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DRAFT REPORT

on the impact of advertising on consumer behaviour
(2010/2052(INI))

Committee on the Internal Market and Consumer Protection

Rapporteur: Philippe Juvin

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MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

on the effect of advertising on consumer behaviour (2010/2052(INI))

The European Parliament,

- having regard to Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market¹ (UCPD),
- having regard to Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising² (MCAD),
- having regard to Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive or AMSD)³,
- having regard to Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (Consumer Protection Cooperation Regulation)⁴,
- having regard to the Charter of Fundamental Rights of the European Union⁵, in particular Articles 7 (respect for private and family life) and 8 (protection of personal data) thereof,
- having regard to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data⁶,
- having regard to Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector⁷,
- having regard to Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce in the Internal Market⁸,
- having regard to its resolution of 9 March 2010 on consumer protection⁹,

¹ OJ L 149, 11.6.2005, p. 22.

² OJ L 376, 27.12.2006, p. 21.

³ OJ L 95, 15.4.2010, p. 1.

⁴ OJ L 364, 9.12.2004, p. 1.

⁵ OJ C 83, 30.3.2010, p. 389.

⁶ OJ L 281, 23.11.1995, p. 31.

⁷ OJ L 201, 31.7.2002, p. 37.

⁸ OJ L 178, 17.7.2000, p. 1.

⁹ Texts adopted, P7_TA(2010)0046.

- having regard to its resolution of 9 March 2010 on the Internal Market Scoreboard¹,
- having regard to its resolution of 13 January 2009 on the transposition, implementation and enforcement of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and Directive 2006/114/EC concerning misleading and comparative advertising²,
- having regard to its resolution of 18 November 2008 on the Consumer Markets Scoreboard³,
- having regard to its resolution of 3 September 2008 on how marketing and advertising affect equality between women and men⁴,
- having regard to the Commission communication of 28 January 2009 entitled ‘Monitoring consumer outcomes in the single market: Second edition of the Consumer Markets Scoreboard’⁵ and the accompanying Commission staff working document entitled ‘Second Consumer Markets Scoreboard’⁶,
- having regard to the Commission staff working document of 29 March 2010 entitled ‘Consumer Markets Scoreboard – Consumers at Home in the Internal Market: Monitoring the integration of the retail Internal Market and Benchmarking the Consumer Environment in Member States’⁷,
- having regard to the report entitled ‘Consumer protection in the internal market’, published by the Commission in October 2008 (Special Eurobarometer 298),
- having regard to the analytical report entitled ‘Attitudes towards cross-border sales and consumer protection’, published by the Commission in March 2010 (Flash Eurobarometer 282),
- having regard to the European approach to media literacy in the digital environment⁸,
- having regard to the Commission guidelines on the application of the UCP Directive⁹,
- having regard to Opinion 2/2010 on online behavioural advertising, adopted by the Article 29 Data Protection Working Party on 22 June 2010,
- having regard to Opinion 5/2009 on online social networking, adopted by the Article 29 Data Protection Working Party on 12 June 2009,

¹ Texts adopted, P7_TA(2010)0051.

² OJ C 46 E, 24.2.2010, p. 26.

³ OJ C 16 E, 22.2.2010, p. 5.

⁴ OJ C 295 E, 4.12.2009, p. 43.

⁵ COM(2009)0025.

⁶ SEC(2009)0076.

⁷ SEC(2010)0385.

⁸ COM(2007)0833.

⁹ SEC(2009)1666.

- having regard to the communication from the French National Commission for Information Technology and Civil Liberties (CNIL) of 5 February 2009 entitled ‘La publicité ciblée en ligne’ (*‘Targeted online advertising’*),
 - having regard to Rule 48 of its Rules of Procedure,
 - having regard to the report of the Committee on the Internal Market and Consumer Protection and the opinion of the Committee on Women’s Rights and Gender Equality (A7-0000/2010),
- A. whereas advertising fosters competition and competitiveness, combats abuses of dominant position and encourages innovation in the internal market, and is consequently of benefit to consumers,
 - B. whereas it may nevertheless have a negative impact on the internal market and on consumers (owing to unfair practices, intrusion into public spaces and the private arena, targeting of individuals, entry barriers and distortion of the internal market),
 - C. whereas unfair commercial practices are still common in the advertising field,
 - D. bearing in mind the significant impact on advertising of the development of communications media,
 - E. bearing in mind the development of targeted (contextual, personalised and behavioural) advertising supposedly tailored to internet users’ interests, which sometimes involves tracking individuals (through cookies, profiling and geolocation),
 - F. whereas groups of people who are particularly vulnerable because of their mental or physical disabilities, age or credulity need special protection,

Evaluation of existing legislative and non-legislative framework

1. Maintains that the UCPD provides an appropriate legal framework for combating misleading and aggressive advertising, although it is not yet possible to undertake a comprehensive evaluation;
2. Emphasises that differences in its interpretation and implementation at national level have precluded the desired level of harmonisation;
3. Calls on the Commission to update its guidelines on the implementation of the UCPD on a regular basis; encourages the Member States to take those guidelines into account as far as possible;
4. Welcomes the joint investigations undertaken by the Member States (‘EU sweeps’); calls for further such investigations, the scope of which should be broadened;
5. Calls on the Member States to provide the competent national authorities with the necessary means and resources;
6. Encourages the practice of self-regulation, which is a dynamic, flexible and responsible

adjunct to the existing legislative framework; calls on those Member States that do not yet have self-regulatory bodies to facilitate the establishment of such bodies and/or grant them formal recognition;

7. Emphasises the limits of self-regulation, which cannot take the place of legislation (in the area of penalties, for example);
8. Encourages co-regulation, whereby the various stakeholders are involved in legislative developments;
9. Calls on those Member States that have not yet implemented the AMSD to do so immediately; awaits with interest the publication by the Commission of the report on the application of the AMSD, and stresses the need to address the use of new technologies (such as IPTV);

Issues arising from the development of the internet and new technologies

10. Deplores the development of 'hidden' internet advertising that is not covered by the UCPD (C2C relationships), in the form of comments posted on social networks, forums and blogs, the content of which is difficult to distinguish from mere opinion;
11. Suggests that the Member States encourage the emergence of forum observers/moderators who are alert to the dangers of hidden advertising;
12. Voices its concern about the routine use of behavioural advertising and the development of intrusive advertising practices (such as reading the content of emails, using social networks and geolocation, and retargeted advertising);
13. Emphasises the risk presented by companies that are both content providers and advertising saleshouses (owing to the potential for cross-referencing data collected in the course of each of these activities); calls on the Commission to ensure that different levels of data collection are kept wholly separate;
14. Stresses that consumers must receive clear, accessible and comprehensive information about how their data are collected, processed and used;
15. Stresses the need for consumers to be informed fully when they accept advertising in exchange for discounts based on behavioural marketing techniques;
16. Calls on the Commission to:
 - carry out an in-depth study of new advertising practices involving online communication or portable devices;
 - prohibit the systematic, indiscriminate sending of text message advertisements to all mobile phone users within the coverage area of an advertising poster equipped with Bluetooth technology without their prior consent;
 - prohibit the content of private e-mails being read by a third party for advertising purposes;

- require advertisements sent by e-mail to contain an automatic link enabling the recipient to refuse all further advertising;
- ensure the application of techniques making it possible to distinguish advertising tracking cookies, for which free and explicit prior consent is required, from other cookies;
- encourage the use of default settings – for computer systems sold to the public and for social networking services – that meet the strictest data protection standards;
- develop an EU website labelling system modelled on the European Privacy Seal, certifying a site’s level of data protection;
- restrict online alcohol advertising to the websites of industry professionals, local authorities and tourist offices, while prohibiting intrusive advertising practices;
- modify the limited liability regime for information society services in order to make the sale by search engines of registered brand names as advertising keywords subject to prior authorisation from the owner of the brand name in question;

Protecting vulnerable groups of people

17. Calls on the Commission to conduct a detailed analysis of the impact of misleading and aggressive advertising on vulnerable consumers, in particular children and adolescents;
18. Calls for children’s specific interests to be free from targeted advertising;

Educating and informing the various stakeholders

19. Stresses the crucial importance of transparency and consumer information in the advertising field, and the need for consumers to develop a critical attitude to the quality of media content;
20. Calls on the Commission to:
 - include advertising-related indicators in the Consumer Markets Scoreboard;
 - devise information campaigns on consumers’ rights in respect of advertising, including the use of their personal data, and to develop educational material explaining how they can protect their privacy on the internet;
 - develop an EU advertising literacy programme for children, modelled on the United Kingdom’s Media Smart initiative;
 - insert the words ‘behavioural advertisement’ into the relevant online advertisements, along with a window containing a basic explanation of this practice;
21. Calls on the Member States to encourage national authorities and/or self-regulatory bodies to conduct information campaigns designed to alert SMEs to their legal obligations in respect of advertising;

22. Instructs its President to forward this resolution to the Council and the Commission, and to the governments and parliaments of the Member States.

EXPLANATORY STATEMENT

This report deals with unfair commercial practices in the advertising field, as defined in the Unfair Commercial Practices Directive (UCPD), and concentrates on issues arising from the development of new advertising practices and technologies. It does not discuss B2B relations, which are covered inter alia by Directive 2006/114/EC.

Rather than adopting a socio-philosophical approach to the subject, the rapporteur has chosen to focus on specific issues.

Advertising is a tool that benefits both the internal market (oiling the wheels of economic activity by stimulating competition, competitiveness, innovation and creativity) and consumers (by increasing choice and lowering prices). It is a key economic sector: the EU online advertising market alone is worth more than EUR 14 billion.

It must not be idealised, however: advertising can also involve unfair practices, intrude into public spaces (e.g. advertising billboards) and the private arena (e.g. unsolicited e-mails), target vulnerable groups of people (such as children and those in excessive debt), create potential entry barriers to the internal market (where the outlay required is too high) and distort the internal market (by causing consumers to buy goods or services they would not normally have purchased).

Evaluation of existing legislation

The rapporteur highlights **problems in the implementation** of the UCPD, and calls on:

- the Member States to provide national authorities with the necessary human, financial and technological resources;
- the Commission to update its guidelines on the implementation of the UCPD on a regular basis.

EU-wide cooperation in combating unfair online advertising practices should be stepped up in view of the success of ‘EU sweeps’ (systematic, simultaneous website checks by the Member States), which have so far been confined to three sectors (airline tickets, mobile phone ring tones and electronic devices). The rapporteur suggests broadening the scope and increasing the frequency of such sweeps.

The rapporteur also supports **co-regulation**, whereby the various stakeholders are involved in legislative developments, so that the resulting measures are more effective and easier to apply.

In the audiovisual sector, the rapporteur points out that 12 Member States have yet to implement the AMSD. In his view, the forthcoming report on the application of this directive should include an analysis of the impact of new technologies (such as IPTV).

Self-regulation

Self-regulation is very common in the advertising field, although its extent varies depending

on national traditions. This is a dynamic, flexible approach conducive to addressing rapid developments in the advertising sector; it is based on instilling responsible attitudes and disseminating good practices. The International Chamber of Commerce has produced an international code of conduct, which sets out basic principles (such as standards of decency) and is supplemented by codes relating to specific areas (such as alcohol); national self-regulatory bodies apply their own versions of the code in the Member States.

The rapporteur wishes to encourage self-regulation with a view to establishing a tradition of self-discipline and responsible communication, while being mindful of the inherent limitations of such an approach (the scope for imposing penalties, for example). Self-regulation supplements legislation, but cannot take its place.

Issues raised by the use of new technologies

The development of new technologies and advertising practices has brought about far-reaching changes (including the internet, social networks, forums, blogs, growing user mobility and the boom in digital products).

The internet, which differs radically from other means of communication (owing to its anonymity, the speed of exchanges, its extensive reach, the combination of text, video and music and the fact that it is difficult for national authorities to monitor), has become an important advertising medium.

The rapporteur is of the opinion that **advertising via the internet and portable devices** requires in-depth analysis, and calls on the Commission to study these new practices.

The rapporteur highlights the issue of **targeted advertising**, which can take a number of forms:

- contextual advertising, based on the immediate content provided to internet users and the keywords entered;
- personalised advertising, based on internet users' known characteristics, such as age, gender and location;
- behavioural advertising, based on an analysis of internet users' behaviour over time (sites visited, online purchases, etc.).

While personalised advertising (offers of products or services tailored to consumers' tastes, for example) is not in itself a problem, it must not lead to the development of intrusive advertising based on consumer tracking, which breaches the principles of data protection and privacy.

Accordingly, the rapporteur proposes the following measures to protect consumers:

- prohibiting the indiscriminate sending of unsolicited advertising to mobile phones – by means of Bluetooth technology – without prior consent;

- providing consumers with clear, accessible and comprehensive information about how their data are collected, processed and used;
- requiring advertisements sent by e-mail to contain a direct, working hyperlink that enables consumers to refuse all further advertising;
- prohibiting the content of private e-mails being read for advertising purposes (although this practice is based on a technique similar to those used by anti-spam filters, it serves a different purpose);
- ensuring that data collected in the course of supplying a service (such as an e-mail account) are kept wholly separate from those collected in the course of advertising activities;
- ensuring that consumers are informed about the discriminatory practices sometimes associated with behavioural advertising (such as price adjustments based on an internet user's profile): such practices should be transparent, and consumers should be notified of the real price prior to any adjustments;
- distinguishing advertising cookies, for which a consumer's prior consent is required, from other cookies;
- encouraging default internet privacy protection settings that meet the highest standards ('privacy by design');
- introducing an EU label for websites that comply with EU data protection legislation, modelled on the European Privacy Seal (a voluntary trans-European label certifying the compliance of IT-based products or services with EU data protection legislation, supported by numerous national and regional bodies in different Member States);
- restricting online alcohol advertising;
- modifying the limited liability regime for information society services in order to make the sale by search engines of registered brand names as advertising keywords subject to prior authorisation from the owner of the brand name in question (this applies, for example, to sites containing a keyword that redirects consumers to counterfeit sites).

Online advertising also includes '**hidden**' forms of advertising whereby consumers post comments to one another on forums about a product or service (e.g. TripAdvisor). With just one click, such comments can ruin a company's reputation and mislead consumers.

The UCPD covers online advertising in the context of business-to-consumer relations (irrespective of whether businesses declare themselves as such or pass themselves off as consumers), but not consumer-to-consumer relations. Although comments based on personal experience are difficult to distinguish from advertising (and anonymous exchanges are hard to monitor), this form of misleading advertising affects both consumers and the businesses targeted. In addition, the development of internet auction sites has created a new form of consumer-to-consumer advertising that is not covered by either the UCPD or the conventional definition of advertising.

Accordingly, the rapporteur suggests encouraging the emergence of forum observers/moderators who are alert to the dangers of hidden advertising and can respond rapidly if a comment strikes them as dubious. However, it is important to balance online consumer protection with freedom of expression.

Lastly, the rapporteur addresses the issue of **advertising techniques involving social networks**. Such networks are playing an increasingly important role in society, particularly among young people, and may be used for purposes such as social contact (Facebook) or job-hunting (LinkedIn). The vast amount of information exchanged between ‘friends’ on these sites is often used for advertising purposes (e.g. Facebook’s ‘Like’ feature, whereby users can tell their list of ‘friends’ about a product or brand by clicking the ‘Like’ button on the sites of Facebook’s commercial partners).

Protecting vulnerable groups of people

The most vulnerable groups of people (children, adolescents, the elderly and so on) need special protection. Accordingly, the rapporteur calls on the Commission to study the impact of misleading, aggressive advertising on vulnerable consumers, and points out that children must not be subjected to specifically targeted advertising in view of their great receptiveness and curiosity, limited free will and potential to be influenced.

Educating, informing and training the various stakeholders

The rapporteur notes that there is a **lack of information about consumers’ rights in respect of advertising**, and suggests taking steps to facilitate access to information and make advertising more transparent (examples include inserting the words ‘behavioural advertisement’ into the relevant advertisements, and clarifying statements of terms and conditions).

Given that the general public is often unaware of the **issues surrounding the use of personal data** and the tools available for addressing them, the rapporteur suggests launching information campaigns on consumers’ rights in respect of advertising, in particular as regards the use of personal data (irrespective of whether they are provided voluntarily or collected automatically). He also suggests producing educational material to inform internet users about the technologies available to manage ‘traces’ left on the web, and about how to protect their privacy.

It is also essential to develop a critical attitude to the quality of media content. Well-informed consumers are in a stronger position. In view of the **lack of advertising literacy**, the rapporteur suggests introducing an EU education programme modelled on the United Kingdom’s Media Smart initiative, which was launched in 2002 and has been taken up by a number of Member States. This is a non-profit education programme aimed at children between the ages of six and 11, delivered in schools in conjunction with families and designed to make children advertising-literate by enhancing their understanding of advertising and teaching them how to interpret it.

The rapporteur notes that the development of the internet and of digital technologies has **simplified and democratised access to advertising techniques** (e.g. AdSense), but that such techniques are often used without a proper understanding of current advertising regulations. Accordingly, he emphasises the need to educate SMEs – which are increasingly advertising online – about the media, and calls on the Member States to encourage national authorities and/or self-regulatory bodies to conduct information campaigns in order to alert SMEs to

these issues.