.1

¹² Ibid, Article 6.1(c)

¹³ Ibid, Article 6.1(f)

self-regulatory codes which many Member States use to control misleading advertising. It also could be applied more broadly to corporate accountability in general, by introducing a binding feature into corporate codes of conduct. Though such codes are often used to boast of good corporate citizenship, it has hitherto been difficult to force companies to prove that statements made in their codes are true. This provision will surely need to be tested and interpreted by the courts to provoke the changes needed from code of conduct owners.

Article 7 deals with misleading omissions, and is also more prescriptive than previous legislation. Though one must allow for the constraints of the medium being used to convey the information (such as a short television spot), commercial practices may not omit material information that the average consumer needs to make an informed decision. This could easily be interpreted as to include a product's environmental effects, but it will also need to be tested.

As far as enforcement is concerned, the Directive stresses that Member States may continue to use self-regulation, though as a corollary and never as a substitute to legal action.¹⁴

The Directive leaves it up to the Member States to ensure "adequate and effective" means for enforcement exist. Although it leaves open recourse through self-regulatory bodies, in theory weaknesses in self-regulation could clash not only with national law but with the UCPD as well. Such a situation would require a Member State to take measures to increase the efficacy of its self-regulation.

As in the previous legislation, behind self-regulation (if it is present), either courts or administrative bodies must have the power to order the cessation of misleading practices, or prohibit a practice which has not yet taken place. When such state involvement is coupled with self-regulation, it is known as "co-regulation". The Directive suggests that Member States may require the publication of corrective statements, but it is not required.¹⁵ The burden of proof is placed on traders, as stipulated in Article 12.

A final addition in the new legislation is a black list of practices which are prohibited in all Member States under all circumstances, contained in an annex. Though many of the 31 practices mentioned are beyond the scope of this report, the following practices, listed here, are relevant:

- Claiming to be a signatory to a code of conduct when the trader is not;
- Displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation;
- Claiming that a code of conduct has an endorsement from a public or other body which it does not have;
- Claiming that a trader or a product has been approved, endorsed or authorised by a public or private body when he/it has not or making

¹⁴ Ibid, Article 10

¹⁵ Ibid, Article 11

such a claim without complying with the terms of the approval, endorsement or authorisation;

- Presenting rights given to consumers in law as a distinctive feature of the trader's offer.

According to the Directive, its provisions must be transposed into national law by June 12th 2007 and enter into force by December 12th 2007. So far, as will be discussed in the next chapter, only a few Member States had transposed the Directive at the time of writing. The Commission should submit a comprehensive report of the application directive by June 12th 2011.

The main additions in the new Directive are the following:

- **The UCPD calls for maximum harmonisation;**
- **A general clause prohibits unfair practices in general;**
- **Stricter definitions of misleading practices;**
- **More prescriptive remedies for Member States to apply;**
- **A practice can be misleading if incorrect information is provided or important information omitted on any significant characteristics of product or trader;**
- **Code of conduct breaches can constitute a misleading practice;**
- **State involvement is more pronounced than in previous legislation.**

Conclusions

Insomuch as it deals with misleading advertising, the UCPD does represent a step forward. Compared with previous European legislation, it is more prescriptive, offers more legal status for codes of conduct and a larger role for the courts and state administrative bodies. In light of national legislation being passed to transpose the UCPD, which will be discussed in the next chapter, fears about lowering the bar appear unwarranted; though the gains do not appear to be revolutionary, they are gains nonetheless. Finally, because in many Member States transposing the UCPD requires completely new legislation, it is forcing a general rethink about the status of misleading advertising regulation and in some places resulting in notable improvements.

Chapter two – National legislation for dealing with misleading advertising

Introduction

Now that we've examined the European legislation to which the Member States must conform, it is logical to look at the differing national systems put in place or adapted to conform to it. Of course, European legislation is not the only factor influencing Member-State regulation. At least before maximum harmonisation was introduced, each Member State regulated misleading advertising in line with its legal traditions. Although in the future all misleading advertising legislation will resemble the Unfair Commercial Practices Directive (UCPD) in that it will have a general clause followed by more specific provisions, most Member States are yet to transpose the law.

Because the current systems remain important, this chapter will first discuss legislation that has been in force in accordance with the 1984 Misleading Advertising Directive¹⁶, and then new legislation as it has been transposed or is likely to be transposed in individual Member States. Some case law will be touched on (details can be found in the national case studies at the end of this report), but self-regulation will be looked at in depth in the next chapter. Conclusions in each section will help point out which kinds of regulation appear to work best, although all of course have room for improvement.

I. Existing national legislation

Legislation set up to control misleading advertising varies greatly according to Member State. However crude the exercise may be, though any generalisations are crude given the vast differences between Member States, for simplicity's sake this chapter will divide them into several groups depending on the legal framework each uses either for consumer protection in general or for misleading advertising in particular. The first group is made up of those countries having a specific legal framework set up to address unfair marketing practices, which includes the Nordic countries, Belgium, Germany, Austria, Luxembourg and Spain. A second group is made up of those countries which include provisions on commercial fairness in their main private law legislation. Included here are notably France, Italy and the Netherlands. The third group is made up of the common law countries, namely the UK and Ireland, who have no specific consumer protection framework. Although all EU Member States fall into these broad categories, large differences sometimes necessitate further subdivision. Finally, there is a fourth group, made up of the new Member States (EU-12). Although these new Member States do mostly fall into the other three groups, they will be dealt with separately because their legislation is so new and hard to compare directly with the rest of the EU. The four categories, with examples from specific countries, will now be described, followed by a comparison to show

¹⁶ Council Directive 84/450/EEC relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising

what the strengths and weaknesses of each are as regards misleading environmental and/or social claims.

A. Group one: legislation designed specifically to prohibit unfair market practices

Those in the first category have specific legislation defining and controlling unfair commercial practices, including misleading advertising. The Nordic countries, Belgium, Germany, Austria, Greece, Luxembourg and Spain all belong in this group, but for convenience they will again be divided into three more groups: the Nordic countries; Germany, Austria, Spain and Greece; Belgium is alone in the third group.

1. The Nordic Countries

The Nordic countries (Denmark, Finland, Norway and Sweden) cooperate extensively and all deal with misleading advertising in a similar manner. The four systems (although Finland's is a bit different) are characterised by a Marketing Practices Act, containing a broadly formulated general clause and a "small" general clause specifically on misleading advertising. Inspiration for the "small" general clause comes from the earlier-discussed 1984 European Directive on Misleading Advertising. The purpose of the legislation is to guard consumers, while competitors are protected as a secondary effect. This distinguishes the Nordic countries from Germany and others whose legislation seeks above all to protect fair competition between competitors.

Perhaps the most distinguishing feature of this system is the important role the state maintains, through the Consumer Ombudsman and Market Court system. Rather than outsourcing the formulation of detailed provisions and enforcement to self-regulatory bodies, as in Belgium and other countries, the Nordic countries have all created a Consumer Authority, which is a state body headed by a Consumer Ombudsman. The Consumer Ombudsman is empowered to supervise the legality of marketing practices, and can act to end or prevent a misleading advertisement in several ways. In most cases, the Consumer Ombudsman, acting either in response to a complaint or as a result of monitoring, informs a trader that an advertisement is misleading. If the trader agrees, the advertisement is discontinued and the trader must pay a default fine. If the trader contests the Consumer Ombudsman's opinion, the case may be referred to the special Market Court. In the Market Court, the Consumer Ombudsman represents consumer interests and the Court makes a ruling based on evidence, in which the burden of verifying claims made in advertisements rests with the advertiser. In severe cases, traders can be forced to pay a market disturbance fee in addition to the default fine. The Consumer Ombudsman issues guidelines to keep consumers and businesses aware of their rights and obligations, for which consultation is conducted with relevant stakeholders. The Consumer Ombudsman and the Market Court also use the advertising codes issued by the International Chamber of Commerce (described in detail in the self-regulation chapter) to guide their decisions.

This system presents several advantages. Firstly, the longstanding tradition of ombudsmen commands a high level of consumer and business confidence in the system. Second, state involvement keeps the threat of sanctions real while the Consumer Ombudsman/Market Court system is still able to function much quicker than traditional legal procedures. Third, the body of case law from the Market Court, where controversial or important cases end up, establishes over the years a comprehensive set of rules which advertisers must follow. This is especially true as regards misleading environmental claims made in advertising. Jurisprudence, which is unavailable under self-regulation, ensures in the Nordic countries that rules are concrete and coherent. In Sweden for example, detailed later in this report in a case study, the Consumer Ombudsman enforces the following rules on environmental claims, as elaborated over time through jurisprudence:

- **The word “environment” can only be used in conjunction with a product if the product displays significant advantages for the environment over comparable products;**
- **Absolute terms such as “environmentally friendly” can only be used if in its entire lifecycle the product causes no harm to or improves the environment;**
- **It is absolutely misleading to use terms such as “environmentally friendly” to describe products that typically damage or stress the environment;**
- **The term “biological origin” can only be used for products where this can be proven;**
- **All claims must be proven in order to be lawfully employed.**

As far as codes of conduct are concerned, the Nordic countries generally find a breach of a code to be a misleading act, but only if the company involved uses the code specifically to market itself to potential investors or the public.¹⁷

2. Germany, Austria, Spain, Luxembourg and Greece

Like the Nordic countries, the countries in this group all possess legislation designed specifically to deal with unfair market practices, including misleading advertising. However, at this point the similarities stop. For the most part legislation in these countries is much older and this is reflected in a relative lack of concern for the consumer. Instead, the law seeks to protect competition, which theoretically protects the interests of consumers as a corollary. Unfortunately, this severely limits the opportunity for individuals or organisations, rather than competitors, to take action against a misleading advertisement.

The German “Act against unfair competition” provides the inspiration behind the unfair competition laws in all these countries apart from Spain, which has

¹⁷ Compilation of national expert questionnaires, 2003, pg 49

its own “General advertising law”.¹⁸ Despite their differences, the basic principles of these laws are the same and can be discussed in general terms. They all set out to protect competitors from unfair competition. Thus, misleading advertisements are prohibited because a trader would gain an unfair competitive edge by publishing one. Consumers are protected as a kind of reflex.

Like in the Nordic countries, there is a “small” general clause explicitly prohibiting misleading advertising in a very broad manner, which applies to “Any person who, in the course of business activity and for purposes of competition, makes deceptive statements concerning business matters”.¹⁹

A major weakness of this system is that individual consumers and civil society organisations cannot complain or act to initiate proceedings to halt or prevent a misleading advertisement. Instead, only competitors, consumers’ associations, chambers and industries of commerce and artisans organisations can do so. There is also no monitoring by a public body.²⁰ Moreover, in Germany, though not in the other countries being discussed, there is no “reversal” of the burden of proof. Instead, the general rules governing which party is responsible for substantiating facts in a legal dispute pertain.²¹ There is also no duty to disclose pertinent information in advertising unless the lack of information leads to a sale, in which case the non-disclosure could constitute a misleading practice.²²

Thus although this legislation implements the Misleading Advertisements Directive, there is relatively low consumer and civil society activity on the subject of misleading environmental and social claims. Going through the administrative court system, which in any event can only be done with the help of a consumer organisation, is too onerous and timely, sapping the will to act. Because the stakes are too high, the people have almost no power to complain.

Codes of conduct operate in an environment completely separate from the legal system. It is therefore not surprising that they play a minor role. In this group of countries self-regulation is not given the state backing necessary for well known self-regulatory bodies, such as that in the UK, to function.

3. Belgium

Belgium is unique in that it combines legislation designed purely to protect consumers with largely self-regulated enforcement. The central pillar of Belgian consumer protection legislation is the Act on Commercial Practices

¹⁸ Profs Shulz, Reiner and Schulte-Nölke, Hans, *Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices*, 2003, pg 13.

¹⁹ *Ibid*, pg 19

²⁰ *Compilation of national expert questionnaires*, 2003, pg 19

²¹ *Ibid*, pg 48

²² *Ibid*, pg 62

and Consumer Information, passed in 1991.²³ Unlike Nordic legislation, it also aims to protect businesses against unfair commercial practices, thus it has two general clauses, one for business-to-consumer (B2C) and one for business-to-business (B2B) practices.

There is also a provision explicitly prohibiting misleading advertising, including a series of rules which must be adhered to. Most important is Article 23, which prohibits

“Statements, facts or representations which could mislead with regard to the identity, nature, composition, service, quantity, availability or method and date of manufacturing, the ‘characteristics of the product’ or the consequences for the environment”.²⁴

The president of the Commercial Court is empowered to put an end to a misleading practice with an injunction, which can even be used to stop an advertisement before it is published. An injunction can be demanded by any interested party, including a consumer, though it must go through the Minister for Economic Affairs.²⁵ According to the legislation, a code of conduct breach can be considered a misleading practice.

Despite this ostensibly comprehensive set of rules, misleading environmental and social claims rarely if ever make it to the courts. This is for the simple reason that self-regulation is given priority to resolve complaints. The Minister for Economic Affairs can and does initiate proceedings in cases of misleading advertising, but has not thus far done so for environmental or social claims. The faults of the Belgian self-regulatory body will be discussed in the next chapter, but the lack of state involvement in its functioning is clearly a big problem. That being said, new Belgian legislation, examined in the next section, might introduce a further element of state control and an improvement of the self-regulatory body.

B. Group two: private law legislation

Rather than enacting legislation exclusively to deal with unfair market practices or consumer protection, France, Italy and the Netherlands have written consumer protection provisions into larger civil or tort law legislation. Theoretically, this should not result in a lower level of protection. It could simply be a reflection of the legal systems in these countries.

In France, for example, misleading advertising is prohibited in the Consumer Code, a large piece of legislation covering many aspects of consumer law. The law contains the basic prohibitions found in other laws, in accordance with the Misleading Advertising Directive 1984. There are even extra protections in peripheral legislation, such as in the Environmental Code, which prohibits car advertising from inciting environmental infractions. Public authorities can intervene to enforce the consumer code, but individual

²³ Loi du 14.07.1991 sur les pratiques du commerce et sur l'information et la protection du consommateur

²⁴ Ibid, Article 23

²⁵ Compilation of national expert questionnaires, 2003, pg 19

consumers cannot complain without evidence of damage from a commercial practice, very difficult to prove in response to a misleading environmental or social claim.

It is therefore not surprising that only one court case of note dealt with the issue. Detailed in the case study of France later in this report, the case was brought against Monsanto for advertisements claiming a certain home-use pesticide to be safe and biodegradable. Although the plaintiff, a conservation NGO from Brittany, eventually won the case, it took nearly seven years for the judicial procedure to run its course. Instead, self-regulation is the principal method of acting against misleading advertising in France.

Italy and the Netherlands involve the state even less. Provisions prohibiting unfair competition, rather than consumer protection, are incorporated into the general Italian Civil Code, complemented by a Legislative Decree implementing the 1984 Misleading Advertising Directive.²⁶ This only allows persons acting in their professional capacity to bring proceedings before the authorities. However, unlike in Germany and Austria, this has led self-regulation to play a large role, based mainly on the fact that even traders seek to avoid the court system because of the enormous length of time needed to pursue a case.²⁷

In the Netherlands the basic provision of tort law protects fair competition, and advertising law is mostly based on unwritten rules derived from its general clause. The law does not even provide a definition of misleading practices, but giving misleading information is prohibited in the Civil Code. However, there is a long-respected tradition of self-regulation in the Netherlands, and because of the consumer and business respect it generates, its rulings are considered to be as significant as judicial decisions.²⁸ This is despite self-regulation codes carrying no legal status.

C. Group three: Common law

At least until the arrival of legislation implementing the UCPD, the UK and Ireland had no specific legal framework for dealing with consumer protection or misleading advertising. Instead, both countries have actively encouraged self-regulation, and are more involved in its practice than in other Member States. In the UK, for example, misleading advertising is prohibited by a statutory instrument, the Control of Misleading Advertisements Regulations 1988.²⁹ It is within this framework that the Office of Fair Trading, a government body, empowers the self-regulatory body to issue and enforce advertising codes. The Office of Fair Trading itself acts as an enforcer of last resort, and can step in to seek an injunction against a non-compliant advertiser. However, this happens so rarely that its usefulness is difficult to substantiate.

²⁶ Profs Shulz, Reiner and Schulte-Nölke, Hans, *Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices*, 2003, pg 15.

²⁷ *Ibid*, pg 23.

²⁸ *Ibid*, pg 23.

²⁹ Statutory Instrument 1988/915

D. Group four: the new EU Member States

The new Member States present a unique problem because, in most of them, the idea of protecting consumers against misleading advertising is new. Without going into detail that is beyond the scope of this report, the basic provisions of these countries will be briefly described. In addition, a more detailed case study of the Czech Republic is found later in the report.

Each of these Member States does prohibit misleading advertising, as required by the 1984 Misleading Advertising Directive. This is done either through specific legislation, general commercial legislation or consumer protection legislation. However, as the case study on the Czech Republic points out, self-regulation is underdeveloped in most of these countries and has not dealt extensively with misleading environmental or social claims. The courts have not been tested on this issue, excepting a case in the Czech Republic which dealt more with trademark abuse than the environment as such.

Conclusions: existing legislation

Looking at this brief comparison, it must be said that the Nordic countries present the most promising method for dealing with misleading advertisements. Because they combine the speed of self-regulation with the authority and legal certainty of the state, consumers and advertisers are well informed of their rights and obligations. Taking the International Chamber of Commerce codes into account allows the Nordic countries to keep up with the latest developments, since these codes are frequently revised.

What then can be said about the other systems? Surely there needs to be reform in those Member States which set out only to protect unfair competition. By definition, this leaves civil society and consumers out of the loop and unable to generate attention on this increasingly important issue. By contrast, as will be detailed in the next chapter, in countries where self-regulation is widespread, despite its faults, there is more consumer and civil society awareness. In most of these countries, including Belgium, the UK and France, “greenwashing” has become a public issue, with substantial media attention which could possibly lead to government action. This is not happening in the countries where only fair competition is protected, because advertisers themselves do not have incentives to act. On a positive note, it is in these countries that transposition of the UCPD could make the biggest difference, because consumer protection must be the primary goal of implementing legislation. Although many countries have been late on transposing the legislation, this next section will examine the new legislation where it has been implemented, in addition to looking at how the UCPD is likely to be implemented where the procedure is still ongoing.

II. Transposition of the Unfair Commercial Practices Directive

So far, the UCPD has only been transposed in a handful of countries: Belgium, Ireland, Slovakia, Romania and Malta. The implementation of legislation in Belgium and Ireland will be examined here, since the others have not yet been translated into English and French. Though in theory implementing legislation would be very similar in each Member State – because of the maximum harmonisation requirement – these two examples show that differences do indeed exist. Special attention will be paid to the parts of the new legislation that may most improve the current situation.

A. Belgium

The new legislation is simply an amended version of the Act on Commercial Practices and Consumer Information. This is not to say it is not ambitious. On the contrary, there are several notable additions to the legislation which might help to stem the proliferating flow of misleading environmental claims. In fact, the legislation goes far enough in this area to raise concerns about whether the European Commission will consider it too far-reaching to fulfil the requirements of maximum harmonisation.

Many additions to the updated Act are cut and pasted from the UCPD. There is an improvement to the burden of proof provision, which stipulates that, when an injunction is being sought from the Minister for Economic Affairs (the relevant ministry for enforcing the Act), any information provided in the advertisement which cannot be substantiated will be regarded as false.³⁰ The Act specifically authorises injunctions against advertisements for the purpose of protecting the environment. It also authorises the state, along with the Consumer Council (a government consumer protection body) to come up with criteria that advertisements making environmental claims must fulfil. These two entities are then to commission the drafting of guidelines for environmental labelling and advertising, possibly leading to a code which may be imposed on advertisers. Although it is difficult to tell in advance how much of this power will be taken up it should at least prompt the self-regulatory body to take misleading environmental claims more seriously. It also provides a new focus for civil society action.

Perhaps most interesting is a provision which authorises the Minister for Economic Affairs to prohibit or restrain an advertisement explicitly for the purpose of protecting the environment and to come up with criteria, in consultation with the government consumer protection body, that environmental claims must fulfil. (Though more comprehensive environmental criteria for advertisements would be welcome, there is a risk that such provisions could go beyond the scope of the Directive, undermining the purpose of maximum harmonisation.)

³⁰ Article 94/13

B. Ireland

Unlike Belgium, Ireland took the opportunity of transposing the UCPD to thoroughly revise its consumer protection law. The Consumer Protection Act is a completely new piece of legislation, replacing piecemeal and incomplete provisions on consumer protection. It represents a substantial improvement over previous legislation and increases legal certainty.

The biggest addition the Act brings in is the establishment of a new government agency to protect consumers and enforce the provisions of the Act. It has the power to seek injunctions against advertisers, though it seeks to leave self-regulation as the primary method of enforcement, stating that it will only step in after established methods for redress are exhausted.³¹ It also initiates a system whereby the newly established National Consumer Agency can approve of codes of conduct, though they are only to be submitted voluntarily. Nonetheless, the new legislation represents an improvement over the minimalist regulation of the past and with minor changes could bring about real change.

C. The transposition procedure in other Member States

Several other Member States are well into the consultation procedure for new legislation and thus the likely results can also be discussed here. France, Sweden, the UK and the Netherlands all fall into this category.

Neither the French nor the Swedish proposals for transposing the Directive pose any sweeping changes. In the Swedish case this comes as no great surprise, since specific legislation already exists for the purpose and the state does a reasonable job of spreading awareness of advertising rules and taking measures against those who break them. It is more disappointing that the French are not proposing comprehensive reform. The draft legislation adds one substantial element of state control, which is to empower a state body to enforce parts of the Consumer Code, including provisions on misleading advertising. This may lead to more state involvement in regulating misleading environmental claims, which are running rampantly in France, or it may simply help the self-regulatory body to enforce its decisions against non-compliant advertisers. There is certainly the potential for improvement, but at this point it is difficult to tell whether it will be taken up.

Because existing legislation in the UK and the Netherlands was not comprehensive, they have been more or less forced to undertake substantial consumer-law reform in order to correctly transpose the Directive. The British consultation procedure, which will result in implementing legislation entering into force in mid 2008, has been extensive. Though documented in detail later in this report, there are several points worth reinforcing here. The business and advertising sectors were extremely wary of increased sanctions, including criminal offences for misleading advertisements, which would diminish the

³¹ Consumer Protection Act, Article 3.88

role of self-regulation. Consumer groups and the Director General for Fair Trading were keen on increasing state control. In the end, the Office of Fair Trading, the government body in charge of enforcing consumer legislation, will have more injunctive power to halt or prevent the publication of misleading advertising. As elsewhere, it is difficult to posit whether this will result in drastic changes on the ground. However, the public and civil society are becoming very active on the issue of greenwashing in the UK, and the new legislation should be more adaptable to stricter regulation than the old.

The Netherlands has a widely respected self-regulatory system. However, in crafting its new legislation, the Dutch government is seeking to boost confidence in its system by adding an element of state control. Thus the legislation will create a new government body, the Consumer Authority. The Consumer Authority exists not to handle complaints, which the self-regulatory body will continue to do. Rather, it will monitor the functioning of the system and step in when it feels appropriate, usually in the case of non-compliance with a ruling. It will also take on cases in an *ad hoc* basis when doing so would be useful in solving a structural problem.

The Member States prohibiting misleading advertising only as a tenet of legislation preventing unfair competition stand to improve the most from the UCPD. Unfortunately, perhaps because of the lengthy legislative process needed, none of these countries had implemented the Directive at the time of writing. A qualitative change will need to be introduced, shifting the priority for protection from competitors to consumers. If legislation that meets this aim is enacted, consumers' abilities to complain will be substantially improved.

Conclusions: Transposition of the UCPD

Given the instances of transposition and near-transposition of the UCPD, can any broad conclusions be drawn? It is clear that the Directive itself is not going to revolutionise the manner with which misleading advertising is dealt with in Europe. Those Member States with a penchant for self-regulation are, by and large, managing to reconcile it with legislation that requires a heightened element of state control. However, this added element of state control, most evident in Belgium, the Netherlands and the UK, is not to be ignored. In Belgium, and the UK, as will be seen in the next chapter, new legislation is prompting advertisers and self-regulatory bodies to take misleading advertising rules, especially as regards the environment, seriously. In addition, added state control, even if intended to be superficial, will provide focus for civil society groups arguing for reform. For example, the Belgian legislation introduces the option of government vetting of codes of conduct. This is something Belgian NGOs will have to push for if it is to actually occur, but surely having this in legislation is a step forward.

Another obvious fact is that self-regulation is not about to fade away. While it may become more integrated with state control as the public and civil society react to scandalous stories of grossly misleading environmental and social advertisements, the principle of self-regulation is if anything gaining more ground. The next chapter will discuss self-regulation in depth, focusing on the

myriad differences in efficacy and use in different Member States of self-regulation. The goals will be to determine which elements of self-regulation are the most useful and how voluntary complaint mechanisms can best be employed to stop or prevent advertisers from making misleading environmental and social claims.

Chapter three – Self-Regulation

Introduction

Throughout the previous two chapters, this alternate method of enforcement, self-regulation, has been mentioned many times, leaving us with a lot of questions to answer in this chapter. What exactly is self-regulation? How does it come about? Who is in charge of it? Where do the codes come from if not from legislation? How does it make rulings? How does it enforce them? Is it accountable and transparent? Does it present a viable alternative to expensive and time-consuming court cases? Does it work? Though these are fair questions to ask, no uniform responses can be given that correctly describe the myriad self-regulatory systems set up to enforce misleading advertising rules in most EU Member States.

In short, self-regulation is not a monolith. Though each self-regulatory body investigates complaints and rules whether a particular advertisement is misleading or not, the vast differences between them make it difficult to generalise further. This chapter seeks to shed some light on self-regulation by answering the aforementioned questions. The first section will be general, explaining the basic ideas behind self-regulation in Europe and describing the codes issued by the International Chamber of Commerce (ICC), an international body from which all self-regulatory bodies in Europe draw inspiration for their own codes. The next section will look at the various methods used in the Member States to set up and fund self-regulatory bodies. Though they are all in some way set up and funded by the advertising industry, there are differences which impact how the body functions. The codes themselves emanating from the self-regulatory bodies will be looked at, and then, the adjudication system itself will be examined. The composition of the jury, the time frame and the method for making rulings varies widely from country to country. The system set up to enforce rulings will also be scrutinised, with a focus on the factors that influence whether or not advertisers comply with the rulings, including state involvement. Finally, some conclusions will be drawn. It is not simple enough to say either that self-regulation should be abandoned or embraced. It is clear that self-regulation will be around for the foreseeable future. With this in mind, it is important to tease out the factors causing some self-regulatory bodies to function well and other to function poorly. Once this is determined it will be easier both to push for suitable reform of the system to counter misleading advertising and to file successful complaints.

I. The basics of self-regulation

A. What is self-regulation?

According to the European Advertising Standards Authority, an organisation representing national self-regulatory bodies at the European level,

Self-regulation is a system by which the advertising industry actively polices itself. The three parts of the industry – the advertisers who pay for the

advertising, the advertising agencies responsible for its form and content, and the media which carry it – work together to agree advertising standards and to set up a system to ensure that advertisements which fail to meet those standards are quickly corrected or removed.³²

This leads one to ask how exactly the advertising industry can police itself. The previous chapters in this report clearly showed that there is legislation prohibiting misleading advertising in all Member States. In fact, self-regulation operates within the framework of legislation outlined in this report. In essence, governments outsource the enforcement of the misleading advertising provisions in legislation to self-regulatory bodies, which in general are keen to keep the government out of their affairs. Though many stakeholders point out the faults inherent in a system in which, at least at some base level, the roles of judge and defendant are played by the same parties, self-regulation is widely used in Europe and it is worth understanding how it works.

The basic idea is that the advertising industry in a given country draws up a code of practice that it agrees to support financially and then sets up a body to apply and enforce it. Usually there is a code-making board which draws up and amends the various advertising codes, some kind of jury or complaints committee which interprets and applies the codes and a permanent secretary that manages the day-to-day running of the self-regulatory body. Specific methods of funding as well as the make up of the board and jury and the codes differ from country to country, resulting in varying levels of efficacy.

The codes, although drawn up at the national level, all draw inspiration from the ICC, which is an international business members association with thousands of members from around the world. It develops and updates its Consolidated ICC Code of Advertising and Market Communication Practice in order to guide governments and self-regulatory bodies. Despite the fact that business interests are behind the ICC Code, it is quite comprehensive and contains many worthy provisions.

The Code contains basic provisions that advertising should be legal, decent, honest and truthful. Advertising should also take special care to contain information on all important characteristics of the product and utilise only claims which can be substantiated with documentary evidence.³³ There is even a chapter dealing specifically with environmental claims, which is to be read in conjunction with the general provisions. This forms the basis for all national environmental codes. It contains detailed provisions requiring advertisers not to abuse consumers' concern for the environment or mislead them regarding the environmental aspects or benefits of the product being advertised or the advertiser itself. Absolute claims should only be used if there is a very high standard of proof available, while comparative claims should be easy to understand and presented in close proximity to the claim being qualified. Moreover, only relevant scientific jargon can be used and all scientific claims must be backed by reliable scientific evidence. Environmental

³² European Advertising Standards Authority, Advertising Self-Regulation: The Essentials, 2003. pg 5

³³ Consolidated ICC Code of Advertising and Marketing Communication Practice, pg 13

superiority over competitors should only be claimed when clear benefits exist, a product's whole life cycle must always be taken into account when making an environmental claim and erroneous environmental symbols cannot be used.³⁴ It is clear from content of the Code, even as it is briefly described here, that the problems of self-regulation do not merely stem from the rules promoted in self-regulatory codes.

In fact, because the ICC Code influences them all, there are no major differences between the self-regulatory codes used in Europe. Individual codes are reproduced and detailed in the case studies found later in this report, but it is not necessary to reproduce them again here. It will suffice to say that they are all quite comprehensive, they all prohibit misleading environmental claims explicitly, they all place the burden of proof on the advertiser to provide documentary evidence supporting his claims, they all prohibit absolute terms (e.g. environmentally friendly) unless the product advertised does no damage at all and they all require advertisers to take the entire life-cycle of a product into account when formulating environmental claims. There are more subtle differences, for example regarding the setting in which a passenger car may be portrayed, but such nuances are best discussed in the case studies themselves. What this section attempts to point out is that it is not the codes themselves that determine whether self-regulation does a good or bad job. Rather, it is the make up of the self-regulatory body, which influences the way it handles complaints, which in turn influences how the public and civil society view the self-regulatory body. This influences whether or not civil society and consumers use the self-regulatory body and trust it to make decisions. Thus, other factors related to the implementation of each national system are of paramount importance, as will be demonstrated later with examples of the way national self-regulatory bodies are set up and run.

B. Benefits and drawbacks of self-regulation

It is easy to see why advertisers would prefer self-regulation to the regular sort. But how does self-regulation affect the public good? The drawbacks are well documented. Self-regulatory bodies are not independent. They serve simply to prevent meaningful regulation and they do not put forth binding rulings or sufficiently dissuasive sanctions. They also do not operate in an environment of legal certainty, lacking the formal jurisprudence that successive court systems establish.

For these reasons, this report maintains that the best method for dealing with misleading advertisements is the Consumer Ombudsman/Market Court system used in the Nordic countries, which includes a large role for the government while maintaining the flexibility, speed and ease of use touted as the benefits of self-regulation. However, most other Member States have opted for a lighter regulatory touch. This chapter will demonstrate that self-regulation can function better or worse. The best self-regulatory bodies make decisions quickly and complaints are easily and cheaply filed. For a

³⁴ Ibid, pg 42

campaigning NGO, such qualities provide an opportunity to respond quickly to a misleading advertisement, to have the continued publication of the advertisement prohibited by the self-regulatory body, and to generate negative press coverage about the company in question. As seen in the previous chapter, navigating through a court system requires not inconsiderable resources and large amounts of time which may be more productively allocated elsewhere. But there are many factors determining whether a self-regulatory body is worth taking seriously, as the next sections will demonstrate.

II. National Self-regulatory systems

Self-regulatory bodies around Europe use different methods for funding and board and jury selection. While such differences may appear a bit esoteric or unimportant, they profoundly influence each self-regulatory body's ability to function independently and objectively of their members and paymasters.

A. Funding

All self-regulatory bodies are funded in some way by the advertising industry. However, there are two principle ways this can be done, through levies or through membership. Because the levy system is compulsory for all advertisers and calculated as a simple percentage of money spent on advertising, it produces substantially more independence than the latter, in which voluntary membership and contributions can leave some advertisers with more influence than others. The Netherlands, Ireland and the UK use the levy model, while all other self-regulatory bodies in Europe use some variation of a membership scheme.

The levy model is simple. A percentage of each advertising project is calculated and the advertiser pays this amount to the self-regulatory body. In the UK this takes the form of a 0.1% levy on all advertising, yielding the British Advertisings Standards Authority (ASA) about £8 million in 2006. The Irish Advertising Standards Authority (ASAI) uses a similar scheme, collecting 0.2% of all money spent on advertising. The Dutch Advertising Code Authority is in the process of switching over to the levy model, and is currently financed from a combination of membership fees and a levy.³⁵

The levy model presents several benefits. It is neutral, affecting all advertisers in the same way and spreading the burden of paying for self-regulation evenly. In addition, it ensures that no individual advertisers gain too much influence over how the system is run or how complaints are handled.

This contrasts sharply with the membership model, typified by the Belgian Jury of Advertising Ethics. Membership fees come from trade associations representing the advertising industry, sectoral associations and even individual businesses. There are several weaknesses to such a system. Most

³⁵ European Commission, *Self-Regulation in the Advertising Sector: a report of some discussion among interested parties*, 2006, pg 33.

importantly, it leaves the independence of the system open to criticism. It also affects the reach of self-regulation, because membership is often voluntary. This leads one to ask how the self-regulatory jury can be expected to punish advertisers who are voluntarily paying them to make rulings. Offended companies might simply withdraw their membership. Such a system also risks being a low priority for advertisers and companies, who may come to see membership as a form of public relations exercise, open to changes in public relations budget and in competition with membership of other organisations.³⁶

Luckily, self-regulatory bodies themselves are coming to see that membership-based funding is far inferior to a mandatory levy. Therefore, Spain, Portugal, Poland and Belgium are all considering making the switch to a levy based system.³⁷

B. Board and jury selection and composition

The governing boards and juries of self-regulatory bodies are selected in various ways by various sorts of people. Though involving environmental or social NGOs is virtually unheard of, some self-regulatory bodies are much more inclusive than others, selecting board and jury members from consumer associations and the general public, while others stick strictly to the advertising industry.

The board of the Belgian self-regulatory body, for example, is comprised of 16 members, all from the advertising industry. The board of the French self-regulation body, the *Bureau de vérification publicitaire*, has 26 members, only one of whom represents consumers, with no other representatives of civil society. Meanwhile, the British, Irish and Dutch self-regulatory bodies take a more inclusive approach. The boards that govern the British ASA and the Irish ASAI, for example, draw members mostly from outside the advertising industry, as stipulated in their codes. The five-member Dutch Advertising Code Committee has one member appointed directly by the Dutch Consumers' Association. The other members are appointed by various representatives of the advertising industry and the Advertising Code Authority itself, though they need not have a background in the industry.

Of course, it is likely that membership-based funding or a board made up entirely of representatives of the advertising industry drastically diminishes the effectiveness or the objectivity of a self-regulatory body. It is clear that, for a number of reasons, they receive more criticism and win fewer plaudits than their counterparts in the UK, the Netherlands and Ireland. The next section looks at the complaints process, where it is again evident that these more isolated self-regulatory bodies perform less well.

³⁶ Ibid, pg 32.

³⁷ Ibid

C. Complaint handling

There are several factors that influence how a complaint is handled: make up of the jury; time needed to make a ruling; appeals process; and sanctions (including adverse publicity).

All self-regulatory juries claim to be independent of the advertising interests they represent, and though there are big differences, none of them exercise complete independence. Like the governing boards mentioned above, non-advertising interests are little, if at all, represented outside of the UK, Ireland and the Netherlands. Even in these countries the non-advertising sector has only a token presence.

The time needed to make a ruling is of utmost importance. After all, for its supporters, the swiftness with which a complaint can be investigated and a ruling handed down is one of the primary benefits of self-regulation. Television spots, internet links and daily newspaper advertising campaigns are not designed to run for months at a time, so any system devised to regulate them must pass the swiftness test. Otherwise, it is surely in need of reform.

A most egregious offender on this front is the Belgian JEP, notorious for rulings that condemn advertisements months after the campaign has ceased, preventing them from having a real impact on the companies involved. The most famous case involved an advertisement for a Toyota saloon car. Though clearly misleading (the advertisement claimed the car was heading “towards Kyoto at full speed”), it took the JEP four months to rule, after which time the campaign was long finished. Of the 70 cases examined for this report in which the JEP had found an advertisement misleading, in over 30 of them the advertiser remarked on hearing the ruling that the advertisement was no longer running.

Some self-regulatory bodies seek to avoid this problem with specified time limits depending on the specific situation. Unfortunately, the time needed to make a decision is often just as long. For example, if the British ASA decides, based on *prima facie* evidence, that a complaint is worth investigating, the advertiser is notified and asked to respond within ten working days, although more time can be given in exceptionally complicated cases. The ASA then makes a draft recommendation, which it sends to the advertiser, giving him a chance to respond within seven working days. At this point the ASA makes a decision. With the time needed to send and receive correspondence taken into account for each step, the average time from receipt of a complaint to notification of a decision is 85 working days, though “complex investigations” can take up to 140 working days.³⁸ Interim measures are available in exceptional circumstances, including prohibition of a particular advertisement during the investigation. The Dutch Advertising Code Authority uses a similar time frame, while other self-regulatory bodies do not elaborate on this point in their literature. A meeting of various stakeholders in Brussels last year

³⁸ ASA Complaint Handling Procedures, July 2007, pg 6.

highlighted this problem, and establishing a standard speed time-frame for dealing with complaints was noted as a key objective.³⁹

It is clear that the wheels of self-regulatory justice turn more quickly than those of the legal system, consumer ombudsmen excepted. However, it is also clear that they do not turn fast enough to have advertisements withdrawn much earlier than their planned obsolescence. No self-regulatory body has a jurisprudential structure akin to a court system. If repeat offenders are not more severely punished than others the “cost” of having an advertisement found misleading may not be so great for a company. Therefore, compliance depends highly on enforcement and sanctions, which vary greatly from country to country.

D. Enforcement and sanctions

All self-regulatory bodies claim not just to respond to complaints, but to undertake monitoring activity, initiating proceedings when necessary. However, detailed case reports from the UK, Ireland and Belgium reveal that this option is very rarely used. In Belgium, about five of 100 cases dealing with environmental claims were brought under jury initiative, while none of the five environmental cases brought in Ireland originated in this way.

Since consumer complaints start off the overwhelming majority of cases, visibility plays a key role in enforcement and sanctions. Publicising rulings allows NGOs and newspapers to “name and shame” misleading advertisers and should lead to better corporate behaviour. Thus it comes as no surprise that the more successful self-regulatory bodies use negative publicity as a principal form of sanction.

A prime example here is the British ASA. In its code, bad publicity is the first form of sanction it mentions. It publishes its rulings on its website on a weekly basis, and anyone can set up a profile-specific account and receive automatic emails when there is a ruling on a chosen topic (e.g. environmental claims). The ASA also issues press releases and rulings are given substantial coverage in national and local media. Recent rulings against Lexus, Toyota and Ryanair, for example, have all generated media attention, as detailed in a case study later in this report. It is worth noting that after the Lexus ruling, which prohibited an advertisement over-playing the environmental benefits of a hybrid SUV, Lexus conspicuously abandoned environmental arguments in future advertisements for similar products. The Dutch Advertising Code Authority takes a similar line on publicity, issuing a press release each time an advertisement is found misleading. A recent ruling against Shell, for example, resulted in international press coverage.

Given the primary importance bad publicity plays in leading a company to comply with rulings and alter its behaviour, it is shocking that not all self-regulatory bodies publicise their rulings. The Belgian JEP does not send out

³⁹ European Commission, Self-Regulation in the Advertising Sector: a report of some discussion among interested parties, 2006, pg 19.

press releases and the French BVP does not even post case details on its website. Since most cases are brought by consumers rather than publicity-seeking NGOs, rulings against environmental code violators in these countries go unnoticed by the press, giving advertisers little reason to reform. At the abovementioned stakeholder meeting of interested parties in Brussels in 2006, the need to systematically publish decisions was mentioned as a key element of successful self-regulation.⁴⁰ It can only be hoped that more self-regulatory bodies take on this practice. A test will be in Belgium, where the JEP is currently undergoing a much needed reform.

A crucial element of legal rules is that those who break them face financial penalties. Fearing for their pocketbooks, people keep themselves in line to avoid being fined. This concept is conspicuously absent from most advertising self-regulation. The word “fine” does not even appear in the chapter on sanctions in the British ASA code. Nor do the Dutch, French or Belgians issue fines to non-compliant advertisers. The Irish self-regulatory body, in an exception to this general aversion to financial penalties, leaves itself the option of fining advertisers who do not comply with a ruling, but breaching the code itself does not warrant a fine in any country. Instead, other dissuasive measures are employed. Most common is an order to the media not to publish advertisements by the non-compliant party. The British ASA has always had the state to back up its rulings. If an advertiser refuses to comply, the ASA can ask the Office of Fair Trading, a government body, to seek a court injunction against him. Now, with the entering into force of the Unfair Commercial Practices Directive, all Member States will have a similar form of legal backstop. The British and Irish self-regulatory bodies also subject consistently non-compliant advertisers to mandatory pre-launch vetting, giving them a chance to prevent misleading advertisements from hitting the airwaves before any damage is done. They, along with the French BVP, also have procedures whereby advertisers can have membership of necessary trade bodies revoked, essentially taking media privileges away from the non-compliant. No other self-regulatory bodies have set forth as strict measures, which can function as threats even if they are seldom or never used.

Another point where self-regulatory bodies differ greatly is over the appeals procedure. Shockingly, some self-regulatory bodies, such as the Belgian JEP, Irish ASAI and French BVP do not even have one. The Dutch and British each do have an appeals procedure, whereby a board of appeal in the Dutch case or an independent reviewer in the British case can be asked to reconsider a ruling in exceptional circumstances, meaning that there should be a fundamental flaw in the ruling rather than simple disagreement.

The self-regulatory bodies in other countries surveyed for this report have not factored into this chapter. This is because they are not well developed and are seldom used, especially to resolve complaints regarding environmental and social claims. The self-regulatory bodies in Germany and central and eastern Europe are yet to even rule on an environmental claim.

⁴⁰ European Commission, *Self-Regulation in the Advertising Sector: a report of some discussion among interested parties*, 2006, pg 19.

Conclusions

The ability of a self-regulatory body to at least semi-adequately police environmental and social claims revolves around a number of factors. One is public awareness. The Irish ASAI, for example, closely resembles the British ASA in its organisational structure and procedure for resolving complaints, but it has hardly issued any rulings dealing with misleading green claims. Consumers and NGOs have not concerned themselves with the issue in this country. Contrarily, greenwashing is a hot topic in the UK, leading the ASA to take a prominent role for fear that the government step in to take away its competences. Another key issue is independence. The greater it is, the greater the confidence in self-regulation, leading to increased use. In the UK, Ireland and the Netherlands self-regulatory bodies seek to be more inclusive, allowing consumers' associations to participate in their decision-making processes. It is no coincidence that consumers in these countries are more confident of the system and NGOs, while still critical, are less vehemently so than in a country such as France, where the un-transparent and un-inclusive BVP is relentlessly criticised for its poor performance on handling environmental complaints.

It is also necessary to hold self-regulation up not only against itself, but against all other methods of regulating misleading advertisements. Here, even the best voluntary systems leave much to be desired. The Consumer Ombudsman system used in the Nordic countries functions just as quickly. Its rulings are binding. Fines are meted out in every case of non-compliance. A clear line of jurisprudence lets advertisers and the public know what is acceptable and what is not. The UK, Ireland and the Netherlands, arguably where the most developed and best performing self-regulatory bodies are found, issue non-binding rulings with no financial penalties and independence cannot be taken for granted. Nonetheless, they do possess several qualities which other self-regulatory bodies could do well to emulate if self-regulation is not to be abandoned altogether.

Chapter four – Case studies

Case Study – Sweden

Introduction

The Swedish system for dealing with misleading advertising and other marketing practices is distinguishable from other EU Member States in that it assigns primary responsibility for supervision to the state. In this respect it is similar to other Nordic countries. There is a special Consumer Authority (*Konsumentverket*) set up to police commercial practices, a Consumer Ombudsman (*Konsumentombudsmannen*) to help resolve disputes quickly and cheaply, and a special Market Court (*Marknadsdomstolen*) to hear cases when an easy resolution is not forthcoming. This case study will quickly explain what authority these state bodies have and how they function. Then the general rules and case law that have developed over the years will be examined. A series of precedents has resulted in quite coherent rules for making environmental claims in advertisements. The limited role for self-regulation will then be discussed. Finally, the case study will uncover any changes that are likely to occur as a result of the Unfair Commercial Practices Directive (UCPD) being implemented.

I. Consumer Authority, Consumer Ombudsman and Market Court

The Swedish system for dealing with misleading advertisements stems from the Marketing Practices Act (MPA), passed in 1970 with the primary goal of protecting consumers. Interestingly, until this point businesses were left mostly to their own devices, through the Swedish Council on Business Practice (*Näringslivets Opinionsnämnd*). A backlash led to more supervision, which has endured save a small uptake of self-regulation in recent years.

A new version of the MPA was enacted in 1995. It has a general clause that requires all marketing to comply with good marketing practice and provide all consumers adequate information. This includes but is not limited to misleading advertising. Misleading advertising is specifically prohibited in Paragraph 6 of the legislation. In particular are mentioned the product's origin, use and effects on health or the environment.⁴¹ The legislation also lays down sanction guidelines, which in most cases result in an injunction to stop the practice and a default fine. Injunctions can even be used as a fast track procedure, in special circumstances, while a decision is still pending, provided that the applicant shows probable cause and that not stopping the act immediately would reduce the impact of the decision.⁴²

Primary responsibility for policing the MPA is assigned to the Consumer Ombudsman in his capacity as head of the Consumer Authority. The Consumer Ombudsman can act either on his own initiative or in relation to a complaint. In uncontroversial cases (i.e. where rules are clearly defined and

⁴¹ *Marknadsföringslag* (1995:450)

⁴² National Report, Sweden, pg 14

the business can be made to agree with the decision) he is empowered to issue a prohibition order with its requisite fine. In addition, he can also issue an “information order”. An information order requires a business to provide specific information needed in order to comply with the requirements of the MPA. Such orders are often issued in response to cases of misleading advertising. They are also subject to default fines. In certain cases a “market disruption fee” or damages to competitors may have to be paid.

If, in spite of the Consumer Ombudsman’s mediating role, the two parties cannot be made to agree, he can take the case to the Market Court.⁴³ In this court, the plaintiff may only sue for a prohibition or information order, allowing cases to be processed more efficiently (in speed and cost) than when more complicated results are sought. Cases are normally filed by the Consumer Ombudsman in the consumer interest, but an increasing number of private cases (usually brought by competitors) have been filed in recent years.⁴⁴ The Consumer Ombudsman has the right to solicit information from the defendant, and decisions taken by the Market Court are final. It is in the Market Court that, over the years, decisions have built precedents for norms of what constitutes misleading advertising.

II. Case law

The Market Court began to deal with environmental claims in advertising as early as 1973. This established the precedent that advertising must be “reasonable” (*vederhäftig*) as regards technical information and other statements that can be hard to verify or understand for the private consumer.⁴⁵

The next significant decision, taken in 1977, concerned an air freshener, marketed as “air-cleaning”, which disguised bad scents with perfume. Since it did not actually make the air cleaner, the Market Court took the opinion that the phrase, which would normally have a specific meaning for the consumer, was misleading.⁴⁶

In 1989, there was a case involving a paper bag company which, comparing them to plastic bags, claimed paper bags were made from “environmentally friendly Swedish paper”. This was meant to give consumers the idea that paper is better for the environment than plastic in its entire lifecycle (not just when thrown away), and the Market Court asked the company to prove this assertion. The term itself, “environmentally friendly” had not yet been found unacceptable, but it was later prohibited. In any event, the company was not able to prove that paper bags were better and the advertisement was found to be misleading.⁴⁷

⁴³ Ibid

⁴⁴ Ibid, pg 15

⁴⁵ Marknadsdomstolen avgörande 1973:8

⁴⁶ Marknadsdomstolen avgörande 1977:4

⁴⁷ Marknadsdomstolen avgörande 1989:2

Feeling the need to clarify its position, in 1990 the Market Court stated that environmental claims may continue to be used even for products that have an overall negative effect on the environment. However, society's growing knowledge of environmental questions would always have to be taken into account.

A decision in 1990 established that the use of an environmental phrase in the name of a product would be subject to the same rules as other forms of marketing. Here, a heating oil company mentioned the environment in the name of one of its products, claiming that heating oil had more advantages for the environment than comparable heating forms. The company was unable to prove this fact and thus lost the case.⁴⁸

Later in the year, the Market Court built on this principle and established an important precedent. A washing-up-liquid was marketed, in both advertisements and on packaging, as advantageous for the environment because it did not contain phosphate. The advertisement employed intense imagery, telling consumers that using the washing-up-liquid would be a small but important step for the environment. However, it still contained many harmful chemicals, despite the lack of phosphate, and the Market Court judged both the pictures and text used misleading.⁴⁹

In 1991 the Market Court developed one of its most important precedents, when a company marketed one of its passenger cars as "environmentally friendly". Among the car's advertised advantages was a catalytic converter, and the company claimed that therefore the advertisement was not misleading. The Consumer Ombudsman argued that the advertisement portrayed the car as having significant advantages, even among other cars with a catalytic converter. The Market Court then took a proactive stance, stating that the phrase "environmentally friendly" could only be used in its strict meaning, to describe a product which "improved or at least did not harm the environment". Furthermore, it would be misleading to use such a phrase to describe cars, which typically put a lot of stress on the environment.⁵⁰

In response to a television advertisement for "biological origin" washing-up-liquid, the Market Court established that such a term could only be used if it was true in the strictest sense. Since the company could not prove this was the case, the Court forbid use of the term.⁵¹ Another ruling on an advertisement for washing-up-liquid, in 1994, stated that, despite being recommended by an environmental organisation, an environmental argument could not be used because it implied that the product involved had significantly less effects than similar products, which could not be proved.⁵²

Two cases on passenger car advertisements in 2004 further clarified the limitations for using an environmental argument in relation to cars. The first,

⁴⁸ Marknadsdomstolen avgörande 1990:20

⁴⁹ Marknadsdomstolen avgörande 1990:22

⁵⁰ Marknadsdomstolen avgörande 1991:11

⁵¹ Marknadsdomstolen avgörande 1992:23

⁵² Marknadsdomstolen avgörande 1994:10

brought against Volvo, found an advertisement for its S60 car misleading for its claims that it “removes damaging ozone from the air” and that it “cleans the air”. Despite these claims, the company could not prove that its catalytic converters an ozone-reducing effect. The advertisement was therefore found misleading and the advertisement was forbidden.⁵³ The second case involved an advertisement for the Ford Focus. The advertisement claimed the car had the “best emissions ever” and that it was the “best car to ever drive ever”. The Court found that using these terms together played too much on the environmental benefits of the car and the advertisement was found misleading.⁵⁴

Taken together, precedents from the case law form a coherent set of rules which are then communicated to businesses and the public by the Consumer Authority and enforced by the Consumer Ombudsman. As explained above, in uncomplicated cases the Consumer Ombudsman need not take the violator to court. For example, in June 2007, it ordered car company Kia to stop running an advertisement marketing its Picanto model as environmentally friendly. Such orders normally generate public attention and thus help prevent future infringements.

The rules established through case law can be briefly summed up as follows:

- **The word “environment” can only be used in conjunction with a product if the product displays significant advantages for the environment over comparable products;**
- **Absolute terms such as “environmentally friendly” can only be used if in its entire lifecycle the product causes no harm to or improves the environment;**
- **It is absolutely misleading to use terms such as “environmentally friendly” to describe products that typically damage or stress the environment;**
- **The term “biological origin” can only be used for products where this can be proven;**
- **All claims must be proven in order to be lawfully employed.**

In addition to this, the Consumer Ombudsman and Market Court also keep the ICC regulations and ISO 14021 in mind when making rulings, allowing their interpretations of the law to stay in line with developing knowledge of the environment.

Despite the fact that the legal system works well, it does not function perfectly. Notable are guidelines issued by the Road Authority (*Vägverket*) on the definition of an “environmental car”. Though it is plausible that these guidelines, which class some vehicles, depending on size, emissions and fuel type as “environmental cars”, are well intentioned, their terminology serves to create confusion among the public and the automotive industry. This could easily perpetuate the sporadic occurrences of car advertising that uses terms

⁵³ Marknadsdomstolen avgörande 2004:4

⁵⁴ Marknadsdomstolen avgörande 2004:12

such as “environmentally friendly”, as was the case with Kia in 2007, long after the precedent against such practice had been established. Though it is understandable and desirable to class cars differently according to their environmental effect, less controversial terminology would be helpful.

Self-regulation

Despite its limited role in formulating policy, there is a self-regulatory body in Sweden which functions alongside the legal system described above. The Ethical Market Council (*Marknads Etiska Rådet*) works like the self-regulatory bodies in other Member States, but it has a smaller role. Numerous cases over the years demonstrate that if an infraction or type of infraction is not easily eradicated by the Ethical Market Council, it is taken up by the Consumer Ombudsman to set a precedent. This appears similar to the backup system for state intervention in countries such as the UK, but in practice there is much more state intervention in Sweden and other Nordic countries. Importantly, there does not need to be an explicit case of self-regulation non-functioning to prompt Consumer Ombudsman action.

III. New legislation

The UCPD has not yet been transposed into Swedish law. A recommendation leading to legislation will be released on August 15, 2007, but no major changes to the MPA are expected as the Swedish law is already quite complete. On the contrary, a simple addendum will be added with necessary additions from the Directive.

Conclusions

It is evident from the case study that the Swedish (and Nordic) system has several advantages. Most importantly, the Consumer Ombudsman/Market Court system marries some of the speed of well functioning self-regulation with legal certainty and jurisprudence. Though it does not function perfectly, as shown by the continuing release of misleading advertisements, increased public awareness and continuing Consumer Ombudsman vigilance should keep Sweden in front on this issue.

Case Study – France

Introduction

Strangely, the French system for dealing with misleading advertisements allocates a dominant position to self-regulation. This is strange because, traditionally, France has a distrust of self-regulatory bodies. Misleading advertising is a notable exception. In addition, France has had in force for quite a long time legislation that explicitly prohibits misleading advertising in general and misleading environmental claims in particular. Outsourcing enforcement to the self-regulatory body has left civil society largely disappointed, leading to a recent flurry of activity on the issue. Implementing legislation for the Unfair Commercial Practices Directive (UCPD), available only in draft form at the time of this report, does not appear to attempt any drastic changes to the status quo.

In order to properly evaluate the French system, this case study will be divided into four sections. The first will look at the substance of the old legislation, along with one case that actually made it into the courts. Then, the self-regulatory system will be critiqued. A third section will examine civil society activity on the issue, which has developed into a wide-ranging network with concrete policy proposals. Finally, the new draft legislation will be scrutinised, with a focus on how it will change misleading advertising regulation in France.

I. Existing legislation

The principal rules prohibiting misleading advertising are found in the Consumer Code (*Code de la consommation*), a large piece of legislation dealing with many aspects of consumer law. According to L-121-1 of the Consumer Code, all advertising that contains false or misleading allegations, statements or presentations that can induce consumer error are prohibited. Included characteristics are the existence, nature, composition, ingredients, usefulness, origin, amount, type and time of manufacture, physical properties, price and service conditions of the product advertised or qualities of the advertiser itself.

Other laws touch specifically on misleading environmental claims. The law defining editor obligations in matters of advertising states that advertising must pay attention to the protection of the environment.⁵⁵ The environmental code states that passenger vehicle advertising cannot incite environmental infractions.⁵⁶ It also states that advertising cannot portray the absence or low content of a substance as a benefit if it does not differ substantially from the

⁵⁵ L'article 4 du décret 92-280 du 27 mars 1992, loi fixant les principes généraux définissant les obligations des éditeurs de services en matière de publicité, de parrainage et de télé-achat.

⁵⁶ L'article L362-4 du code de l'environnement

normal composition of the product.⁵⁷ It even mentions energy companies specifically, stating that they must promote efficient energy use.⁵⁸

Despite these seemingly binding and comprehensive rules, there is only one notable court case in which an advertiser was brought to account for its misleading environmental claims. The case related to a series of television advertisements run by Monsanto in 2000, a producer of pesticides and other agricultural products. The advertisements, for a garden pesticide called “Roundup” made several environmental claims. Among them were that the product was biodegradable, left the earth clean, respected and was secure for the environment. In addition, a symbolic bird logo was used that could easily have been mistaken for an official endorsement. Packaging for the product contained similar assertions and labels.

The plaintiff, an NGO called Eau et Rivières de Bretagne, alleged that the advertisements implied that the product did no harm at all to the environment and that it was therefore misleading. Monsanto’s own statistics showed not only that several chemical ingredients in the pesticide were highly toxic but that they did not quickly biodegrade.

Monsanto was eventually found to have breached the Consumer Code and sentenced to pay a 15,000 euro fine. However, this was an exceptional case in which the defendant was marketing an immediately dangerous product. In other cases it has proved very onerous to bring an advertiser to court. Even taking Monsanto to court in this seemingly clear-cut case was no modest task. The judgement was not made until January 2007, meaning that it took over six years for the case to work its way through the system. Surely the courts cannot be fully relied on if such a commitment is required. Self-regulation promises quick justice, but this next section shows that the French self-regulatory body performs poorly in relation to others.

II. Self-regulation

Self regulation in France is conducted by the *Bureau de vérification des publicités* (BVP), a non-profit organisation that regulates the truthfulness and integrity of advertising in the interests of the advertising industry, consumers and the public (in that order).⁵⁹ In other words, it tries to maintain the balance between freedom of expression for advertisers and respect for consumers on the other. It was established in the 1950s and since the 1970s has issued advertising codes. In addition, it was given the authority in 1992 to give its opinion on broadcast advertisements before their release.

Like other self-regulatory bodies, the BVP is set up and funded by the advertising industry. It receives 80% of its funding from membership fees, while the rest comes from a mandatory fee paid to screen television advertisements. It is governed by a 26-member Administration Council (*Conseil d’Administration*). Although the president of the Council is

⁵⁷ L'article 541-34 du code de l'environnement

⁵⁸ L'article 224-1 II al. 3 du code de l'environnement

⁵⁹ <http://www.bvp.org/fre/informations-generalistes/portrait-du-bvp/missions/>

independent, the majority of the members belong to the advertising community, including advertisers, press, television, radio, and multimedia representatives. At all times at least one member of the Council is a consumer representative, and no other civil society groups are present.

The BVP has specific rules addressing the environment, sustainable development and passenger vehicles. The set of environmental rules is familiar. It stipulates that advertisements cannot mislead about the environmental characteristics and activity of products or the advertiser itself. All data has to be substantiated, with the burden of proof on the advertiser. Scientific data has to conform to accepted norms and technical data or terms should not be used without justification. Absolute terms are to be avoided unless no damage is done to the environment during the complete lifecycle of the product. In addition, characteristics which are common to all similar products can not be conveyed as particular advantages and confusing symbols cannot be used.⁶⁰

The sustainable development rules, in use since 2004, make reference not only to the environment but respond to public concerns about corporate behaviour in society at large. The rules themselves are quite explicit. They warn advertisers not to mislead the public concerning the actions taken in favour of sustainable development. Confusing symbols cannot be used, all information given must be true and un-exaggerated and all evidence must be justified. Importantly, individual actions cannot appear to represent the advertiser's activity as a whole. Special care has to be taken with scientific data. Activity cannot be portrayed as unique if many others partake in similar action or if the activity is required. There is also an annex, which stipulates that advertisers should not incite excessive consumption or waste.⁶¹

The rules for passenger vehicles are a direct response to consultation with the French Ministry of Environment and Energy (*Agence de l'Environnement et de la Maîtrise de l'Energie*) and mark a significant change from earlier rules. Previously, cars could be portrayed in nature as long as certain conditions were met. However, now they can only be shown on routes open to traffic. The rules will take effect in November 2007 and represent a victory for civil society groups in France which have been actively campaigning on the issue.⁶²

Though the codes are relatively complete and measure up favourably with those in other countries, the BVP system has some very obvious faults. For one, there is very little civil society involvement in the formulation of rules and handling of complaints. In addition, comprehensive lists of past complaints are not published as in other Member States, preventing adequate scrutiny of BVP judgements. It is easy enough to file a complaint with the available online form, but the process itself is not transparent. Although a recent surge in criticism led to improvements in sustainable development and passenger vehicle rules, serious concerns remain, which will be discussed here.

⁶⁰ *Arguments ecologique*, BVP 1998

⁶¹ *Developpement durable*, BVP, 2003

⁶² *Doctrine espaces naturelles*, BVP 2007

III. Civil society activity and criticisms of the BVP

Frustrated with the inability of the BVP to address the growing problem of advertisements that use misleading environmental or social claims, Alliance pour la Planète, a French NGO, formed an alternative body in June 2007, titled the Observatoire Indépendant de la Publicité (OIP). The OIP brings together 34 of the major environmental organisations in France, including internationally known Greenpeace, Friends of the Earth, Climate Action Network and WWF. This case study will briefly examine their criticisms and their subsequent action.

A principal concern is that the BVP exists solely to prevent regulation from the government, which would be less permissive and more expensive than self-regulation. Unlike other self-regulatory bodies, membership of the BVP is not obligatory and therefore does not have enough decision-making independence. Though the BVP consults with consumers and with an ethics committee, it is not obligated to act on recommendations, leading to a lack of interest in the system, especially by consumers.

The OIP thus recommends a system of co-regulation, in which the government approves self-regulatory codes and upholds rulings. This is partially the case with broadcast advertisements which are subject to pre-vetting, but does not extend to other media.

In light of the BVP's weaknesses, the OIP has set itself a task of disseminating information about misleading advertisements. It seeks to monitor the advertising sector, spread alerts when misleading advertisements are released, produce a yearly report on advertising and the environment, stop misleading environmental claims (using any available recourse) and give "awards" for especially negligent behaviour. To better serve this end, it maintains an updated website with examples of misleading green claims.⁶³ Though most of the advertisements shown obviously contradict French and European law as well as BVP rules, that they have not been censored by the BVP or the French government clearly shows that the system does not function adequately.

Since 2006 l'Alliance pour la Planète and its partners have been campaigning for the creation of an independent administrative authority to police advertising practice. This body would bring together public authority, advertising professionals and civil society, leading to a more effective form of control. The body would be able to sanction non-compliant advertisers and keep misleading advertisements from being published. As with self-regulation in some other countries, the body would be financed by a small, mandatory levy on all advertisements.

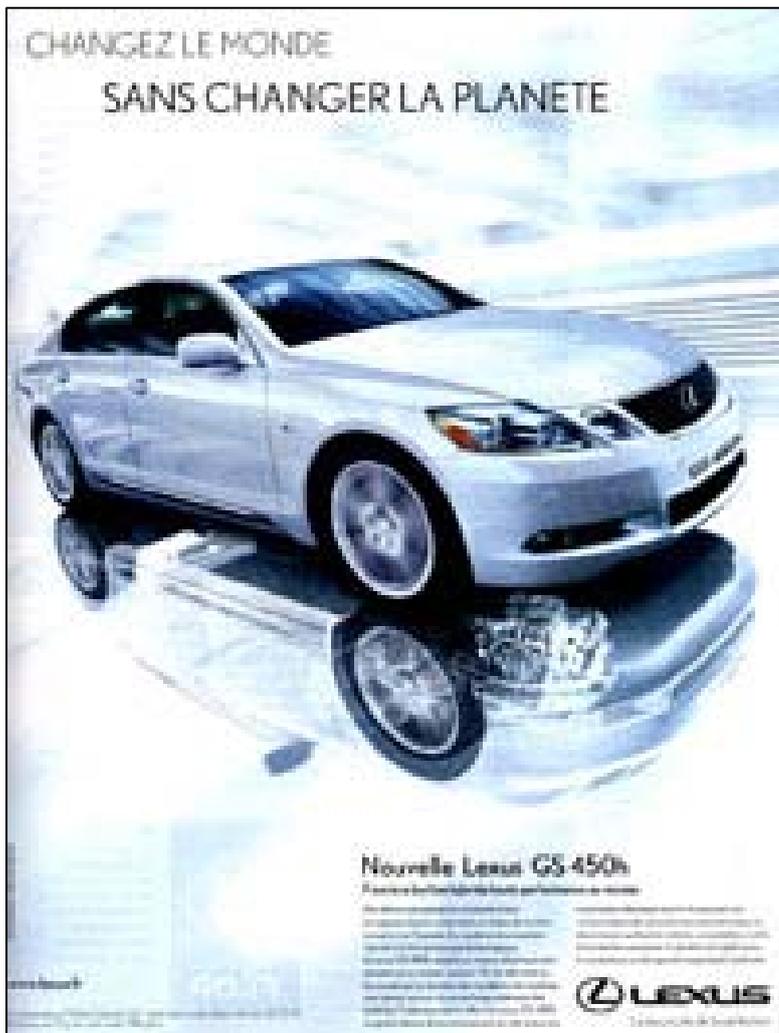
The OIP and l'Alliance pour la Planète activity has generated substantial media attention, with articles in high circulation daily newspapers such as *Le*

⁶³ http://lalliance.fr/xmedia/atelier_BVP/publicites.html#menu_pub

Monde and *La Liberation*. This has led the BVP to react through more consultation and collaboration with the Ministry for Environment and Energy. Disappointingly, no major changes to the system were proposed. The one exception is a new rule that cars may only feature on routes open to traffic, in response to harsh criticism by the OIP.

It is clear from civil society frustration in France that the current system does not work as well as in some Member States. Transposition of the UCPD into national law might just bring some change.

Misleading advertisements such as these examples escaped BVP censure, leading the NGOs to take action:



This misleading advertisement by Lexus claims that using this car would not change the planet. Even though it is a hybrid, it is a powerful car and emits 186g CO2/km, much higher than future European norms for all cars!

LE VENT
UNE DES FAÇONS
LES PLUS NATURELLES
D'AVANCER

Le vent est une énergie très largement partagée, dont la maîtrise peut s'avérer une force. Parce que le monde aura besoin d'énergies complémentaires et que l'exploration est au cœur de son métier, Total s'investit dans le développement de nouvelles générations d'éoliennes. Raisons pour construire le plus grand projet éolien en France et faisant appel aux technologies de pointe, Total prépare les grands développements de demain. Pour avoir le vent avec soi. www.total.com

Pour vous, notre énergie est inépuisable.

This advertisement claims that Total's energy is in inexhaustible supply and implies that it invests substantially in wind power. In fact, at the time the advertisement was published it operated only five wind farms in France!

HONDA
 The Power of Dreams™

- i-CTDi (moteur de l'année 2005 dans sa catégorie)
 = EXCELLENCE
- 140 ch et couple de 340 Nm à 2 000 tr/min
 = PERFORMANCES
- Compartiment moteur insonorisé = SILENCE
- Émissions CO₂ parmi les plus faibles de sa catégorie : 177 g/km(C)
 = RESPECT DE L'ENVIRONNEMENT
- Consommation de 5,8 litres aux 100 km en cycle extra urbain
 = SOBRIÉTÉ
- Garantie 3 ans (ou 100 000 km) = SÉRÉNITÉ

ASAP **

C'est beau un choix rationnel, surtout avec une offre de reprise conditions Argus + 3000 €.

No petrol cars can rightfully claim to 'respect the environment', but this advertisement for a Honda SUV is especially egregious in its claim. It emits 177g CO₂/km, not at all low compared with other cars.

IV. Implementation of the Unfair Commercial Practices Directive

In its form at the time of writing, the draft legislation in France does not appear to pose revolutionary changes to the current system for dealing with misleading advertisements. Additions to the Consumer Code will add definitions for what constitutes an unfair commercial practice, as per the Directive. There is no mention of government authorisation of self-regulation or commercial codes of conduct, despite the fact that the Directive permits it.

There is one important addition in the draft legislation, which is to empower the *Direction Générale de la concurrence, de la consommation et de la répression des frauds* to enforce parts of the Consumer Code, including on misleading advertisements. If used regularly, this tool could add an important element of state control to the system, though it is also possible that it will remain a seldom-used backup for self-regulation.

Conclusions

Although the French system for regulating misleading advertisements has not done a good job of regulating environmental and social claims up to this point, the recent upsurge in press and civil society activity is a positive sign. For the moment all that can be said is that the government and the BVP are doing an inadequate job, though the new legislation may bring in some welcome changes.

Case Study – Belgium

Introduction

The Belgian system for dealing with misleading advertisements is essentially one of self-regulation with legal intervention as a last line of defence for extraordinary circumstances. There is legislation prohibiting misleading advertising, enforcement of which is largely outsourced to a self-regulatory body. If the light touch of the self-regulatory body is not enough to coax an errant business back into compliance with advertising codes, the self-regulatory body itself can seek assistance from the courts. Though the Minister for Economic Affairs has often intervened to prevent or prohibit the publication of misleading advertisements, he has not done so in cases of misleading environmental or social claims, which he instead sends to the self-regulatory body. However, new legislation transposing the Unfair Commercial Practices Directive (UCPD) has now been passed in Belgium. It introduces a number of interesting initiatives, such as state approval of codes of conduct and increased control of environmental claims in advertising. In order to explain how the Belgian system functions, this case study will first summarise the existing legislation that underpins the entire system. Then the self-regulatory body will be scrutinised, followed by a look at civil society action on misleading advertising in Belgium. Finally, the new legislation will be examined with regard to what impact it could have on the interplay between self-regulation and the legal system.

I. Existing legislation

Rules on advertising, and a general clause prohibiting unfair commercial practices, are laid down in the Act of July 14, 1991 on Commercial Practices and Consumer Information and Protection (from here on referred to as the “Act”). The general clause, in Article 94 of the Act, provides that any action contrary to fair commercial practice whereby a seller damages or may damage the interests of one or more consumers shall be prohibited. Belgian law interprets this broadly, meaning that the intention of the seller is not taken into account, only the real or potential effect of his action.⁶⁴

The Act also prohibits misleading advertisements specifically, with a framework of rules laid out in Articles 22-29. Advertising is defined as “any communication aimed at promoting directly or indirectly the supply of products or services, including immovable property, rights and obligations”. Most important for the purposes of this report is Article 23, paragraph 1 which states that an advertisement is prohibited if it contains:

Statements, facts or representations which could mislead with regard to the identity, nature, composition, service, quantity, availability or method and date of manufacturing, the “characteristics of the product” or the consequences for the environment.⁶⁵

⁶⁴ Belgian national report, pg 4

⁶⁵ Ibid, pg 9

Judges can also take codes of conduct, both sector and company-specific, into account when interpreting the notion of fair commercial practice, looking at the conduct and customs of prototypical merchants. Though an infringement of a rule laid down by a code of conduct will not automatically lead to a violation of the Act, it may influence a judge's ruling. Unfortunately, because the courts are used only as a last resort for cases of misleading advertising, this principle has not been tested.⁶⁶

Any person having an interest, including the Minister of Economic Affairs, professional associations having a legal personality or consumer organisations can apply for a court injunction to stop a practice in violation of the Act.⁶⁷ Usually, a special warning procedure would be initiated by the Minister for Economic Affairs or his civil servants as a first step towards legal action, paving the way for a cease and desist order. This is laid down in Article 101 of the Act.⁶⁸ However, as will be explained further below, the Minister of Economic Affairs, at least where environmental and social claims in advertising are concerned, redirects cases of misleading advertising to the self-regulatory body without investigation.

In cases where legal proceedings are initiated, which has not yet occurred for misleading environmental or social claims, the cease and desist order is the main tool for enforcing compliance, as laid down in Article 95. The main benefit of this procedure is its swiftness. There is no need to prove urgency in order to solicit a cease and desist order, and the competent judge is the president of the commercial court. Non-compliance results in a fine. Once an infringement of the Act has been established by the judge in enacting a cease and desist order, it cannot be disputed in further proceedings. It is often used to enforce parts of the Act other than the provisions on misleading advertising, which as mentioned above are usually referred to the self-regulatory body.

Given its pre-eminence in developing and enforcing misleading advertising rules in Belgium, self-regulation warrants an in depth examination.

II. Self-regulation

Advertising self-regulation in Belgium is carried out by the Jury of Advertising Ethics (*Jury d'Ethique publicitaire*) (JEP). The Belgian advertising industry founded the JEP in 1974 and exercises its authority through issuing codes with which advertisers must comply, responding to complaints of code breaches and conducting its own investigations. Its authority extends to the press, magazines, radio, television, outdoor postings, the cinema and the internet (though not information posted on own-websites). The setup and functioning of the JEP will be looked at here, followed by the content of the code and some case law with statistics.

⁶⁶ Ibid, pg 8

⁶⁷ Ibid, pg 28

⁶⁸ Ibid, pg 9

A. The JEP

The JEP is comprised of 16 members, four representing advertisers, four representing advertising agencies and eight representing the media. A president, chosen from prominent people in the advertising industry, Belgian bar or universities, presides over the JEP. Civil society and consumers are not represented.

Complaints can be introduced, by anyone without a commercial interest in the case, with a simple letter sent to the JEP by email, post or fax. The JEP then makes a ruling based on its codes and, if necessary, issues a recommendation to the advertiser involved. This is the only form of sanction available to the JEP, but in extreme cases it may ask the Minister for Economic Affairs to seek an injunction via the procedure outlined above. This is, however, very rare. There is currently no appeals process for disputed rulings, but the JEP is in the process of a reform which will instate a review procedure and should be concluded by the end of 2007. Through its annual reports, a kind of “jurisprudence” is established, though not with the same level of legal certainty as in court proceedings.

In addition to handling complaints, the JEP, upon request from advertisers, the media or advertising agencies can offer pre-publication advice before an advertisement or an advertising campaign is launched.

The JEP develops codes with general rules on advertising, as well as sector-specific and cross-cutting codes on, among other topics, environmental claims and passenger cars.

B. JEP Codes

Taken at face value, the JEP environmental code is quite complete. It is based on the ICC code and stipulates that advertisements should not:

- abuse the public’s prejudices or lack of knowledge as regards the environment;
- incite behaviour damaging to the environment;
- contain any information that misleads regarding the environmental characteristics of the product advertised;
- give the impression that a large portion of the advertiser’s activity is devoted to protecting the environment when that is not the case;
- neglect to mention that environmental characteristics are dependent on a special or certain use of the product;
- give the impression that all stages of the life cycle of a product are not harmful to the environment when that is not the case;
- use absolute terms such as “environmentally friendly” unless a product has no effects on the environment for its entire life cycle;
- give the impression that a lack of harmful ingredients is unique to a product over its ingredients or previous versions of a product when that is not the case;
- use scientific evidence that cannot be completely proven;

- use scientific terminology that is confusing for consumers;
- use expert accounts unless they are in accordance with the current state of scientific or technological thought;
- denigrate competing products that do not differ significantly in their effects on the environment;
- use confusing symbols that could give the impression of official approval.

There is also a code dealing specifically with passenger-car marketing, called the Febiac Code. Its most important points supplement the environmental code:

- advertisements cannot make references to speed or power;
- advertisements cannot show or be presented as to encourage breaking traffic rules;
- advertisements cannot encourage behaviour harmful for the environment;
- vehicles can only be shown outside normal roads if the private character of the location is obvious, regular motorists would not be able to access the location and it must be obvious that the permission was given to use the chosen location.

C. JEP Cases

Though the code itself is sound, the real effectiveness of the JEP depends on how it handles complaints. Case data, which is available from 1999 onwards, reveals that the JEP has handled many complaints about misleading environmental claims over the years. About 100 cases have been handled, but a disproportionate amount took place before 2002, when the JEP handled complaints about messages on packaging and brochures, which it no longer does. In about 70% of cases the complaints have been upheld at least in part. However, this statistic disregards the number of complaints the JEP chooses not to investigate. In 2005, for example, the JEP received 221 complaints, 110 of which were not treated.

Companies large and small have been involved in complaints, including most major car makers, the Belgian national energy company, big consumer goods companies such as Proctor & Gamble and Unilever and retailers such as Carrefour. Although most complaints are upheld, combing through the data reveals an alarming trend. In most cases, by the time the JEP recommends that an advertiser cease or alter an advertisement, the company has already finished the particular campaign.

One notorious case involved a magazine advertisement for a Toyota Avensis saloon car. The advertisement announced that the car was heading “towards Kyoto at top speed” and that it was the “most environmentally friendly car of its category”. Despite the flagrant breach of the environmental and passenger car codes, it took the JEP over four months to issue its recommendation. In the here today, gone tomorrow world of advertising, four months is an eternity. Predictably, Toyota stated it had no issue with the recommendation and that it had already concluded the campaign.



Although the JEP eventually forbid publication of this advertisement, Toyota had already stopped running it. With no fines or bad publicity campaign, the company faced effectively no sanctions for its actions!

Another caveat concerns a recent complaint simultaneously filed by Friends of the Earth with both the Dutch and Belgian self-regulatory bodies. This instance calls attention to the disparity that can exist between self-regulatory bodies, despite the fact that their codes are very similar. In this case, a Shell advertisement, stated that it uses its excess CO2 emissions to grow flowers, without indicating how much of its CO2 it designated for this purpose. Friends of the Earth considered this open statement to be an absolute term that could easily give consumers the impression that Shell used all its emissions to grow flowers, when in fact research revealed this project to involve only a small percentage of Shell's overall CO2 emissions. The Dutch Advertising Code Authority upheld the complaint while the JEP considered all imagery and text in the advertisement to be metaphorical and aspirational. Friends of the Earth has also been disappointed with a JEP ruling in a complaint against ExxonMobil.



This Shell advertisement was indeed declared misleading – in the Netherlands – for implying that it reused all its CO2 emissions. The JEP saw nothing wrong with this.

Taking action to reduce greenhouse gas emissions

We'd like to use this space to share our thoughts on actions to address the risk of climate change.

This week, we will highlight some of the steps we're already taking to address the challenge of reducing greenhouse gas emissions in effective and meaningful ways, while ensuring that there is enough energy to meet the requirements of growing economies.

Climate change is a global issue and greenhouse gas emissions are rising most rapidly in the developing world. Meaningful approaches must be affordable to consumers, be applicable in the developed and developing world, and allow continued economic growth and improvements in living standards. Technological advances will be critical.

With these goals in mind, our scientists and engineers are working to reduce emissions today, while supporting the development of new technologies that could significantly reduce emissions for the long-term. Examples include:

- Working with vehicle manufacturers and engine makers on programmes that could improve fuel economy by as much as 30%, while significantly reducing emissions
- Improving energy efficiency at our facilities. Steps taken since 1999 resulted in CO₂ emissions savings of

11 million tonnes in 2005, equivalent to taking over 4.5 million cars off Europe's roads

- Partnering with the European Commission and other companies in the groundbreaking CO2ReMoVe initiative to assess the viability of geological carbon storage

- Establishing the Global Climate and Energy Project (GCEP) based at Stanford University, California – a pioneering research effort to identify technologies that can meet energy demand with dramatically lower greenhouse gas emissions. ExxonMobil is the lead sponsor and study areas include solar, hydrogen, biofuels and advanced transportation. GCEP involves institutions in the United States, Europe, Australia and Asia

- Exploring new ways to produce hydrogen, for potential longer-term applications ranging from on-board vehicles to retail stations and large production facilities

These steps have the potential to make a significant difference to greenhouse gas emissions. But addressing climate change is a shared global challenge. We all have a role to play. Taking sensible action today is important if we are to address the risk of climate change.

(Our next opinion editorial will discuss the role consumers can play in reducing emissions.)

Steps with the potential to make a difference



ExxonMobil

Taking on the world's toughest energy challenges™

If you want to read more about our company, please visit our web site at exxonmobileurope.com

JEP rejected a complaint about this advertisement even though its claims clearly contradict ExxonMobil's own sustainability report. The reason: readers of the European Voice should be clever enough to check the sustainability report for themselves.

Thus, civil society criticism of the JEP, which has been harsh. A Belgian environmental NGO, Inter Environnement Wallonie, has censured several aspects of the JEP system. Apart from the criticisms levelled at most self-regulatory bodies, Inter Environnement Wallonie notes that JEP does not publicise its decisions (unlike many other self-regulatory bodies) and that it takes much too long to make its rulings. Other NGOs, such as Réspire, are unsure of whether it is worth legitimising the highly flawed JEP system or whether it would simply be better to direct effort towards reforming the system.

III. Implementation of the Unfair Commercial Practices Directive

The UCPD has now been transposed into Belgian law, via amendments to the Act already in force, and will take effect on December 1st 2007. Though only a modification of existing legislation, it introduces several fresh ideas. Although it is difficult to predict with conviction what difference changes to the Act will make, the words themselves are promising. However, it is worth noting that the ambitious reach of the amended Act will result in a faulty transposition. Since the Directive calls for maximum harmonisation, an advertisement should, at least in theory, be considered either lawful in all Member States or misleading in all Member States. If the Belgian implementing legislation proves to be stricter than others, future revisions could be required after the Commission issues its report on the application of the Directive in 2011.⁶⁹

Much of the revision simply involved adding definitions from the Directive, rinsing redundant phrases from the Act and reshuffling articles to making it more coherent. Thus, all definitions were moved to a revised Article 93 of the Act. A notable addition is the definition of Code of Conduct, copied directly from the UCPD. In Article 94/7 misleading omissions are prohibited more explicitly than in previous legislation, with advertising specifically mentioned.

Article 94/13 develops on cease and desist orders to address misleading advertising. It stipulates that if, when asked by the Minister or a civil servant, an advertiser cannot provide sufficient proof of the information in an advertisement, the president of the commercial court will regard the information as false.

Most important and radical is Article 94/15, which seems to imply a lack of confidence in self-regulation, possibly leading it to undergo the reform which the JEP is pursuing at the time of writing. The article authorises the Minister for Economic Affairs to prohibit or restrain an advertisement for the purpose of protecting the environment. It also authorises the state to determine minimum criteria which environmental claims must fulfil, with consultation of the Consumer Council, a branch of the Ministry for Economy.

Furthermore, Article 94/16 authorises these same two entities to create a commission charged with releasing recommendations and notices regarding

⁶⁹ Article 18.1, Unfair Commercial Practices Directive (2005/29/EC), 2005.

environmental advertising and labelling, leading to a code for environmental claims in advertising which the state may impose on advertisers. This commission will include at least two representatives of environmental protection organisations.

Thus, the updated Act may introduce several new tools for combating misleading advertising. However, since some of the proposals are quite vague, there will still be room for advertisers to push for continued voluntarism rather than binding government codes. This will likely play out over the next couple of years after the legislation comes into force at the end of 2007.

Conclusions

The Belgian self-regulatory system shows itself to function less well than its counterparts in some other Member States. However, this may change with the transposition of the UCPD, for which the government seems to have taken a proactive stance. It is also important to remember that the JEP is in the process of reforming and may yet improve. Therefore, it is safe to say that despite the current problems the future for misleading advertising regulation in Belgium is not bleak.

Case Study – the Netherlands

Introduction

The Netherlands, like the UK, has a long-established system for dealing with misleading advertisements through self-regulation. Now, having implemented the Unfair Commercial Practices Directive (UCPD), the government has introduced a fail safe mechanism as well. Since the UCPD has been transposed into national law with Regulation 2006/2004, this case study will concentrate on the performance and make up of the Dutch self-regulation system, which will continue to play a prominent role, and the probable impacts of the new legislation on this system. First, the self-regulatory system will be examined with a look at its code, its decision-making structure and process and some cases brought by Friends of the Earth Netherlands (*Milieudefensie*). This will be followed with a look at the new legislation, whose chief addition is the establishment of a new regulatory body, the Consumer Authority (*Consumentenautoriteit*).

I. Self-regulation – the Advertising Code Authority

The Advertising Code Authority (*Reclame Code Commissie*) has dealt with misleading advertising in the Netherlands for over 40 years. This section will be divided into three parts, first examining the way the Advertising Authority is set up and how it functions, then analysing the specifics of its code. Finally, looking at some cases brought by Friends of the Earth Netherlands will show how the Authority functions in practice.

A. Composition of the Advertising Code Authority

The Advertising Code Authority is made up of the three parties that constitute the advertising industry in the Netherlands, advertisers, advertising agencies and the media. Together they create and update the code which lays down rules for advertising practice. They also assume, through the Authority, responsibility for forcing advertisers to correct misleading advertisements or stop their publication. Through a deal made with the government, this responsibility is accepted under the condition that the government itself will not issue general advertising bans or impose far reaching legal restrictions.⁷⁰

Though it is set up and run by the advertising industry as in other countries, the Advertising Code Authority does have limited support from other stakeholders. Another twelve organisations, including the Consumers' Association (*Consumentenbond*) have approved and accepted the Dutch Advertising Code. Each one of these organisations also has a representative on the board of the Advertising Code Authority. Although there are no other civil society representatives, there are representatives of several industrial sectors, such as the Dutch Associations for the bicycle and motorcar industries.

⁷⁰ The Dutch Advertising Code, pg 3

Complaints are heard by the Advertising Code Committee and when necessary the Board of Appeal. The Committee determines whether advertisers and others responsible for creating advertisements comply with the rules of the Code. Though most rulings are made in response to complaints, the Committee can also evaluate advertisements without a complaint being submitted.

The Committee is made up of five members, only one of which is appointed by a civil society organisation:

- one member appointed by the organisations of Advertisers affiliated with the Advertising Code Authority;
- one member appointed by the Consumer's Association;
- one member appointed by the Association of Communication Consultancies;
- one member appointed by the media organisations affiliated with the Advertising Code Authority;
- one chairman appointed by the Advertising Code Authority.⁷¹

Appeals are made to the Board of Appeal, which is set up in the same fashion. Since both the Committee and Board of Appeal are 80% comprised of members of the advertising community, the Advertising Code Authority cannot be said to operate independently. On the contrary, it exercises less independence than both the Irish and English self-regulatory bodies.

B. System for dealing with complaints

Complaints to the Authority are submitted in writing via either an online complaint form or post. The usual information is required, including a description or copy of the advertisement, including which part the complainant finds misleading, why the complainant finds the advertisement in violation of the Code and which parts of the Code are being violated.

Unlike most other systems, there Authority charges the complainant in some situations. The fee is waived for individuals and organisations and institutions such as NGOs, but they must be established in the Netherlands. However, appealing a decision costs €23. Companies filing complaints or appeals must pay a €228 fee.

Since one of the most important advantages with self-regulation, at least in theory, is swift justice, it is important to examine the speed with which complaints are handled. After it receives a complaint, a copy is immediately forwarded to the advertiser. From this point the advertiser has 14 days to send a written copy of its defence, which will also be forwarded to the complainant. A date is then set for hearing the complaint at a public meeting. If the Chairman of the Advertising Code Committee considers a case urgent, he can rule that it be handled within 14 days. Though the turnover is quicker

⁷¹ Ibid, pg 5

than with other self-regulatory systems, this is still not fast enough to stop a running advertising campaign.

The Advertising Code Committee may uphold or reject a complaint. If it upholds a complaint, the Committee makes a 'recommendation' to the advertiser to discontinue its manner of advertising. The decision is available to all and is released to the general public through a press release. Under the new legislation, the Consumer Authority can take action against advertisers in the case of non-compliance with Advertising Code Authority rulings.

There are also private decisions, in which the recommendation is only communicated to the parties involved. Though the reason such decisions exist is not explicitly explained in the Advertising Code Authority's literature, a private decision is most likely to result from an advertiser admitting the validity of a complaint without a contest. The Chairman, in what is known as the "chairman's allowance", can make similar recommendations without allowing the committee to rule if the advertiser renounces the opportunity to make a defence or admits the validity of the complaint.

This "plea bargain" system is of course neither transparent nor accountable. It is impossible to say with any validity how often such private agreements are made or whether any favouritism is shown. That being said, even real legal processes offer some incentive for admitting guilt. It would be helpful if the Authority released some data on this topic in order for an accurate assessment to be made.

Once a case has been decided, the Committee sets conditions for the advertiser to comply with the ruling. In urgent cases the decision is irrevocable, but in most cases there are 14 days in which an appeal can be lodged with the Board of Appeal. The cost, as explained above, is related to the identity of the appellant. The Board of Appeal decides whether an appeal is wholly or partly founded or whether to send it back to the Committee.

C. Content of the Dutch Advertising Code

The Dutch Advertising Code closely resembles other advertising codes. The Code applies to all communication commending something in public, without stipulation that the commendation need be a paid advertisement. Unlike other codes, it applies even to statements made on a company's own website. In addition to the general clause stipulating that advertisements should not be misleading and that scientific data must be substantiated, there are specific sections dealing with the environment and passenger cars.

The Dutch Code for Environmental Advertising is unique in that it seeks to be as broad as possible. It also places the burden of proof very explicitly on the advertiser and deals strictly with scientific evidence and environmental symbols. Like other codes, it prohibits absolute claims. For more information, the Code in English can be found at:

http://www.reclamecode.nl/bijlagen/dutch_advertising_code.pdf.

Like some other codes, the Dutch Advertising Code also has a section specifically dealing with passenger cars. It stipulates that cars cannot use speed, acceleration and engine power to promote sales. Promoting environmentally un-friendly behaviour is also prohibited.

D. Specific Cases

On paper it is clear that the Dutch Advertising Code is among the more complete. To evaluate how well it functions in practice it is, however, necessary to look at the way actual cases have been dealt with. Friends of the Earth Netherlands has filed several complaints over the last few years which will be summarised here.

Seven complaints, filed simultaneously, involved dealers and producers of garden furniture. A Friends of the Earth Report on timber was also included with the complaints. Originally there were three other companies involved, but they changed their marketing communications upon threat of complaint. All of the advertisers, either on the furniture itself or in brochures, boasted that their products came from sustainable managed forests. Some included false certificates from Indonesian plantations, while one even portrayed a false relationship with CARE, a development NGO. Friends of the Earth claimed that all the advertisers were in breach of articles 2 and 3 of the Environmental Code, undermining the competitiveness of legitimate sustainable products.

All the complaints were upheld and the recommendation was to discontinue such advertising. The Committee found that none of the companies could demonstrate the validity of their claims. Even instances where the text gave the mere impression or feeling of sustainability were found to be misleading. The cases generated substantial press coverage and were viewed as a success by Friends of the Earth.

Another case involved Essent Retail Energie BV. On its website, Essent claimed that the palm oil it used to generate electricity was produced in adherence to strict criteria and that the local environment was not negatively affected. Essent was unable to produce sufficient evidence to substantiate this fact and the complaint was upheld.

A case filed in May 2007 against Shell was also upheld. In the advertisement, smokestacks were portrayed providing nutrition to flowers, with text implying that Shell used all its excess CO₂ in such ways. Although Shell does have a programme in which it uses waste CO₂ to grow flowers, it involves a small proportion of Shell's CO₂ emissions. The Committee upheld the complaint on the grounds that consumers could be misled to believe all Shell's waste CO₂ was used to grow flowers. Interestingly, the same advertisement was run in Belgium, where a complaint was rejected, and in the UK, where it was still pending at the time of this report's publication.

Overall, it must be said that the Dutch Advertising Code Authority functions much better than many others. All of the cases generated substantial media attention, thus helping to deter misleading behaviour in future advertisements.

The cases mentioned were dealt with in a timely fashion and the outcomes were satisfactory. There is however room for improvement. Alongside the Consumer Agency, more civil society involvement in the creation/revision of the Code and make-up of the Committee would add accountability and transparency to the organisation. In addition, financial sanctions would be a useful deterrent, especially given that many advertising campaigns are finished by the time a ruling is made.

II. New legislation

The principle difference in the Dutch system for dealing with misleading advertising to be introduced since the UCPD is the setting up a new government body, the Consumer Authority (*Consumentenautoriteit*). Although the Consumer Authority was set up as part of the implementation of another European Directive, Regulation 2006/2004 on Consumer Protection Cooperation, it represents the biggest change that can be expected regarding consumer protection in the near future.

The Consumer Authority, set up in 2007, was formed in response to a perceived lack of compliance with consumer regulations and therefore adds an element of government control to the system. The Authority's tasks consist of monitoring and (if necessary) enforcing consumer law regulations, coordinating cross-border requests for consumer assistance and providing consumers with information regarding consumer laws and options for obtaining legal redress. Though part of the Ministry for Economic Affairs, it exercises independence in these activities.

The Authority is not meant to replace existing misleading advertising self-regulation. On the contrary, it seeks to support the existing system in cases where it does not perform and in so doing restore consumer confidence in self-regulation. While increased monitoring and enforcement should obviously keep self-regulation in check, the Authority's help desk (*ConsuWijzer*) will add pressure by keeping consumers aware of business' obligations.

In its literature, the Consumer Authority states that its arrival will not affect the basic principle of private sector initiatives such as the Dutch Advertising Code Authority. Therefore, it will only take action if a problem cannot be effectively resolved under self-regulation or if the Consumer Authority sees for itself an additional role to play. Cases are taken on in an *ad hoc* basis. As a priority, the Authority takes on cases where it can rectify a structural infringement. Since any action by the Authority, as a government supervisory authority, would impose costs for non-compliant businesses, the mere threat of it intervening in a case is seen as a strong incentive to comply with Advertising Code Authority rulings. In addition, it has supervisory and enforcement instruments that are not available to self-regulators themselves, such as financial sanctions. Priorities are set up on a yearly basis to address specific problems after consultation with stakeholders such as consumer groups. It will be important for civil society organisations to stress the proliferation of advertisements that use misleading environmental and social information.

As far as the Advertising Code Authority is concerned, the Consumer Authority will only intervene in cases where an advertiser does not comply with a ruling. This seems to echo the British Office of Fair Trading and its relationship with the Advertising Standards Authority. In order to elaborate on this principle, the Consumer Authority and the Advertising Code Authority are in 2007 working on a cooperation protocol.

The Consumer Authority works closely with consumer organisations, including cooperation in enforcement measures and collective action. In addition, it works with other supervisory authorities to exchange information about possible violations. When necessary, criminal proceedings can be initiated with the help of the Public Prosecution Service.

Conclusions

The Netherlands has a long history of self-regulation in misleading advertising and is not about to give this up. However, this system has gained widespread consumer confidence. Consumers and NGOs are both inclined to use it, the latter as a campaigning tool that is relatively cheap and generates significant media attention. It remains to be seen whether the addition of the Consumer Authority to the equation will much alter the functioning of self-regulation, but it is entirely plausible that the possibility of sanctions for non-compliance with self-regulation codes and costly government meddling will cause advertisers to act more responsibly.

Case Study – United Kingdom

Introduction

The United Kingdom (UK) has a well developed and firmly entrenched system for dealing with misleading advertisements in comparison with the other countries studied for this report. Companies were quick to use environmental claims in their advertising in the UK and therefore there is a long history of NGO activity on the issue, public awareness, legislation and self-regulation. However, rather than the state being deeply involved as in other countries with a history of strong consumer protection, in the UK there is a tradition of self-regulation. Substantial legislation to prevent and stop misleading advertising exists, and a self-regulatory body is assigned with upholding it. In exceptional cases the state can intervene, meaning that it backs up the self-regulation, a method technically described as “co-regulation”.

This case study will examine several aspects of the UK system for dealing with misleading advertisements. First the existing legislation will be described. Following will be an analysis of the self-regulation system, including individual cases and the means by which the state can intervene in exceptional instances. Then, the transposition of the Unfair Commercial Practices Directive will be looked at. While implementing legislation is not expected until April 2008, the results of a long consultation procedure leave a good impression of what it will look like. Finally, civil society and public action on the issue will be looked at.

I. Existing legislation

The rules controlling misleading advertising in the UK are mostly laid down in the Control of Misleading Advertising Regulations 1988 (Statutory Instrument 1988/915). This was the response to the 1984 Misleading Advertising Directive. In line with the Directive, Regulation 2(2) of the Statutory Instrument, reflecting Articles 2(2) and 3 of the EC Directive provides that:

“an advertisement is misleading if in any way, including its presentation, it deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and if, by reason of its deceptive nature, it is likely to affect their economic behaviour or, for those reasons, injures or is likely to injure a competitor whose interests the advertisement seeks to promote”.

However, the self-regulation system, described below, pre-dated the Regulations, and in negotiating the EC directive a major UK objective was to allow self-regulation to maintain its pre-eminent status. In order to introduce the required element of state control, the UK empowered the Director General of Fair Trading, to whom complaints should be made under regulation 4 of the 1988 Regulations. He has the authority, under Regulation 5 to apply to a court for an injunction against any person involved in the publication of a misleading advertisement.

In this way state authority backs up self-regulation, at least in theory. Though rarely used, it is not without precedent. The case, *Director General of Fair*

Trading v Tobyward Ltd [1989]⁷² illustrates perfectly the way the system is intended to function. The defendant advertised a product as contributing to permanent weight loss. When the ASA found the advertisement misleading and ordered it to be discontinued, the company did not obey. The ASA then referred the case to the Director General for Fair Trading, who sought a court injunction, subsequently granted, to have the advertisement stopped.

State authority is thus used not to determine whether advertisements are misleading or not, but to give some legal backing to self-regulation, thereby increasing its effectiveness. The Directorate General for Fair Trading stated as much and felt that the interests of consumers demanded the protection of an injunction. In practice, such a procedure is very rare, but its existence does arguably lead to better compliance with ASA decisions.

The competence of state authority in this field was broadened in 2001, again in response to European legislation, this time the EC Injunctions Directive 1998⁷³. The implementing legislation, the Stop Now Orders Regulations 2001⁷⁴ apply to any act contrary to a provision in certain listed EC consumer protection directives, including Directive 84/450 on misleading advertising as transposed into domestic law, which harms the collective interests of consumers. The Regulations define such acts as “Community infringements”, and stipulate that not only the Director General of Fair Trading, but any “qualified entity” has the power to bring proceedings before a court under section 35 of the Fair Trading Act 1973. If the court is satisfied that the trader has engaged or is about to engage in such behaviour, it may make a “Stop Now Order”, requiring the trader to stop the infringement immediately or not engage in conduct which would constitute and infringement.

Of course this leads one to ask what exactly a “qualified entity” is. The Regulations identify three categories of qualified entities with standing to bring the matter before a court: “public UK qualified entities”; “other UK qualified entities”; and “Community qualified entities”. Since this does not really leave the reader much enlightened, further explanation is necessary.

“Public UK qualified entities” are listed in Schedule 3 of the Regulations and include statutory regulators and trading standards departments. This extends authority to local public officials. “Other UK qualified entities” are private consumer organisations meeting objective criteria set out in Regulation 4(2) who have been designated for this purpose by the Secretary of State. “Community qualified entities” are defined as entities from other Member States which are listed in the Official Journal of the European Communities.

In addition, the Director General for Fair Trading and other UK qualified entities can bring proceedings in other Member States and in the UK on behalf of Community qualified entities. Cooperation is encouraged among all mentioned entities.

⁷² [1989] 2 All ER 266

⁷³ 98/27/EC

⁷⁴ SI 2001/1422

One caveat which is important not to overlook is that the qualified entities are obliged to consult both the Director General and the trader before taking action, giving the latter a chance to stop the infringement without the need for court action. If two weeks pass and the infringement continues, then proceedings may be brought.

Though individuals can complain to the Director General or another qualified entity, they still are not empowered to initiate proceedings directly. Nevertheless, allowing consumer organisations to bring matters before court is a big step.

As far as penalties are concerned, breaching any kind of cessation order would constitute contempt of court, for which the penalties are unlimited and can be large.

II. Self-regulation

As explained above, self-regulation is the principal enforcement mechanism for preventing and stopping misleading advertising in the UK. The Advertising Standards Authority (ASA) administers and enforces the two codes of practice written by the Committee on Advertising Practice (CAP). Finance is handled by the Advertising Standards Board of Finance (ASBOF). The functioning of these three bodies will now be briefly explained in order to be more easily compared with those operating in other Member States.

A. Set up of the ASA, the CAP and the ASBOF

The ASA describes itself as “the independent body set up by the advertising industry to police the rules laid down in the advertising codes”. It was founded in 1962, reflecting the long tradition of self-regulation in the UK. Its primary functions include investigating complaints, identifying and resolving problems through its own research and ensuring the system operates in the public interest.

It is set up as a limited company, independent from both government and the marketing industry. It is also stipulated that a majority of the 12-member council set up to run the ASA is unconnected with marketing business.

Like the self-regulatory bodies in other Member States, the ASA is not only set up but funded by the advertising industry. This fact is liable to cause concern over the level of independence and the influence of large advertising companies on the self-regulation system. However, independence varies across Europe and here the ASA scores quite well. It receives its funding through a mandatory levee of 0.1% on all display and broadcast advertising and 0.2% on Royal Mail Mailsort contracts. Thus, the advertisers fund the ASA but they cannot influence the amount of money they give to it. Last year the ASA had an income of £7,355,000. Rather than the advertisers giving this money directly to the ASA, there is one more degree of separation. The ASBOF, whose members include advertisers, promoters, direct marketers, their agencies, the media and trade and professional organisations of the

advertising, sales promotion and direct marketing industries, is responsible for funding the ASA and administering the levee.

The CAP creates, reviews and amends the advertising codes. It also produces industry help notes giving detailed guidance on specific sectors or subjects that are not covered in depth in the codes, oversees sanctions and convenes ad hoc working groups to address specific concerns. Its chairman is appointed by ASBOF.

In addition to these three main bodies, there are subsidiary bodies handling specific parts of the self-regulation system. Without going into too much detail, the CAP Copy Advice team gives advice to advertisers on the likely conformity (or non-conformity) of communications before they are launched. This is a free and confidential service, and is usually concluded within 24 hours of submission. Importantly, advertisers frequently or flagrantly found in breach of the codes by the ASA may be subject to obligatory pre-vetting by the Copy Advice Team. However, all broadcast advertising is subject to approval in advance.

The CAP Compliance team ensures that marketing communications conform to the applicable code. It takes action against marketers who persistently break the code and can immediately stop communications which are blatantly misleading, even if an investigation is still ongoing. Therefore, advertisements can be investigated even without being subject to complaints. The CAP Compliance team also sends compliance notices to its members advising them to withhold their services from non-compliant marketers.

Two CAP Panels, composed of experts together with one member each of the ASA council, guide the Executive, help the ASA and CAP to produce advice and help interpret the codes in individual cases. The panels can be asked to look at an issue by the parties to a complaint before it is adjudicated.

The ASA and CAP share an Executive that carries out the day-to-day work of the system. Among other functions, it ensures that industry expertise, specialist advice and the decisions of the ASA Council are co-ordinated and disseminated.

B. The Codes

There are three codes, one each for non-broadcast, television and radio advertising. Aside from laying down how the system is administered, they explain what kinds of marketing fall under their purview, describe in detail what constitutes misleading advertising and how the complaint procedure works. The important parts of the codes will be outlined here. For further reference, the codes can be consulted online at www.asa.org.uk/asa/codes.

Some of the important parts of the non-broadcast code are summarised here.

Paragraph 1 of the non-broadcast code specifies what does and does not fall under the remit of the codes. Aside from the obvious, the non-broadcast code

applies to online advertisements, emails, text transmissions, cinema and video commercials. Own website content does not have to abide by any of the codes. It also makes very clear that the codes operate alongside the law and not instead of it. This disclaimer is quite extensive, also stating that no spoken or written communications with the ASA or CAP should be understood as containing legal advice.

Paragraph 2 contains general rules, including that all marketing should be legal, decent, honest and truthful, with a sense of responsibility to consumers. It also absolves CAP members from the responsibility of complying with the codes. This responsibility is placed firmly on the marketers themselves. Others are given only secondary responsibility. This is reiterated in paragraph 4 on legality.

Paragraph 3 on substantiation places the burden of proof on marketers, stating “before distributing or submitting a marketing communication for publication, marketers must hold documentary evidence to prove all claims, whether direct or implied that are capable of objective substantiation”. It also states that “if there is a significant division of informed opinion about any claims made in a marketing communication they should not be portrayed as generally agreed.”⁷⁵

Paragraph 7 on honesty states that “no marketing communication should mislead, or be likely to mislead, by inaccuracy, ambiguity, exaggeration, omission or otherwise”.⁷⁶

There are also sections of the codes dealing with specific subjects. Most important for this research are the sections on motoring and environmental claims, located in paragraphs 48 and 49, respectively.

In paragraph 48.2, it is stated that “marketers should not make speed or acceleration claims the predominant message of their marketing communications. However it is legitimate to give general information about a vehicle’s performance...”.⁷⁷ It is also stipulated that marketers should specifically comply with the rules on environmental claims.

Since this case study deals primarily with environmental claims, paragraph 49 is reproduced here:

49.1 The basis of any claim should be explained clearly and should be qualified where necessary. Unqualified claims can mislead if they omit significant information.

49.2 Claims such as 'environmentally friendly' or 'wholly biodegradable' should not be used without qualification unless marketers can provide convincing evidence that their product will cause no environmental damage when taking into account the full life cycle of the product. Qualified claims and comparisons such as 'greener' or 'friendlier' may be acceptable if marketers

⁷⁵ CAP code for non-broadcast advertising, §3,1

⁷⁶ Ibid, § 7,1

⁷⁷ Ibid, §48,2 and 48,6

can substantiate that their product provides an overall improvement in environmental terms either against their competitors' or their own previous products.

49.3 Where there is a significant division of scientific opinion or where evidence is inconclusive this should be reflected in any statements made in the marketing communication. Marketers should not suggest that their claims command universal acceptance if that is not the case.

49.4 If a product has never had a demonstrably adverse effect on the environment, marketing communications should not imply that the formulation has changed to make it safe. It is legitimate, however, to make claims about a product whose composition has changed or has always been designed in a way that omits chemicals known to cause damage to the environment.

49.5 The use of extravagant language should be avoided, as should bogus and confusing scientific terms. If it is necessary to use a scientific expression, its meaning should be clear.

The codes for television and radio advertising follow a similar logic, but due to the constraints of broadcast media, the codes are less detailed and a bit less onerous. However, the main ideas are there. There is also a qualitative difference giving the ASA a bit more power than with non-broadcast advertising, because enforcement duties exercised by Ofcom are specially sourced to the ASA.

In the television code, Article 5 covers misleading advertising. Its general statement is that “no advertisement may directly or by implication mislead about any material fact or characteristic of a product or service”.⁷⁸ Footnotes warn against ambiguity, scientific terms or jargon, and statistics unless they are justified. Proof is required for all scientific evidence and independent verification is required. Importantly, the code cites the Misleading Advertising Regulations 1988 to place the burden of proof squarely on the advertiser, stating that “the ASA is empowered to regard a factual claim as inaccurate unless adequate evidence of accuracy is provided”.⁷⁹ Unsubstantiated claims about the environmental impacts of products are also prohibited. The code advises advertisers to have regard to ISO 14021, as well as the DEFRA Green Claims Code, though both of these are voluntary standards.

The Radio Advertising Standards Code follows in a similar vein. It stipulates that advertisements must conform to the Misleading Advertising Regulations 1988 and that the ASA will regard a factual claim as inaccurate unless sufficient evidence is provided. Scientific evidence and terminology can only be used in a way comprehensible to the “unsophisticated listener”. Ambiguity is to be avoided.

Article 5 lays down rules specifically for environmental claims, which are more specific than for television advertising. General claims must be assessed in light of the entire life-cycle of the product, absolute terms are inappropriate, and qualified claims must be justified.⁸⁰

⁷⁸ Broadcast Committee on Advertising Practice, Television Advertising Standards Code § 5,1

⁷⁹ Ibid, § 5,2,1

⁸⁰ Broadcast Committee on Advertising Practice, Radio Advertising Standards Code, § 5

It is evident from the codes that it is not the content itself that is of utmost importance, which though not perfect is quite complete, but how well they are enforced. Thus it is necessary to examine the complaint mechanism to see how it deals with complaints. The procedure as laid down in the codes will be described first, and then a look at the extensive case log will reveal how good a job the ASA does of resolving misleading environmental claims. The functioning of the system has to be held up not only against other self-regulation systems, against which it performs quite well, but against an ideal. The conclusion will be that, though the ASA/CAP system functions better than many, a quicker, more accountable system would still be desirable.

B. The complaint procedure

The complaint procedure is explained in paragraphs 60.28 – 60.38 of the non-broadcast code. Most noteworthy from the investigation procedure are the following points:

60.29 The identities of individual members of the public are kept secret unless permission is given otherwise ().

60.30 Equal weight is given to the investigation of all complaints regardless of the source ().

60.32 Complaints are not normally pursued if simultaneous legal action is going on.

60.34 The Executive conducts an investigation into complaints that are pursued. Most are dealt with within six to 12 weeks, though some are fast-tracked and completed within 48 hours. External expert consultants are used when necessary before recommendations are made for the ASA Council, which can also be considered by a CAP Panel. The final decision rests with the Council, and all decisions are posted on the website (www.asa.org.uk), updated weekly.

60.35 The Executive can take interim action if necessary to avoid further harm.

60.37 Marketers must produce documentary evidence to substantiate their claims.

60.38 The ASA council can be asked to reconsider its decision in exceptional situations. Requests should contain a full statement on the grounds for review and be sent within 21 days of notification of the ASA adjudication, though the Independent Reviewer has the discretion to waive the time limit. Requests can only be made if additional evidence becomes available or if there is a substantial flaw in the ASA Council's adjudication. If the Independent Reviewer accepts the request he will undertake further investigation and make a recommendation to the ASA Council, whose subsequent decision will be final.

C. The system for sanction⁸¹

The system for sanction is described in paragraph 61 of the non-broadcast code. The ASA makes it very clear that its most important form of sanction is adverse publicity. Thus, the ASA promptly publishes its rulings on its website (www.asa.org.uk) and publishes press releases. Rulings against well known companies often receive coverage in international, national, regional and local media. The ASA stresses that this adverse publicity is a sufficiently damaging threat for most marketers to keep them in line, preventing most companies from falling foul of the codes and ensuring speedy compliance from those the ASA rules against.

In case adverse publicity does not work, the CAP can issue Ad Alerts to its members, meaning that they should withhold their services from non-compliant marketers. These are issued at short notice and aimed for maximum impact. In addition, CAP trade associations and professional bodies can refuse to offer privileges and recognition, even expelling companies from membership in extreme situations.

Another important sanction is pre-publication vetting, in which persistent offenders can be required to have their marketing communications vetted by the CAP Copy Advice team until the ASA and CAP are satisfied that each new communication does not risk breaching the codes.

Finally, as described above, in extreme cases there is a legal option. Therefore, under the Control of Misleading Advertisements Regulations 1988, if a misleading advertisement continues to appear after the ASA has ruled against it, the ASA can refer the case to the Office of Fair Trading (OFT). The OFT can then seek a court injunction to prevent further appearance. In addition, as explained above, the OFT and other qualified entities can issue Stop Now orders when the situation requires.

An independent investigative and adjudication Council and an independent reviewer for the appeals process are both signs that this self-regulation system is well developed. Access to the courts, even if only as a failsafe, is also a positive sign. However, there are notable omissions. There is no system for jurisprudence. As will be shown below when individual cases are examined, while in each case the ASA Council makes a judgement based on the applicable code, there is no coherence with earlier cases, resulting in a lack of certainty that does not exist in established legal systems. As to which advertisements are investigated, though the ASA states that it may bring proceedings on its own, the overwhelming majority of investigations result from complaints. In addition, the review procedure does not allow access to the courts, even as a last resort. Finally, the sanction system aims to be dissuasive rather than punitive, as no fines are assigned for bad behaviour.

⁸¹ CAP code for non-broadcast advertising, § 61.1-61.15

Therefore, a company that releases an advertisement that it knows may be misleading can hope that no one complains about it. If there is a complaint and an investigation, the marketer can then hope that the complaint will not be upheld, even if similar complaints were upheld in the past. Then, if the complaint is upheld, the biggest risk that the marketer faces is bad publicity. Even in light of the Stop Now Orders Regulations 2001, the advertisement would most likely have finished its run by the time any authorities got involved. While these sanctions are not to be overlooked, it is clear that they have less force than a state-administered system.

D. Cases

The benefit of this system should be time efficiency and lack of expense, though as explained in the main body of this report, a case is not normally concluded before an advertisement finishes its run. The trends and some individual cases from the past five years will be looked at in order to evaluate the success of the UK self-regulation system.

The ASA purports to take misleading environmental claims very seriously. Since 2002, there have been about 30 ASA investigations dealing specifically with environmental claims in advertisements, covering a wide variety of sectors ranging from the automotive, aviation and energy, to cosmetic, land development and paints. Of these cases, 22 have been upheld (at least in part) while eight have been dismissed. However, this is not to say that most claims are upheld, since the statistics only relate to those cases which the ASA decided to investigate.

The complaints have followed popular trends. Thus, when utility privatisation left companies vying for customers at the beginning of the decade, they quickly started using environmental arguments to differentiate themselves. Of the six complaints in 2002 and 2003 alone, five of them were upheld. Utility companies were being too vague about their promises to pump renewable-only energy into the grid. Now, complaints against utility companies have calmed down as they have learned to phrase their advertisements correctly.

On the rise are complaints against transport companies. In 2007 alone there have been five complaints upheld against airlines and automobile companies. This strongly reflects the rise in public awareness about how much these two industries contribute to carbon emissions and therefore climate change, and how companies have responded not (only) by altering their behaviour but by dressing their behaviour in environmental clothing.

For example, easyJet recently published an advertisement in the national press, against which a complaint was later upheld, claiming that "Because we operate Europe's most modern fleet, our planes emit 30% fewer emissions per passenger mile than traditional airlines. So you can enjoy your holiday safe in the knowledge that you'll have done more for the Gordon's [Brown, former British Chancellor] taxes ever could". The complainants doubted that easyJet would be able to substantiate this claim. As it turned out, the emission

savings resulted from packing its planes with more seats rather than the fleet's age. The company was asked not to run the advert again, but the advertisement had finished its run anyway and easyJet had not planned another. This demonstrates a weakness in the self-regulation system. Without a system of fines or jurisprudence, there is very little with which a company such as easyJet can be prevented from making a similar claim in the future.

Another advertisement, for Ryanair, claimed among other things that "aviation accounts for just 2% of CO2 emissions". Complainants, including AirportWatch, an NGO, argued that 2% is the worldwide figure and that air emissions account for around 5% of CO2 emissions from the UK itself. Since the advertisement was run in the British national press, the ASA agreed with this argument, upholding the complaint and asking Ryanair not to use the figure in the future. However, Ryanair maintains that it is a truthful figure and that it will not abide by the ruling. The ruling, from 18 July 2007, will be a good test of whether co-regulation functions. If Ryanair continues to use the 2% figure, in theory the OFT would seek an injunction and prevent future advertisements from running.



Toyota has recently been reprimanded advertisements for its hybrid vehicles: the Lexus RX 400h and the Toyota Prius. In the first advertisement, pictured here, Toyota used the fact that the RX 400h SUV was a hybrid model as justification for its claim that the 4x4 had "Low emissions. Zero Guilt". In fact, it still had emissions of 192 g/km, not low at all, and the advertisement was found misleading. Articles in national newspapers followed.

The advertisement features a side profile of a silver Lexus RX 400h SUV against a light blue background with a subtle grid pattern. To the right of the car, the text reads: 'HIGH PERFORMANCE. LOW EMISSIONS. ZERO GUILT. V8-LIKE POWER WITH CLASS-LEADING CO₂ EMISSIONS. THE RX 400h LEXUS HYBRID DRIVE - PUSHING BOUNDARIES.' In the bottom right corner, the Lexus logo is displayed with the tagline 'The pursuit of perfection'. Contact information for Lexus Poole is provided: 'LEXUS POOLE, Patrick House, West Quay Road, Tel 01202 667575, www.lexus.co.uk/poole'. At the very bottom, small text provides model details and fuel economy figures: 'Model shown: RX 400h with metallic paint £36953 OTR. RX range prices start from £20,023 to £45,888 OTR. Prices correct at time of going to press and include VAT, delivery charges, number plates, full tank of fuel, one year's road fund licence and first registration fee. RX 400h fuel economy figures: extra-urban 37.2mpg (76L/100km), urban 31.0mpg (91L/100km) combined 34.9mpg (81L/100km). CO₂ emissions 192g/km.'

The next advertisement, for the Toyota Prius, claimed that the Prius emits "1 tonne of CO2 less than an equivalent vehicle with a diesel engine". Complainants thought this was exaggerating the benefit of the car, and the data produced by Toyota showed that in fact it based its calculation on an annual driving distance almost 60% higher than the average UK family. Thus the complaint was upheld and Toyota agreed not to use the figure again.

What is evident from self-regulation is that the co-operation of companies involved is necessary. Perhaps a company such as Toyota exaggerates a claim and then behaves with more care to avoid upsetting its reputation as a responsible company. Another company such as Ryanair, which competes solely on price rather than reputation, is not afraid of adverse publicity and may flout the ASA's rulings, hence undermining the system. As of yet there has not been much evidence to show that the injunction capability of the OFT is sufficiently wielded to keep companies in check.

III. Civil society and public uptake

It is difficult to tell cause from effect, but in the UK there are clearly more misleading environmental advertisements and more consumers and NGOs working to thwart them than in other EU Member States. Friends of the Earth Europe was making complaints to the ASA as early as 1995, while today, the ASA is seeking to tackle the issue before the authorities see a need to get involved themselves. Friends of the Earth, Greenpeace, Aviation and Environment Federation, local conservation groups and others have all filed complaints since 2004.

In addition, the issue is increasingly attracting media attention and thereby raising public awareness. In 2007 alone, complaints upheld against Ryanair, Shell, Lexus, Toyota, easyJet and Volkswagen have made headlines in national newspapers, prompting the ASA itself to publicise the importance it attaches to misleading environmental claims and the rigorousness with which it holds companies to its environmental codes.

The ASA has a special section on its website specifically highlighting its work on misleading environmental claims. It stresses that companies have to take care to make sure their claims are truthful. Singled out are carbon offsetting schemes, "green" cars, confusing symbols and terminology, scientific evidence, misleading omissions and absolute expressions (e.g. environmentally friendly).⁸²

Some civil society groups have decided to attack the problem from another angle. Enoughsenough.org uses the most egregious examples of misleading advertising as inspiration for its own advertisements which it then publishes in the national press. Targets have included the aviation and nuclear energy sectors.⁸³

Government Advice

In addition to legislation and enforcement, the government also produces a code with voluntary guidelines explaining how to best make environmental claims. The code is supported by the Confederation of British Industry, the

⁸² Advertising Standards Authority, <http://www.asa.org.uk/asa/focus/Live+Issue/Live+Issue+Environmental+claims+on+the+rise.htm#introduction>

⁸³ <http://www.enoughsenough.org>

British Retail Consortium, the Local Authorities Coordinating Body on Food and Trading Standards and the British Standards Association. Though only voluntary, the Green Claims Code, as revised in June 2000, stresses that businesses should use independent verification to substantiate their claims, use relevant data, explain the use of any symbols and use clear language. Attention is turned to ISO 14021. The legal framework is also briefly explained and the concept of self-regulation is introduced.⁸⁴ It is not however very clear what the benefits of this code are other than to give credibility to the government and supporting institutions as regards environmental claims.

IV. Implementation of the Unfair Commercial Practices Directive

Though the Member States were required to transpose the Unfair Commercial Practices Directive (UCPD) by June 2007, allowing it to enter into force before the end of the year, the UK recently announced that it would not transpose the Directive until April 2008. A divisive consultation procedure is ongoing in which the advertising industry has sought to preserve the principal role of the ASA in upholding misleading advertising legislation.

The first consultation, on the transposition of the Directive, was released in late 2005. After collecting responses, the government put out a summary in May 2006. The summary confirms that business groups in general and particularly members of the CAP such as the Advertising Association opposed the introduction of criminal sanctions for infringements of the Directive. The ASA and others fear that criminal sanctions will lead regulators to bypass the existing self-regulatory system. Their reasoning was that, since self-regulation is based on trust between the ASA and advertisers, the latter would be reluctant to provide substantiation for claims that could later result in criminal liability.

Enforcers and consumers groups took the opposite line, asserting that criminal offences are essential for investigative powers and act as a strong deterrent.⁸⁵ They claimed that criminal sanctions underline the seriousness of undesirable acts which might otherwise be seen as nothing more than a regulatory risk.

The ASA and business groups also opposed the setting up of an additional injunctive regime, including the mandatory publication of corrective statements by *inter alia* advertisers, arguing that it could be confusing for consumers and harm overall trust in advertising. They prefer that the ASA continue to deal with such publicity as it sees fit in individual circumstances. Consumer organisations, the OFT and enforcers strongly favoured such corrective statements.⁸⁶

In its response, released in December 2006, the government asserted that civil and criminal proceedings would both be available to enforce the

⁸⁴ Department of Trade and Industry, Green Claims Code, revised June 2000

⁸⁵ Summary of Responses to the Consultation on implementing the EU Directive on UCP and Amending Consumer Legislation, pg 3

⁸⁶ *Ibid*, pg 12

implementing legislation of the UCPD. As was expected, the implementing legislation will contain a provision for enforcers to “consider the desirability of breaches by traders being dealt with by established means”. In addition, some infringements will not be subject to criminal if to do so might undermine the self-regulatory regime, such as breach of codes of conduct. The government is considering whether or not to give the OFT the power to bring criminal prosecutions for breaches of the UCPD, which could be a step in the right direction. Thus, while the Directive will likely increase the force behind legislation on misleading advertising, the current balance between self-regulation and the Office of Fair Trading will be only be marginally affected.⁸⁷

Since it overlaps with many existing laws, provisions will be repealed in 22 laws to make room for the new legislation.⁸⁸ However, injunctions to prevent misleading advertisements and other unfair commercial practices will not be dealt with in new legislation. Instead, a change will be made in Part 8 of the Enterprise Act 2002 adding breach of the UCPD to the list of “Community infringements” for which an injunction may be sought. On a positive note, Part 8 will be amended in order to firmly place the burden of proof on traders to prove the accuracy of factual claims made in a commercial communication.⁸⁹

Another consultation, conducted between December 2006 and February 2007, dealt with how to frame criminal offences in the implementing legislation. As far as misleading advertising is concerned, the consultation concluded that infringements of the general clause of the Directive (Article 5) will require a *mens rea* (intentionality) in order to constitute criminality. The OFT will also be given the power to bring criminal prosecutions.⁹⁰ In general, business and advertiser groups were hostile to any extension of criminal offences while enforcers and consumer groups were keen.

Having now prepared draft implementing legislation, the Draft Consumer Protection from Unfair Trading Regulations 2007, the government released a new consultation in May 2007. It will collect responses until the end of August 2007. The Draft Regulations incorporate the responses from the previous consultations and should come into effect in April 2008.

Important to remember from the Draft Regulations is that they attempt to preserve existing self- and co-regulation, with the ASA/CAP system in mind, as evident in this provision:

Article 20 (4) In determining how to comply with its duty of enforcement every enforcement authority shall have regard to the desirability of encouraging control of unfair commercial practices by such established means as it considers appropriate having regard to all the circumstances of the particular case.

⁸⁷ Government Response to the Consultation Paper on Implementing the UCPD, DTI, December 2006, pg 3

⁸⁸ For a list of the legislation that will be amended and repealed, see *ibid*, pg 9

⁸⁹ *Ibid*, pg 5

⁹⁰ Government Response to the Consultation Paper on how to frame criminal offences, DTI, May 2007, pg 7

This, in short, tells the OFT and other qualified entities not to encroach on ASA turf unless there is extreme need. Enforcement will be according to the Enterprise Act 2002, part 8, as amended by the Draft Regulations.⁹¹ In addition, breaches of codes of conduct, such as the ASA/CAP codes will not be made into criminal offences.

Nonetheless, the implementation of the UCPD in the UK will bring several clear benefits. It clearly defines misleading practices and reproduces the “black list” of prohibited actions from the UCPD. In addition, it simplifies consumer law in the UK by putting much of it into one piece of legislation. It also increases the power of the OFT, which may in the future result in a more accountable ASA/CAP or more state involvement in enforcing the misleading advertising rules.

Despite the fact that most changes brought by the Draft Regulations will not drastically alter the current prevalence of self- and co-regulation, at least so far as enforcement of misleading advertising rules are concerned, the advertising industry has been hostile to the government’s proposals. Thus, a more powerful OFT, while not directly challenging the ASA system, could potentially take on a greater role in instances where the ASA functions insufficiently. In relation to misleading green claims, even the director-general of the Confederation of British Industry, Richard Lambert, has expressed concern. In March 2007, he warned the advertising industry that it will face restrictive regulation if it continues to make misleading claims about the environmental impact of different products and services.⁹² However, all this will have to be tested once the Draft Regulations enter into effect.

Conclusions

In comparison with other European countries, the UK boasts high levels of consumer awareness and civil society involvement in misleading advertising. The self-regulatory body also takes environmental concerns more seriously than elsewhere. However, its lack of hard tools has stopped it from preventing truly errant companies from making misleading claims, while the government has been reluctant to use its available tools to get involved. The changes brought on by the new UCPD, while subtle, may eventually result in the OFT and newly enabled “qualified entities”, such as consumer organisations, making up for some ASA/CAP shortcomings. However, it is also clear that self-regulation will continue to provide the principal protection against misleading advertisements for the medium-term.

⁹¹ Consultation the Draft Consumer Protection from Unfair Trading Regulations 2007, DTI, pg 12

⁹² Willman, John, “Advertising Industry Warned over climate change claims”, Financial Times, May 23, 2007

Case Study – Ireland

Introduction

In Ireland, it is clear that the groundwork for effective regulation exists. Unfortunately, there is not enough consumer or civil society awareness to really push the issue and stop misleading advertisements. Until recently, self-regulation was the only method for enforcing misleading advertising rules, with state intervention available only as a last resort. Now, with the transposition of the Unfair Commercial Practices Directive (UCPD) the government created a new body to enforce consumer legislation. This case study will first look at the performance of self-regulation so far and then move on to the new legislation, concentrating on the potential for a more active approach to misleading advertising regulation in Ireland.

I. Self-regulation

A. Composition of the Advertising Standards Authority for Ireland

Advertising self-regulation is carried out by the Advertising Standards Authority for Ireland (ASAI), which is set up and funded by the advertising industry. Its 15-member board is made up of four advertiser members plus the Chairman, four agency members and six media members. The Board, as well as the Director for Consumer Affairs, appoints the Complaints Committee, whose majority is not to be employed by the advertising industry. These members tend to have expertise in such fields as consumer protection, child welfare and community issues. There is an independent chairperson and 13 members. The composition of the Complaints Committee, as well as the involvement of the Director for Consumer Affairs, is meant to ensure the objectivity and independence of the complaint procedure.

Funding is by mandatory levy of 0.2% of all money spent on advertising. This spreads the cost across the industry and prevents individual members from exercising undue influence.

The stated goal of the ASAI is to ensure that all advertising is “legal, decent, honest and truthful”.⁹³ The Board draws up and updates the Code of Standards for Advertising, Promotional and Direct Marketing in Ireland after consultation with various stakeholders including advertisers, agencies, the media, the public, consumer representatives and government departments. Advertisers are then obligated to obey the codes, although secondary responsibility falls to all others involved in creating marketing communications, including the media. Interestingly, all relevant parties are encouraged to include provisions of the Code in their contracts, which would give some legal backing to an otherwise voluntary exercise.

⁹³ ASAI Manual of Advertising Self-Regulation, pg 69

B. The Code

The Code itself is quite complete. It is made up of a general section followed by an issue-specific section which includes rules for making environmental claims. The general section immediately makes clear that the burden of proof is on advertisers and that they must be able to supply on demand documentary evidence to substantiate all claims. It also stipulates that statistics and scientific evidence cannot be used to suggest false validity, and that scientific claims should not be portrayed as universally accepted unless it is the case.

The environmental section is much more specific and contains the following important points⁹⁴:

- Unqualified terms can only be used if the product will cause no environmental damage;
- Qualified terms are acceptable if advertisers can demonstrate that the product provides an improvement against either competitors or previous products;
- The basis of any claim should be explained clearly and qualified where necessary;
- Any division in scientific opinion should be clearly presented;
- If a product has never had an adverse effect on the environment, it should not be marketed to imply its formulation has changed to make it safe;
- Extravagant language and pseudo-scientific terminology should be avoided;
- Symbols used should be simple and not convey false impressions about the characteristics of goods or services.

B. Complaints and compliance

The ASAI investigates advertisements for non-compliance with the Code either through its monitoring programme or due to complaints. Any person or body can submit a complaint, which should be in writing and include a copy or description of the advertisement and the grounds for complaint. Complaints are investigated free of charge.

Upon receiving a complaint, the ASAI secretariat decides whether there are grounds for a full investigation. If so, the advertiser is informed and asked for comment in relation to the Code, usually within ten days. The secretariat then forms a summary with recommendations for the Complaints Committee, which is also provided to the complainant and the advertiser. The Complaints Committee then makes a ruling and details are set out in a case report which is published on the ASAI website and released to the media. An advertisement found in breach of the code is to be amended or withdrawn. In special circumstances the Complaints Committee can speed up the whole procedure or call for interim measures pending a decision, such as immediate withdrawal of the advertisement.

⁹⁴ Ibid, pg 66

There is a review procedure, only for exceptional circumstances, whereby the Committee can be asked to reconsider a ruling within 21 days. A Review Panel, comprised of three members appointed by the Board for five-year terms, will consider a review either in the case of new evidence or clear error by the Complaints Committee. There is a €30 fee for consumers or €5000 for advertisers to apply for review, refundable if the original decision is reversed.

This most important form of “punishment” the Complaints Committee metes out is bad publicity. The ASAI publishes Case Reports including names of advertisers, promoters and agencies involved. A non-compliant advertisement must be immediately withdrawn or amended. In order to ensure compliance with ASAI rulings, the Board is empowered to discipline advertisers with penalties such as fines and ASAI membership suspension or expulsion.

C. Cases

Despite an advanced Code and seemingly high levels of public awareness of advertising self-regulation in general, there has been little activity in Ireland as far as action against green claims is concerned. According to the ASAI, there have been only ten complaints on the subject since 1998. The cases for which the ASAI could provide information involved Shell petrol, home heating and passenger cars. Of these four complaints, three were upheld at least in part.

The two car cases were both straightforward, with one radio advertisement for a Mitsubishi Charisma claiming that the car’s fuel efficiency meant the car was “good for the environment as well as your pocket”. The other, for a television advertisement for a Toyota Prius, claimed to be advertising “a car that was good for the planet”. Both complaints were filed in December 2000 and upheld, and no similar complaints against car companies have been filed since.

It is the case against Shell that is most distressing. Friends of the Earth and Earthwatch claimed that an advertisement for Shell’s Pura Petrol product was misleading. The advertisement, presented on a billboard portraying clear blue skies, stated “Purer air. From Pura Petrol”. FoE objected on several grounds, namely that no petrol is clean or pure, Pura Petrol will not result in bluer skies as depicted in the advertisement and that Shell was falsely implying it was a corporation assisting in the generation of clean air. Surprisingly, the Complaints Committee did not uphold the complaint, even though it ceded that some of the visuals were exaggerating the effects of petrol and that expressions used such as “it’s a breath of fresh air” and “Shell Pura doesn’t just help make the air clean” were tantamount to being absolute claims. In the end, the Complaints Committee decided that,

“consumers in general would be well aware from the volume of information on environmental issues being made available by official and other sources that emissions from all petrol engines are harmful to the environment. Accordingly, consumers would recognise the visuals

as promoting cleaner petrol and would not be led to believe that they would result in the environment depicted in the advertisements".⁹⁵

This line of reasoning would essentially prevent any advertisement using environmental claims from being found misleading. Though the case is from 1998, the subsequent lack of similar cases makes it difficult to assess the seriousness with which the ASAI enforces the environmental section of the Code. The almost complete absence of complaints in recent years indicates that there simply is not much public and civil society awareness or action on this issue in Ireland.

II. New legislation

The Irish government took the opportunity of transposing the UCPD to radically reform consumer law. Thus, the coming into force of the Consumer Protection Act on May 1st, 2007 brings many changes to the enforcement of consumer protection legislation in general and possibly, if consumers and civil society increase their activity, on misleading advertising as well. The legislation repeals all the old legislation dealing with misleading advertisements including, most importantly, the Consumer Information Act 1978. The Consumer Protection Act defines misleading practices as per the UCPD. It also establishes a new enforcement agency and issues new rules governing misleading advertising and codes of conduct.

The biggest development brought in by the Act is the establishment of a new consumer information and enforcement body, the National Consumer Agency (NCA). The NCA has the power to enforce consumer legislation, including the prosecution of offences, though as far as misleading advertisements are concerned the ASAI will continue to enjoy its pre-eminent role. The NCA will only intervene as a last resort. The NCA does however have substantial powers. It can suggest legislative change or give other policy recommendations to the government. Importantly, it shall also review and approve codes of practice and publish voluntary guidelines for traders.⁹⁶ Although submission of codes for approval is completely voluntary, the Act states that codes are admissible as evidence in court proceedings and will be taken into account.⁹⁷

The NCA has the power to request anyone engaging in misleading advertising to discontinue the advertisement in question. If the trader agrees to stop the practice, the remedy may include corrective publication at the trader's expense.⁹⁸ The Act stipulates that any person, including the NCA itself, can apply to the High Court for an order prohibiting the publication or further publication of a misleading advertisement. However, the Act appears to leave self-regulation as the principal method of resolving misleading advertising disputes, stating that in the case of non-compliance with a code that has mechanisms for redress, the NCA may defer consideration of a complaint until

⁹⁵ ASAI Case Report, AC/98080053

⁹⁶ Consumer Protection Act, Section 2.8

⁹⁷ Ibid, Section 3.89

⁹⁸ Ibid, Section 3.72

the means described in the code are exhausted.⁹⁹ That being said, the establishment of the NCA surely puts the onus on the ASAI to show it can regulate adequately.

Conclusions

On paper, Ireland's protection against misleading advertisements is among the stronger in Europe. However, the lack of ASAI action against misleading environmental claims over the years shows that consumers and civil society need to be involved for the system to function. The establishment of the NCA, by backing up self-regulation, might allow more pressure to be applied to the ASAI, but that depends on a more general awareness on the issue.

⁹⁹ Ibid, Section 3.88

Case Study: Czech Republic

Introduction

The example of the Czech Republic demonstrates perfectly the wide disparity between EU Member States concerning the treatment of misleading advertising in practice. This is because the existing legislation and self-regulation, in theory, are capable of providing a level of protection from misleading environmental claims in advertising which is not much inferior to other EU Member States. However, it becomes clear in the Czech Republic that the existing tools are not used enough to affect companies' behaviour.

This brief case study will first go over the existing legislation. Then, the one piece of case law that treated the subject will be looked at in some depth. Next, the existing self-regulation system will be scrutinised. Here it is especially evident that a spread of consumer and NGO awareness could be beneficial. Finally, the implementation of the Unfair Commercial Practices Directive will be studied.

I. Existing legislation

Misleading advertising is currently dealt with in the Czech Republic through two pieces of legislation, the Consumer Protection Act (No. 634/1992 Sb) and the Commercial Code (No. 513/1991). Both are largely based on historical legislation dating before the communist period.

In the Consumer Protection Act, § 8 states "It is forbidden to deceive consumers, especially indicate false, unsubstantiated, inaccurate, unclear, equivocal or exaggerated statements". However, the definition is not further specified. It is left entirely up to the courts to flesh out the definition. There is therefore some scope for the Unfair Commercial Practices Directive to guide the interpretation of this provision. The European Court of Justice's definition of "average consumer" could also shape the provision. Unfortunately, as of yet there have been no cases specifically requiring the Czech courts to define misleading environmental or social claims.

The Commercial Code (No. 513/1991 Sb) § 41-55 also bans misleading advertising inasmuch as it is an unfair competition practice. The law states that unfair competition is illegal and then defines misleading advertising as a kind of unfair competition. Explicitly,

"To engage in unfair competition is to act in commercial competition that is in breach of good commercial practice and is capable of causing harm to other competitors or consumers. Unfair competition is forbidden".

"Misleading advertising is the diffusion of information about one's own or another company, its products or performance, that is capable of evoking a false notion and thus obtaining advantage for one's own or other company in commercial competition at the expense of harming other competitors or consumers".

The law then goes on to set a range of conditions which must be fulfilled in order to constitute a breach.

1. The conduct must happen during commercial competition.
2. It must be in breach of good commercial practice (defined very vaguely).
3. It must be capable of causing harm to other competitors or consumers. Harm may be of a financial nature or nonmaterial. Importantly, misleading advertising falls under so-called “endangering” or “jeopardising” behaviour. Therefore, only the potential to cause harm is judged, rather than the harm itself.
4. Misleading consumers also causes harm.
5. Misleading advertising is defined very broadly, including any diffusion of information about the company, its products or its performance.

Unlike in some other countries, there are no specific procedural provisions in Czech legislation concerning the burden of proof. The plaintiff must first bring some evidence that the company’s statement is false before the Court will require it to prove otherwise. The Court may weigh the opposing evidence and decide based on which version of the story is more probable. On the basis of the Unfair Commercial Practices Directive, Czech courts should in theory place the burden of proof clearly with the company. However, it is not likely that they will take this view on their own.

Cases brought under both laws are heard by the civil courts, where NGOs have standing. These courts can also assess codes of conduct when applicable.

II. Case Law

Until very recently, environmental and social claims have not been included in Czech advertising. It is therefore not too alarming that no Czech court cases have dealt specifically with misleading environmental and/or social claims. That being said, there is one case that touches on the subject and is therefore indicative of the view the Czech courts might take in the future.

This case was brought against Danone not for an advertisement as such, but for the product labelling and packaging of its “BIO” line of yoghurts, though advertisements for the product also featured its name and packaging.

At the time Danone released the product on the Czech market, in 1997, the “Bio” label was legally reserved only for products of the organic farming industry. Furthermore, provisions forbid the use of the “Bio” prefix as a name for goods that were not produced in the organic farming system. In addition, Danone’s “BIO” graphical design resembled the legally protected mark for organic products, with both using a dark green background colour with white letters, stripes, and an oversized dot over the letter “I”.

Danone’s three-fold argument was quite flimsy. Firstly, it claimed that introducing its product actually promoted organic farming by increasing public

awareness. Secondly, it asserted that the “BIO” label is not indicative of the organic farming sector, but that it is a general term invoking life and health. Thirdly, Danone argued that its activities did not cause any harm to its competitors or to consumers. This argument was necessary because the possibility of infliction of harm is a necessary condition for an advertisement to be misleading.

Danone lost the case in Prague’s Municipal Court. It concluded in its decision that Danone “might” have misled consumers both about the origin of “BIO” yoghurts and about the nature of the “BIO” label and its connection to the organic farming sector. Thus Danone “might” have harmed its competitors and consumers, possibly obtaining an unjustified advantage in the market. The decision was based on the abovementioned legal provisions banning unfair competition in the Commercial Code. It is also worth mentioning that at first the Municipal Court rejected the plaintiffs’ claim on the grounds that they were not able to calculate the damage caused to competitors and consumers. On appeal the High Court ruled that only potential harm needs to be demonstrated.

Danone appealed the decision to the High Court, but accepted a settlement before a decision was reached. The settlement followed the line of the Municipal Court’s decision, and obliged Danone to publicly apologise to consumers in the biggest national press agency and its websites.

Looking back at the case, the biggest drawback involved time and commensurate expense. It was filed in 1998 and settlement was reached in 2006. While competing firms may be able to make an investment of this magnitude in order to prevent long-term unfair competition, NGOs and consumer agencies cannot easily use this system. A faster method would be much favourable, so that a misleading advertisement seen today could be quickly stopped. Though this points to the purported benefits of self-regulation, it is clear that this system is not very developed in the Czech Republic either.

III. Self-regulation

Like in other countries, there is a voluntary complaint mechanism set up by representatives of the Czech advertising industry, the Council for Advertisement (*Rada pro reklamu*). Anyone can send complaints based on the Code of Advertisement (*Kodex reklamy*), which is the code of conduct set up by the Council for Advertisement. The Code specifies the legal regulations and ethical rules which apply and contains explanatory provisions. However, it only resolves complaints that have an ethical and a legal element. The recommendations it issues, as with other voluntary systems, are not binding.

Of course, the strength of self-regulation derives from how much it is used and how much trust is instilled in it, rather than the force of the body, which will by nature always be low. In the Czech Republic, the problem of misleading environmental advertising is too new and the voluntary complaint mechanism too obscure for it to play a large role at this time. Thus it has not

yet dealt with any claims where alleged misleading advertising was based on environmental or social claims.

IV. New legislation

Given the obvious shortcomings with both the existing legal system and self-regulation in the Czech Republic, one might look to the new Unfair Commercial Practices Directive and subsequent developments for progress. Although implementing legislation has not yet been passed, the consultation procedure as it has been conducted thus far does not inspire optimism. The Ministry of Industry and Trade proposed changes to current legislation that would fulfil the transposition requirements of the UCPD. However, the Legislative Council of the Government, which draws together legal experts from various organisations including NGOs, disapproved of the proposal citing serious shortcomings. Among them are a restrictive definition of misleading advertising and a definition of Codes of Conduct which only includes voluntary obligations made by companies towards their consumers, thereby omitting from the definition broader social and environmental claims. The proposal also does not mention that code of conduct breaches will be considered misleading advertising. The Czech government is yet to take a decision on the proposal, but it is possible that since the UCPD calls for maximum harmonisation, the proposal would not fulfil all the requirements and would need to be revised.

Conclusions

This case study of the Czech Republic makes it clear that advertising practices, even by seasoned multinational companies, are taking time to spread to central and eastern Europe. What is also clear is the fact that the practice comes first and the regulatory environment comes later as a reaction. This is true in the old EU Member States, explaining insufficient methods for dealing with misleading advertising there in spite of a proliferation of misleading environmental claims. In central and eastern Europe, though current regulation is far from adequate, the element of maximum harmonisation of the UCPD offers a chance, though slight, that the means for dealing with misleading environmental claims will arrive in time to prevent such advertisements from running rampant, as they now do in most other EU Member States.

The research for this case study was provided by Filip Gregor of the Environmental Law Service, Brno, Czech Republic.

General Conclusions

From all these case studies and comparisons some conclusions must be drawn. A wide variety of national systems for dealing with misleading advertising have been looked at, and they can be divided into several categories. Germany and other countries prohibiting misleading advertising only inasmuch as it constitutes unfair competition clearly afford the least protection against misleading environmental and social claims. Consumers and civil society organisations have limited rights to complain and there is very little consumer awareness.

Most other Member States have specific laws protecting consumers and they have self-regulatory bodies set up to enforce misleading advertising legislation. These can be subdivided into two categories: those whose self-regulatory bodies have a modicum of independence from the advertising industry and use negative publicity as a key sanction; those whose self-regulatory bodies are not independent at all and do not generate much public awareness or civil society use or acceptance.

In the report we have seen that there are substantial differences among countries in how well the self-regulatory complaint mechanisms work. In some countries this has resulted in interesting cases where self-regulatory bodies ruled advertisements misleading and campaigning groups were able to use the system successfully. Nevertheless, we have also seen that the voluntary mechanisms have a number of fundamental flaws. Most important is that, due to the long procedures, in most cases they are not capable of stopping an advertisement in time to make an impact: the advertisement has finished its run before a case is closed. Moreover, their ability to sanction errant advertisers is weak or non-existent; their lack of jurisprudence provides no preventive impact (so even if an advertisement is found to be misleading, nothing stops the advertiser from launching a similar advertisement the next day); and it does not exercise independence from the advertising industry.

The best existing systems of protection against misleading advertisement can be found in the Nordic countries, who keep the state involved through the Consumer Ombudsman and a special Market Court system. This functions best because the authority entrusted to the Ombudsman allows him to act quickly, while the controversial cases that make it to the Market Court provide jurisprudence, legal certainty, effective sanctions and fines, publicised rulings and an appeals process which guides future corporate behaviour and Ombudsman action. Since the Consumer Ombudsman is the head of a state authority, his independence is unquestionable.

Friends of the Earth favours a system of strong government involvement, realising that existing legal procedures in most Member States do not function adequately. While the Nordic system currently functions best overall, the following characteristics are all important and can be advocated in all countries:

- **True independence of juries, boards, ombudsmen etc;**
- **Short procedures, including a kind of fast track for extraordinary situations;**
- **Effective sanctions, including fines, with more severe penalties for repeat offenders;**
- **Publicised rulings;**
- **An appeals procedure;**
- **Binding rules;**
- **Accumulation of jurisprudence;**
- **Stakeholder involvement.**

Finally, the EU Unfair Commercial Practices Directive of 2005 is acting as a catalyst for mild reform. It has put more legal force behind codes of conduct, secured state control as a fail-safe option for self-regulation when it does not function as it should and has provided Member States with an opportunity to undergo reform, as in Belgium. It is not revolutionary enough to force radical change, but it has helped to push most Member States a little way in the right direction.

Abbreviations

ASA	Advertising Standards Authority
ASAI	Advertising Standards Authority for Ireland
ASBOF	Advertising Standards Board of Finance
BVP	Bureau de Vérification des Publicités
CAP	Committee on Advertising Practice
JEP	Jury d’Ethique Publicitaire
MPA	Marketing Practices Act
NCA	National Consumer Authority
OfCom	Office of Communications
OFT	Office of Fair Trading
OIP	Observatoire Indépendant de la Publicité
UCPD	Unfair Commercial Practices Directive

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