Business Marketing Directive

Directive 2006/114 concerning misleading and comparative advertising (codified version)

This briefing is one of a series of ‘Implementation Appraisals’, produced by the European Parliamentary Research Service (EPRS), on the operation of existing EU legislation in practice. Each such briefing focuses on a specific EU law which is, or will shortly be, subject to an amending proposal from the European Commission, intended to update the current text. ‘Implementation Appraisals’ aim to provide a succinct overview of material publicly available on the implementation, application and effectiveness of an EU law to date - drawing on available inputs from, inter alia, the EU institutions and advisory committees, national parliaments, and relevant external consultation and outreach exercises. They are provided to assist parliamentary committees in their consideration of the new Commission proposal, once tabled.

EP committee responsible at time of adoption of the EU legislation: Committee on the Environment, Public Health and Consumer Protection¹ (Directive 84/450) and Committee on Legal Affairs (JURI) (Directive 2006/114)

Date of adoption of original legislation in plenary: 8 May 1979 (Directive 84/450) and 12 October 2006 (Directive 2006/114)

Deadline for transposition of legislation: As Directive 2006/114 codifies Directive 84/450 and its amendments included in Directive 97/55 and Directive 2005/29 (only Article 14), it does not as such include a provision about its transposition. However, Directive 84/450 was supposed to be transposed by 1 October 1986 (Article 8), Directive 97/55 by 23 April 2000 (Article 3) and Directive 2005/29 by 12 June 2007 (Article 19).

Planned date for review of legislation:
- Neither Directive 84/450, nor Directive 2006/114 include a review clause. However, in 2011, the Commission announced its intention to review Directive 2006/114 in its review of the Small Business Act for Europe.²
- Pursuant to Article 2 of Directive 97/55 the Commission shall study the feasibility of establishing effective means to deal with cross-border complaints in respect of comparative advertising. Within two years after the entry into force of this Directive the Commission shall submit a report to the European Parliament and the Council on the results of the studies, accompanied if appropriate by proposals.³
- By 12 June 2011 the Commission shall submit to the European Parliament and the Council a comprehensive report on the application of this Directive, in particular of Articles 3(9) and 4 and Annex I, on the scope for further harmonisation and simplification of Community law relating to consumer protection, and, having regard to Article 3(5), on any measures that need to be taken at Community level to ensure that appropriate levels of consumer protection are maintained. The report shall be accompanied, if necessary, by a proposal to revise this Directive or other relevant parts of Community law (Article 18, Directive 2005/29).⁴

Timeline for new amending legislation: The Commission Work Programme 2015 (Annex III: REFIT) noted that the Directive 2006/114 will simplify and streamline the scope of protection in business-to-business transactions. According to the Commission Staff Working Document: Regulatory Fitness and Performance Programme⁵ “in 2015, the Commission plans to ... bring improved protection, simplification and clarity in relation to misleading marketing practices and comparative advertising through a revision of the Business Marketing Directive.” The same document claims that the Commission’s proposal will be adopted ‘by the end of 2015’.⁶

¹ Committee on the Environment, Public Health and Consumer Protection is nowadays split into Committee on Environment, Public Health and Food Safety (ENVI) and Committee on Internal Market and Consumer Protection (IMCO).
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1. Background

By the end of 2015, the European Commission intends to submit a proposal for simplification of Directive 2006/114 with "a focus on simplifying and streamlining the scope of protection in business-to-business transactions, clarifying what is prohibited (including through the definition of a 'black-list' of prohibited practices) and making it easier for businesses to find out where to complain and how to obtain help if they have been the victim of misleading advertising." The European Commission expects that the potential benefit of Directive 2006/114 for SMEs could amount to € 419 - € 477 million per year. This is connected with reducing costs relating to the misleading marketing practices where SMEs cannot themselves enforce their rights effectively.

The European Commission intends also to provide general rules against misleading marketing practices and market scams that are very often directed at the SMEs. Common misleading marketing practices include practices of so-called misleading directory companies. In 2012, the then Commission's Vice president Reding informed about more than 13,000 complaints on company directory scams, though she noted that this might only be 'a tip of an iceberg'. According to definition of the European Commission, misleading directory companies are traders who use misleading marketing practices and send out forms asking businesses to update details in their directories, seemingly for free. If the targeted business signs the form, they are however told that they have signed a contract and will be charged a yearly sum. Subsequent attempts to withdraw from the contract are usually refused and the companies are often pursued for the amount purportedly owed through debt collection agencies. Another characteristic of this scheme is the fact that the victim and the offender are often from two different EU countries.

- **Directive 2006/114 concerning misleading and comparative advertising (codified version)**

Directive 2006/114 codifies Directive 84/450 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising and the amendments of the latter directive. The purpose of Directive 2006/114 is to protect traders (businesses) against misleading advertising and the unfair consequences thereof and to lay down the conditions under which comparative advertising is allowed. Directive 2006/114 sets minimum legal standards for misleading advertising and comparative advertising across the EU Member States. However, the Member States are flexible to lay down a higher level of protection.

Advertising is defined by Article 2 (a) of the Directive as the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations.

Pursuant to Article 2 (b) of the Directive, an advertising which in any way deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which is likely to affect their economic behaviour or which injures or is likely to injure a competitor is misleading advertising. In order to determine whether the advertising is misleading it is necessary to assess all features of advertising and the information it contains such as information concerning price or its calculation, characteristics of goods or services and attributes or rights of advertiser, for example, his ownership.

At the same time the Directive sets rules for the comparative advertising. It defines comparative advertising as an advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor and compares them with goods or services of advertiser (Article 2 (c)). Comparative advertising is not a priori forbidden however advertisers when comparing their goods or services with the goods or services of competitors must make sure that their advertising:

- is not misleading,
- compares goods or services that are intended for the same purpose or meet the same needs ("like with like"),

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6 Ibid., p. 100.
7 See, November 2012 presentation of Vice President Reding.
8 See, Communication Protecting businesses against misleading marketing practices and ensuring effective enforcement, p. 1.
- objectively compares the qualities of those goods and services,
- does not discredit the trade marks,
- in case of products with designation of origin, relates to products with the same designation,
- does not present goods or services as imitations or replicas of trade mark protected goods or services,
- does not take unfair advantage of reputation of a trade mark, and
- does not create confusion among traders.

Directive 2006/114 provides a primary protection to businesses (traders) and not to consumers. 9 With regard to misleading advertising the Directive lays down rules for the business-to-business transactions (B2B), while with regard to comparative advertising it regulates the business-to-business and business-to-consumer transactions (B2C). The Directive requires Member States to create adequate and effective mechanisms to combat misleading advertising and enforce compliance with the provisions on comparative advertising. Member States are obliged to confer upon the courts or administrative authorities powers enabling them to order the cessation of misleading advertising or unlawful comparative advertising or order the prohibition of publication or such advertisement.


While Directive 2006/114 mainly covers the business-to-business (B2B) relations, Directive 2005/29 provides a comprehensive legal framework protecting consumers against all forms of unfair commercial practices in business-to-consumer relations (B2C). According to Directive 2005/29, the B2C relations also include advertising and marketing by a trader, directly connected with the promotion, sale or supply of a product to consumers. 10 Directive 2005/29 thus harmonizes the laws of the Member States on unfair commercial practices, including unfair advertising, which can directly harm consumers and their economic interests. According to this Directive, commercial practices are misleading if they cause or are likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and they involve any marketing of a product, including comparative advertising, which creates confusion with any products, trademarks or other distinguishing marks of a competitor. Annex I to this Directive includes a 'black list' of the commercial practices which are under all circumstances considered unfair with regard to B2C relations. For now, it is not clear whether Directive 2005/29 will be in any way touched upon by the European Commission's proposal aiming at the revision of Directive 2006/114.

2. EU-level reports, evaluations and studies

- First Report on the application of Directive 2005/29 concerning unfair business-to-consumer commercial practices in the internal market (March 2013) 11

Although this report primarily dealt with the application of Directive 2005/29, at one point it directly referred to Directive 2006/114, namely in context of the need for an extension of Directive 2005/29 beyond business-to-consumer transactions to also include business-to-business transactions. The report noted that the extension at EU level of the scope of Directive 2005/29 to business-to-business relations has been raised by various stakeholders who intended to deal with the problem of the practices of misleading directory companies, partially forbidden by Directive 2006/114. However, the report showed that the vast majority of Member States and stakeholders do not support an extension of the Directive to business-to-business transactions. Because of that the Commission concluded that there is no case for such an extension. In connection with Directive 2005/29 the future efforts have to concentrate on key thematic areas, such as retail trade (including e-commerce), the transport sector, the digital economy and energy/sustainability where detriment and lost opportunities for consumers appear to be most frequently recurring and where the Single Market’s growth potential is the biggest. 12 In this context this Directive plays a crucial role.

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12 Ibid., p. 31.
The Commission’s green paper addressed a specific issue of a business-to-business food and non-food chain i.e. transactions between undertakings or between undertakings and public authorities leading to the delivery of goods destined mainly to the general public for personal or household consumption or utilisation. In the same document, the Commission noted that in the field of marketing, Directive 2006/114 provides minimum protection rules in order to protect customers and competitors against misleading advertising. The Commission suggested that future actions in the field of business-to-business misleading marketing practices should include a better enforcement and substantive rules protecting businesses against misleading schemes in Europe. In this context the Commission revealed its intention to present a legislative revision of this Directive with a view to install an enforcement cooperation mechanism to strengthen the cross-border cooperation and to ensure better protection against the most harmful misleading marketing schemes.

Although Directive 2006/114 does not include a review provision, in 2012, as a reaction on two resolutions of the European Parliament, the Commission carried out a review of the application and implementation of the Directive by the Member States. The Commission found that the Member States have fully harmonised rules on comparative advertising and that these rules have been transposed in a uniform manner. On the other hand, the Commission discovered a great variety of rules that go beyond the minimum protection against misleading advertising. In general, the Member States have chosen many different models to transpose the Directive. This, in the end, led to different levels of protection for European businesses. With regard to the enforcement of the Directive, the Commission found that there is a crucial difference among individual Member States. The communication also noted that the protection of the businesses varies in cross-border advertising.

The Communication focused on a broad subject of misleading marketing practices which also include misleading advertising and other marketing techniques. It showed that the Directive is not very effective against misleading directory companies as some enforcement authorities raised doubts as to whether these practices are advertising. As the main drawbacks of the Directive the Commission identified that:

- there is a lack of clarity of definition of the term 'advertising',
- the test for determining whether a practice is misleading does not give sufficient legal certainty,
- Directive 2006/114 does not provide for a cross-border cooperation procedure,
- some national authorities lack enforcement powers to stop such misleading practices in business-to-business relations and
- that there is a lack of mutual cooperation between the Member States and inability to request enforcement action from other Member States.

In order to react to these challenges, the Commission noted that legislative action is necessary as the current legislative framework has several deficiencies. This action should lead to a revision of the rules prohibiting certain practices and to strengthening the enforcement of the rules in cross-border cases. These two general measures should, in particular:

- set up a temporary and an ad hoc network of authorities to step up the enforcement of Directive 2006/114,
- clarify the scope of the Directive by introducing a clearer definition of misleading marketing practices,
- introduce a black-list of the most harmful misleading marketing practices,
- introduce penalties for infringements of the national provisions implementing the Directive,
- clarify certain aspects of comparative advertising based on the jurisprudence of the Court of Justice,
- create an enforcement cooperation procedure in cases of cross-border misleading marketing practices,
- introduce mutual assistance obligations for the Member States with explicit possibility of requesting enforcement measures in cross-border situations and
- oblige Member States to designate an enforcement authority in the area of business-to-business marketing.\(^{18}\)

**Roadmap - Possible revision of Directive 2006/114 concerning misleading and comparative advertising subject to the outcome of the consultation (October 2011)**

In 2011, the Commission adopted a roadmap that presented an intention of the Commission for a possible revision of Directive 2006/114. According to the roadmap the Commission wanted to address the problem of the practices of misleading directory companies as well as other similar misleading practices in business-to-business relations. The policy objective of such a revision was to "enhance cross-border enforcement of Directive 2006/14 with new tools what should specifically tackle the issue of misleading directory companies and other misleading practices in the business-to-business relations".\(^{19}\) The roadmap noted that the main benefit of a possible legislative action should be a better enforcement of the Directive and thus improved protection against misleading advertising. In order to assess the need to revise the Directive the roadmap informed about the Commission's intention to carry out the public consultation on this topic and its endeavour to assess the implementation of the Directive on the basis of a questionnaire for Member States.\(^{20}\)

**Study: Misleading practices of ‘directory companies’ in the context of current and future internal market legislation aimed at the protection of consumers and SMEs (October 2008)**\(^{21}\)

This study, requested by the European Parliament’s Committee on Internal Market and Consumer Protection,\(^{22}\) goes beyond the issue of advertising. The study researches the problem of ‘directory companies’ applying misleading practices. It provides for an overview of judicial and extra-judicial measures that can be taken by competent authorities of the Member States when tackling these malpractices. At the same time the study presents an overview of the implementation of the EU legal framework applicable to the researched issue. Although the study talks about these practices at the EU level, a detailed legal analysis was carried out only in 3 Member States: the Netherlands, Austria and Spain. Nonetheless, the study supported its conclusions also by a stakeholder survey.

At the time, the study reached several conclusions that can have an impact on the issue of advertising, in particular that:

- substantial numbers of enterprises in Member States are affected by the problem of ‘directory companies’,
- a number of lawsuits filed against ‘directory companies’ is lower than a number of complaints,
- non-judicial redress mechanisms are rare in disputes with ‘directory companies’ operating cross-border,
- the implementation of Directive 84/450 (codified by Directive 2006/114) has not introduced legal loopholes in the national legislation of the Member States analysed,
- Directive 2006/114 has not led to relevant amendments to the national legislations of the Member States,
- existing advertising law remedies do not provide for relief in terms of the effects caused by the misleading practices and
- there is no specific legislation concerning ‘directory companies’ engaging in misleading practices in most Member States.\(^{23}\)

\(^{19}\) Roadmap, p. 2.
\(^{20}\) See further, point 5.
\(^{22}\) The study was carried out by CIVIC CONSULTING.
\(^{23}\) Ibid., p. i - ii.
The study presented three possible roads of action:
- option 1 - no legislative action at EU-level, while strengthening enforcement cooperation,
- option 2 - including a list of practices that are considered misleading to Directive 2006/114 and
- option 3 - extending the scope of Directive 2005/29 to business-to-business relations.  

3. European Parliament position / MEP questions

- European Parliament resolution of 22 October 2013 on misleading advertisement practices

With regard to prevention issues, Parliament asked the Commission to clarify the scope of Directive 2006/114 in order to allow better protection for businesses against misleading marketing practices. It called on the Commission to ensure coordination of a smooth exchange of information from the national databases whilst taking account of the budgetary limitations. It also called on the Commission to establish a mutual network between national enforcement bodies to improve the implementation of Directive 2006/114 in cross-border cases. Parliament supported the Commission’s intention to investigate the possibility of introducing an EU-wide blacklist of misleading marketing practices and of companies who have been repeatedly convicted for such practices. In this context, Parliament recommended that such a blacklist should be coherent with that which already exists under Directive 2005/29. With regard to the enforcement of Directive 2006/114, Parliament called on the Commission to extend the scope of Directive 2005/29 to cover also business-to-business contracts in parallel to the consideration of a possible review of Directive 2006/114 in order to assess whether this would result in a more coherent approach since it would extend the concept of unfair commercial practices to business-to-business relations. In this context it also called on the Commission to examine whether convictions for using serious and repeated misleading marketing practices could affect the eligibility of the companies concerned for taking part in EU procurement procedures and/or receiving EU funding.

In January 2014, the Commission came forward with a follow up to this resolution. With regard to exchange of information, the Commission considered that the existing Internal Market Information system established by Regulation 1024/2012 provides an adequate platform to ensure exchange of information between Member States and the Commission. In this context, the Commission announced that it is assessing the possibility of using this system to facilitate cross-border enforcement between the Member States. In connection to the list of traders who have been convicted for misleading practices, the Commission argued that creating such an EU-wide list of convicted traders is not a practical option, however it welcomed the creation of a ‘blacklist’ of misleading marketing practices. The Commission acknowledged that it is important that businesses are aware of the dangers related to misleading marketing practices. Because of that, in the context of the possible legislative proposal, the Commission expressed its intentions to assess how initiatives to educate and inform businesses could be promoted. In connection to the need to introduce effective, proportionate and dissuasive sanctions, on establishing the mutual cooperation network and on introducing the definition of misleading marketing practices, the Commission pointed out that these elements could be included in the possible legislative revision of Directive 2006/114. It also noted, that it will assess the possibility of introducing some minimum requirements for enforcement systems in Member States in order to ensure that businesses are protected in cross-border transactions. The Commission also argued that it conducted an in-depth evaluation of Directive 2006/114 and Directive 2005/29 and assessed the possibility of extending the application of Directive 2005/29 to business-to-business situations.

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24 Ibid., p. 33 - 35.
26 SP(2014)62.
In this resolution, the European Parliament expressed its regrets that Directive 2006/114 appears to be either insufficient in providing an effective remedy or inadequately enforced by Member States. It also recalled the Commission's duty to ensure that the Directive is adequately implemented by Member States. In this regard it called on the Commission to proactively verify the Member States' transposition, implementation and national enforcement of Directive 2006/114 and, to take corrective action where needed. Also, it urged the Commission to speed up its activities with regard to revising and improving the Directive in order to put an end to the misleading practices of business directory companies. Parliament called for a specific black-list of misleading practices.

The Commission reacted to this resolution in the previously mentioned Communication from the European Commission - Protecting businesses against misleading marketing practices and ensuring effective enforcement - Review of Directive 2006/114 concerning misleading and comparative advertising of November 2012.

Parliament stressed the importance of Directives 2005/29 and 2006/114. It expressed its belief that proper transposition, implementation and enforcement of these Directives are crucial in order to achieve their aims and welcomed the Commission's efforts to assist Member States in transposing the Directives. Furthermore, Parliament considered two options: to submit a legislative proposal for an amendment to Directive 2006/114 to include a "black list" of misleading practices or to extend the scope of Directive 2005/29 so that the Directive, or its Annex, would cover business-to-business contracts. In this context, Parliament requested the Commission to report on the measures taken. Parliament also encouraged the Commission to develop more efficient implementation monitoring tools, such as sweeps, in such a way that the enforcement of consumer protection law can be improved. Lastly, it insisted that the Commission submits a comprehensive implementation report pursuant to Article 18 of Directive 2005/29 which incorporates experience gained from Directive 2006/114.

In January 2009, the Commission came forward with a follow up to this resolution. It noted that misleading business-to-business practices are already covered by Directive 2006/114 and they should be regulated solely by this Directive. The Commission pointed to the fact that there was no evidence that this Directive is not functioning properly in relations to business-to-business practices. With regard to the 'black list' of misleading practices the Commission claimed that it is not the most efficient way to tackle these practices. Furthermore, the Commission noted that it is using the Sweeps as tools for monitoring the implementation of consumer protection laws. The Commission also confirmed its intention to submit a comprehensive report on the application of Directive 2005/29 and agreed that it would make sense to include the experience gained from the application of the Directive 2006/114 in this report. Report on the application of Directive 2005/29 concerning unfair business-to-consumer commercial practices in the internal market, as described above, was adopted in March 2013.

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28 P7_TA(2011)0269.
30 According to the webpage of the Commission, sweep is an EU-wide screening of websites in particular the online sector. It is conducted in a form of simultaneous, coordinated checks to identify breaches of consumer law and to subsequently ensure its enforcement. Following such investigation, the relevant national authorities take proper enforcement actions: they contact companies about suspected irregularities and ask them to take corrective action or face legal action. See, http://ec.europa.eu/consumers/enforcement/sweeps/index_en.htm, accessed on 8 July 2015.
31 SP(2014)62.
With regard to Directive 2006/114, Parliament expressed its regrets that the Directive appears to be either insufficient in terms of providing an effective remedy or inadequately enforced by Member States. Parliament requested the Commission to report on the feasibility and possible consequences of amending Directive 2006/114 in such a way as to include a “black” or “grey” list of practices that are to be regarded as misleading. Furthermore, it called on the Commission to ensure that Member States fully and effectively transpose the Directive so that protection is guaranteed in all Member States, and to influence the shape of the legal and procedural tools available. At the same time, Parliament called on the Commission to step up its monitoring of the implementation of Directive 2006/114. At the same time, Parliament expressed its regrets that Directive 2005/29 does not cover business-to-business transactions and that Member States appear reluctant to extend its scope. In this context it requested the Commission to report on the feasibility and possible consequences of extending the scope of Directive 2005/29 to cover business-to-business contracts.

In March 2009, the Commission came forward with a follow up to this resolution. The Commission considered that Directive 2006/114 provides sufficient protection against the misleading practices of certain business directory companies. In this context, the Commission claimed that there is no real evidence that the legislative framework is insufficient. The Commission considered that there may be scope for certain Member States’ competent authorities to increase enforcement action, against these companies and to cooperate with other Member States to tackle cross-border practices. The Commission did not specify this Member States. With regard to broadening the scope of Directive 2005/29 the Commission noted that Member States are free to apply the provisions of Directive 2005/29 also to business-to-business transactions. It pointed out the example of Germany, Austria and France. The Commission also noted that it would most likely be preferable to continue to regulate such business-to-business practices solely in Directive 2006/114.

**Written questions**

**Written question by MEP Olga Sehnalová, March 2015**
The MEP wanted a clarification on the Commission’s position on advertising based on subliminal perception. The MEP pointed out that neither Directive 2006/114 nor Directive 2005/29 incorporate any provision on subliminal advertising.

**Answer given by Ms Jourová on behalf of the Commission, April 2015**
The Commission answered that these Directives do not include special provisions on the prohibition of this advertising. With regard to Directive 2005/29 the Commission noted that this commercial practice is not included in Annex I, which lays down a limitative list of practices to be considered unfair in all circumstances. The Commission is of the opinion that the Member States are not allowed to impose a general ban on business-to-consumers subliminal advertising. With regard to Directive 2006/114 the Commission highlighted that this directive sets only minimum harmonisation standards in business-to-business relations and that the Member States are free to adopt stricter rules and include a prohibition of subliminal advertising in business-to-business relations.

**Written question by MEP Biljana Borzan, February 2015**
The MEP asked about the Commission’s plans linked with ensuring a transparent market and consumer protection. The MEP also asked whether these practices will be regulated by a single regulation so as to reduce the possibility of manipulation.

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34 In November 2012, the Commission in its Communication (COM(2012) 702 final) noted that a black-list of the most harmful misleading marketing practices should be developed.
35 SP(2009)988.
Answer given by Ms Jourová on behalf of the Commission, April 2015

The Commission replied that EU legislation protects consumers from misleading product packaging at least with four different legal documents that is Directive 2005/29, Directive 2006/114, the Price Indication Directive (1998/6) and the Food Information Regulation (1169/2011). The Commission also underlined the need to ensure effective enforcement of EU consumer law. It noted that a key priority for this action is updated guidance for national enforcers with a view to further clarifying the interplay with other EU legislation and facilitating the enforcement activities of national enforcement authorities. Nonetheless, the Commission suggested that the primary responsibility for enforcing consumer protection law lies with the Member States.

Written question by MEP Gabriel Mato, February 2015

The MEP asked the Commission about the Commission's measures to ensure that standards relating to misleading advertising and advertising shared on the new social media channels.

Answer given by Ms Jourová on behalf of the Commission, June 2015

The Commission answered that it was aware that emerging communication technologies have brought about significant changes in the way traders market their products. Nonetheless, it pointed to the EU legislation which already protects consumers and businesses from misleading marketing practices, namely, to Directive 2005/29 and Directive 2006/114. In connection to the latter Directive, the Commission stated that the Directive regulates misleading advertising in business-to-business relations and ensures that comparative advertising always compares 'like with like'. The Commission also pointed out that Directive 2006/114 protects traders against misleading advertising. Lastly, it informed the MEP that a review of Directive 2006/114 is foreseen by the Commission Work Programme 2015.

Written question by MEP Monica Luisa Macovei, October 2013

The MEP referred to Communication (COM(2012)702)36 where the Commission noted that the current legislative framework has several deficiencies, particularly as regards substantive and procedural rules and because of that there should be a further initiative addressing unfair trading practices between businesses in the retail sector. In this context the MEP asked about the Commission’s timeframe for tabling the proposal for amending Directive 2006/114. In addition, the MEP asked about the Commission's plans for tabling a proposal addressing unfair trading practices between businesses in the retail sector.

Answer given by Mrs Reding on behalf of the Commission, January 2014

The Commission confirmed its commitment to provide a comprehensive solution for European businesses and other entities affected by misleading marketing practices. In this context, the Commission noted that it was considering legislative action in order to clarify certain provisions, strengthen the enforcement against the most harmful questions and ensure effective cooperation between Member States. With regard to unfair trading practices in the food sector, the Commission informed that it has taken no decision yet on any proposal addressing unfair trading practices between businesses in the retail sector.37

4. European Economic and Social Committee (EESC)

In its opinion of April 2014 on Consumer protection and appropriate treatment of over-indebtedness to prevent social exclusion the EESC explored the problem of over-indebtedness. It noted that misleading advertising campaigns can be one of the factors that negatively influence this social problem. In this regard the EESC stressed that the EU legislation has to be more incisive and ambitious than Directive 2006/114. The EESC called for banning certain forms of misleading or abusive advertising, particularly where they target vulnerable consumers or consumers who are already unable to pay off their debts.

In its opinion of May 2013 on protecting businesses against misleading marketing practices and ensuring effective enforcement and review of Directive 2006/114 the EESC considered the Commission's review of

36 See above.
Directive 2006/114. In this opinion the EESC accepted that the Commission should immediately present a specific legislative proposal on this issue, based on an impact assessment. In order to ensure more uniform and effective enforcement of the Directive across the Member States, the EESC called for the adoption of a framework regulation. At the same time the EESC expressed an opinion that a joint review of Directive 2006/114 and Directive 2005/29 is the best way to achieve coherent and consistent rules prohibiting misleading marketing practices as it addresses business-to-business and business-to-consumer relations at the same time. In this context it urged the Commission to start such an action in the short term. The Committee also urged the Commission to develop and enforce complementary measures to improve information and dissemination and cooperation between administrative authorities and other stakeholders. Furthermore, the EESC noted that an amendment to Directive 2006/114 along the lines suggested by the Commission in its Communication (COM(2012)702) does not ensure protection for SMEs.

5. Public consultation

In order to gather more information on misleading marketing practices the Commission held a Public Consultation on Directive 2006/114 concerning misleading and comparative advertising and on unfair commercial practices affecting businesses. In the form of a questionnaire, it requested information from the Member States. The public consultation took place between 21 October 2011 and 16 December 2011. It received a total of 280 responses. The Commission gathered data on overall effectiveness and existing problems in application of Directive 2006/114 and wider issues concerning marketing practices.

The main problems discovered by the consultation included, in particular:
- misleading directory companies,
- misleading marketing practices sometimes referred to as mass-marketing frauds or scams,
- misleading payment forms,
- offers to extend internet domain names,
- offers to extend protection for trademarks or
- misleading marketing concerning advertising on social networks.

The public consultation showed that a legislative action is supported by stakeholders. As noted by the Communication, the public consultation called for:
- an increased protection for small companies and independent professionals against misleading marketing practices,
- development of a cooperation procedure for cross-border cases of misleading advertising,
- development of a EU-wide instrument to protect businesses against the most harmful misleading marketing practices and
- changes of Directive 2006/114 with regard to cross-border actions regarding misleading advertising.

Based on this public consultation the Commission concluded that:
- Directive 2006/114 provides a solid regulatory framework for a considerable part of the business-to-business advertising market,
- the persistence of certain large-scale misleading schemes shows that the existing mixture of the EU-wide rules combined with self-regulation needs to be strengthened to address certain clearly identifiable scams,
- the most vulnerable businesses to misleading schemes are SMEs and independent professionals and
- specific consideration should be given to the interpretation of comparative advertising rules where significant case-law has been developed by the Court of Justice of the EU.

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39 See above.
41 Ibid., p. 9.
6. Court of Justice

The issue of misleading or comparative advertising was multiple times the subject of cases before the Court of Justice.\(^{42}\) In various judgments where the Court of Justice reacted to references of national courts for preliminary rulings and gave authoritative interpretation of EU law:

- **Judgment of 13 March 2014, C-52/13 - Posteshop SpA – Divisione Franchising Kipoint v Autorità Garante della Concorrenza e del Mercato,**

The Court here interpreted a provision of Directive 2006/114 with regard to relation between misleading advertisement and unlawful comparative advertisement. It judged that with regard to the protection afforded to traders, Directive 2006/114 is to be interpreted as referring to misleading advertising and unlawful comparative advertising as two independent infringements and to the effect that, in order to prohibit and penalise misleading advertising, it is not necessary that that latter at the same time should constitute unlawful comparative advertising.

- **Judgment of 18 June 2009, C-487/07 - L’Oréal and others**

With regard to comparative advertising the Court ruled that an advertiser who states explicitly or implicitly in comparative advertising that the product marketed by him is an imitation of a product bearing a well-known trade mark presents ‘goods or services as imitations or replicas’ within the meaning Directive 84/450. The advantage gained by the advertiser as a result of such unlawful comparative advertising must be considered to be an advantage taken unfairly of the reputation of that mark.

- **Judgment of 19 April 2007, C-487/07 - De Landtsheer Emmanuel SA**

In this judgment the Court among others explained that the existence of a competitive relationship between the advertiser and the undertaking identified in the advertisement cannot be established independently of the goods or services offered by that undertaking. In order to determine whether there is a competitive relationship between the advertiser and the undertaking identified in the advertisement, the Court set several obligations that are necessary to consider, in particular:

- the current state of the market and consumer habits and how they might evolve,
- the part of the Union territory in which the advertising is disseminated, without, however, excluding, where appropriate, the effects which the evolution of consumer habits seen in other Member States may have on the national market at issue, and
- the particular characteristics of the product which the advertiser seeks to promote and the image which it wishes to impart to it.
- Furthermore, the Court ruled that a reference in an advertisement to a type of product and not to a specific undertaking or product can be considered to be comparative advertising where it is possible to identify that undertaking or the goods that it offers as being actually referred to by the advertisement.

7. Petitions

There were several petitions submitted to the European Parliament on the issue of misleading advertising. As noted in point 3, the European Parliament reacted to several petitions by its resolutions.\(^{43}\) In particular, it is possible to refer also to a Notice to Members, submitted by the Committee on Petitions in September 2014. This


notice contained a summary of three different petitions (Petition 1176/2013 by Annick Pelletier (French) on misleading offers from Deutsche Adressdienst GmbH (DAD), Petition 1180/2013 by Consuelo Cortellessa (Italian), on misleading advertising of trade registers, Petition 1556/2013 by P.V. (Italian), on misleading advertising regarding trade registers, PETI, 29.9.2014). All three petitions dealt with cases when individual petitions were a subject to misleading practices, especially those connected with misleading directory companies. The Committee on Petitions concluded that the European Commission was considering presenting a legislative proposal reviewing Directive 2006/114, especially with regard to improve the clarity of the provisions of Directive 2006/114 and their effective cross-border enforcement.  

8. Conclusion

Directive 2006/114 concerning misleading and comparative advertising, while codifying Directive 84/450, laid down two types of rules. On the one hand, it specified the minimum legal standards for misleading advertising, and on the other one hand it indicated the conditions under which comparative advertising is allowed. While the former rules are only applicable to business-to-business transactions (B2B), the latter rules apply to B2B transactions and business-to-consumer transactions (B2C) alike.

Although there has not been yet any specific legislative proposal to amend Directive 2006/114 concerning misleading and comparative advertising, the intention of the European Commission to simplify and consolidate Directive 2006/114 may tackle some of the problems connected with the current legislation. Parliament repeatedly called for changes and further actions in this field, in particular with regard to prevention of misleading marketing practices and urging the EU Member States to enhance their mutual and cross-border cooperation. In this context, Parliament also often expressed its worries about the current misleading marketing practice of misleading directory companies. Furthermore, Parliament pointed to various inconsistencies with regard to implementation and enforcement of the directive and called for its better implementation and better monitoring. The studies and reports suggested that a revision of the rules prohibiting certain marketing practices strengthening the enforcement of these rules in cross-border cases is needed. Such potential changes can have an impact on legal certainty and improve the prevention of misleading marketing practices. These inconsistencies and implementation and enforcement of the directive present challenges for legislative proposal which the Commission intends to adopt by the end of 2015.

9. Other sources of reference

- http://epthinktank.eu/2013/05/29/protecting-businesses-against-misleading-marketing-practices/
- Protecting businesses against misleading marketing practices, Keysource by Lorenzo GENITO, Mar Negreiro, May 2013

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44 See, also petitions included in PE398.532/REV.II or PE337.214v01-00.