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The essential rights linked to the consumer through Advertising

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Abstract:

Advertising is a broad concept, apprehended late by the law, it is intended to make known and to sell a product or a service. It takes many forms, and the advertiser is considered responsible for the advertising, when it comes to the content.

Thus, the main role of advertising is to inform the consumer about the characteristics of the product or service. At the same time, it isprohibited when it can mislead or abuse the consumer. This deception, whether intentional or not, constitutes an offence that may lead to the suppression of the advertisement.

Introduction:

In the face of increasingly aggressive and insidious business methods, the development and spread of machines and devices of all kinds, consumer safety (Jean-Pascal CHAZAL, 2000) has become one of the main concerns of the public authorities.

A series of rules of legal origin, essentially protective and considerably reinforced by a jurisprudence concerned with the protection of the most vulnerable party, was therefore born in reaction to these practices.

For more than a century, the responsibility of professionals has tended to increase. This is due to the considerable increase in their field of action, to the appearance of new professions, such as advertising, as well as to the birth of new obligations. This increase in power has been concomitant with the extraordinary demand for the responsibility that characterizes the contemporary world.(G. PIGNARRE, 2015, 05)

Even before the formation of the contract in the field of advertising, the consumer is faced with professionals who offer him goods and services under

more or less well-defined conditions. These preliminary relations influence the decision that the consumer will take and the decision in which he will find himself if he decides to contract. An important part of consumer law, therefore, governs the preliminary relations between professionals and consumers.

To date, research regarding the content presented in an actualadvertisement for a given advertiser has focused on personalization.While customizing product/service components, prices and websiteplatforms has long been commonplace, advertising customization is inits infancy. Despite the recent call for greater appreciation of the increasingly important role of customization (i.e., consumer-initiated co-creation) in products, web content, and brand meaning, where adaptation of the message content itself iscustomer initiated.

While customers often value the ability to have a direct impact on the tangible elements associated with the product they receive, the extent to which they will value the ability to customize aesthetic characteristics of an advertising (and the impact such seemingly innocuous decisions might have on perceptions of the organization) is less clear. (G. Douglas Olsena, John W. Pracejusb, 2020, 245).

That leads us to the following problematic: do the texts related to advertising protect sufficiently the rights of the consumers?.

Therefore, from a legal point of view, we are faced with the obligation to inform the consumer about the general and specific characteristics. For this, the consumer needs information that is as complete and objective as possible in order to enlighten his consent.(Jean CALAIS-AULOY , 2003, 49).This obligation of information has two characteristics: general (01) and special (02), in order to avoid infringements of advertising (03).

1-The general obligation to inform on advertising:

Advertising is the process of persuading a targeted group of people to take a specific action, regardless of whether that is purchasing an item or bringing responsiveness towards an issue. An advertisement could be viewed as an endeavor that connects with and impacts the audience while informing them about a product.(Kranthi Kiran TALAPAGA, 2020, 852).

For Dean CARBONNIER “a man is always able to defend his rights if he is enlightened”. It must therefore be noted that the obligation to provide information represents a major issue in the transparency of the Convention and conditions the consent of the contracting party. The latter is all the more vulnerable when he contracts as a consumer, that is, when he contracts with a professional to acquire ownership of a good or service intended for non-professional use.

This is the reason why, at the stage of contract formation, the consumer must be able to conclude the contract having had at his fingertips all the relevant information relating to the rights and obligations deriving from the contract. Understanding today the issues related to the possible generalization of an obligation of information before the conclusion of the contract is of particular interest insofar as it makes it possible to determine the influence of the

consumer law in the elaboration of the Common Framework of Reference.(Juliette EHUVET , Tania RACHO ,2010).

As to the operative event of the obligation of information, which is the ignorance of a relevant fact. Any individual who is unable to obtain essential information for him or her, either because of the technical nature of the information or because of his or her relationship of trust with his or her co-contractor, is credited with this obligation to provide information.

It should therefore be avoided to state that the main area of information obligation is the relationship between professionals and consumers. Of course, professionals know the goods and services they market, while consumers are, for the most part, unable to judge them in advance and compare them with each other. As well, positive law poses a presumption of consumer ignorance, a presumption that could be described as irrefragable.(Laurent BRUNEAU, 2005, 379).

Traditionally, two conditions must be met for this obligation of information to come to life. First, a person can only be required to inform his partner if he has "relevant" information, that is, information the knowledge of which is likely to lead the person who ignores him, to modify his behavior, either he renounces his plan to conclude the contract or he perseveres in it by reviewing the conditions.

Secondly, the obligation to inform exists only if the person claiming to be the creditor of that obligation has himself ignored the data in question and if this ignorance is legitimate

Ignorance is said to be legitimate when the person concerned was unable to discover for himself the fact concealed while his partner had access to it or when the person concerned could think, because of the special relationship of trust which bound him to his partner, that he would take the initiative to inform him..(Laurent BRUNEAU, 2005, 381).

This obligation is for the professional to provide objective information, namely raw information on the product or service. However, it is customary to distinguish between:

-The pre-contractual obligation to provide the consumer with all information necessary for the consumer's consent (for example, the professional seller must inform the buyer of a serious accident in the vehicle) ;

-and the contractual obligation to provide all information necessary for the proper performance of the contract (for example, the instructions for use of the item sold).

This is a distinction that is becoming increasingly artificial. The fact remains that such a distinction retains its interest when it comes to penalizing any breach of one or the other of the obligations. (Eric BAZIN, 2011, 20).

Practically the case law frequently opted for the implementation of the mechanisms of contractual liability although the legislator expressly aimed at informing the consumer "before the conclusion of the contract".

It is true that the legal obligation appears pre-contractual. The proposal is in the interest of consumers. The solution is not contrary to the solutions provided by ordinary law.

However, the case law has also discovered, sometimes relying on the same texts of the French Civil Code (In particular articles 1134 and 1135 of the French civil code), a contractual obligation of information in an increasing number of contracts, especially in those concluded between professionals and consumers.

Again, the solution is in no way inconsistent with the interests of consumers and it would not be appropriate, even paradoxical, to deny the existence of a contractual obligation protecting the interests of consumers on the basis of a restrictive interpretation of a text of the Consumer Code. (Yvan AUGUET, 2008, 52)

Thus, the general obligation to provide information is intended to enable consumers to exercise their contractual freedom fully in at least two ways:

First, it promotes transparency and restores the information balance between professional and consumer.

Second, it has an economic role. The consumer, who enters into a single contract once, bears a much higher cost of acquiring the information than the professional, who enters into the same contract a large number of times and can distribute this cost over a multitude of transactions.

Such an obligation is an important tool of consumer law. Nevertheless, it has certain limits. First, while it helps to correct the information imbalance and promotes a rational decision, it cannot guarantee the rational behavior of the beneficiary or the fair and balanced outcome of contractual negotiation.(Blaise CARRON)

This consumer information encounters a number of difficulties, which the legislator strives to overcome without the results being always satisfactory. The difficulty is the ignorance of the rules of law by most consumers. In order to understand a contract, and in particular, the obligations arising from the general conditions of sale, it would be necessary to have legal knowledge that is lacking to the majority of consumers .

However, the seller cannot be required to explain the contents of his contract, when he himself may not know what it is all about. The law and the jurisprudence then intervene a posteriori , when the dispute arises , to sanction a breach of the obligation of information that the professional has not respected.(Guy RAYMOND, 2013,45).

It should be noted that, in general, consumers are economically inferior to professionals. As the latter tries to make a profit, in order to ensure its development. On the contrary, the consumer is the one who contracts only for the purpose of satisfying a personal or family interest.

Consequently, the economic inferiority of the latter results from the difference in purpose which opposes it to the professional.

It is this essential difference of purpose which explains the financial and economic means at the disposal of the professional, and of which the consumer is deprived. He reasoned in large numbers, considering a plurality of identical acts, while he gave his consent for an isolated, particular act. The economic position of the professional thus allows him to make his forecasts, his anticipation prevails.

In addition, the financial resources made available by the company make it possible to systematically use insurance. The professional is the one who is insured against the risks inherent in the exercise of his profession. The consumer, on the other hand, often does not have the means to ensure that the risks he incurs are adequate. On the professional side, therefore, there is anticipation and full coverage of the risk that is not as widespread among consumers. (Jean-Pascal CHAZAL, 2003).

2-Special information requirements:

Special consumer information is combined with the plural. There is a great diversity among the texts that provide for information, other than general, from the consumer. Sources whose legal force differs, disciplines whose purposes vary, civil and criminal sanctions, special contracts, specific clauses, all contribute to an impression of disorder. Access to special information, therefore, requires an attempt to put things in order, even if it is somewhat arbitrary. In spite of everything, special information requirements reveal areas of preference, such as prices or the characteristics of products and services offered to consumers.

Special provisions reinforce this obligation, e.g. for the labeling of foodstuffs, even if limits exist for "the denomination of typical products and specialties of foreign appellation known to the general public"; for example, expressions such as "product of France", "made in", or "copyright".

Information on the characteristics of goods and services is frequently subject to provisions for which non-compliance is criminally sanctioned. Failure to comply with the general obligation to inform may, in certain circumstances, constitute a criminal offense of deception. the crime of deceit prevents misinformation about “nature, the species, the origin, the substantial qualities, the composition or content of useful principles of all goods”, or “the quantity or identity of the goods delivered”, also about “the suitability for use, the risks of use, the checks carried out, the instructions for use and the precautions to be taken” (Yvan AUGUET ,2008, 59), and even “the package leaflet of a medicinal product” (Bordeaux Court of Appeals, Fifth Civil Division, Audience of March 18, 2015, n° RG: 13/03029),and “fuel prices” (Fuel prices, 2013).

Thus, according to the legislation in force which is more precise than the former (Algerian Law n°. 89-02 of February 7, 1989 on the general rules of consumer protection) , stipulates that every professional must inform the consumer of all the information relating to the product which he puts for consumption, by means of labeling (Article 17, under Chapter V: "On the obligation of consumer information" of Law 09-03), marking or by any other appropriate means , and this mainly in Arabic language.

Also, according to article 18 of the Algerian law n° 09-03: The labeling, the instructions for use, the user's manual, the conditions of guarantee of the product, and any other information envisaged by the regulation in force, must be written essentially in Arabic language and, incidentally, in one or several other languages accessible to the consumers, in a visible, readable and indelible way.

Starting with information by labeling, which may include the mark, the latter's function is to guarantee to the consumer or end-user the original identity of the product designated by the mark, allowing it to distinguish this product from those from another source without possible confusion, whereas the purpose of labeling is to provide the consumer with information on the characteristics of the product concerned that a sign whose use is legally prohibited may not be adopted as a mark; only as regards the presentation of foodstuffs, which includes the mark, shall not be used in any way to emphasize a particular characteristic which all similar foodstuffs possess.Without, however, ruling out the criterion of a reasonably informed and reasonably attentive, and prudent consumer.

knowing that the labeling is all mentions, writings, indications, marks, labels, images, illustrations or signs relating to a good, appearing on any packaging, document, sign, label, card, ring or collar accompanying or referring to a product, whatever the form or the support accompanying it, independently of the mode of apposition; according to article 03 of the law n° 09-03 mentioned above.Since the consumer must be attentive in principle, he knows his consumer code well and must also know that "home-made" has nothing to do with "all organic". (Guy RAYMOND, 2014, 10)

For a practical example, in refusing to cancel the trademarks of the company Hero AG and to hold against the company Hero France a fault of unfair competition, although it was forbidden to use the adjective "pure" in the designation of a jam; the normally informed consumer knows that jam, composed of a mixture of fruits and sugar, is supposed to contain no bacteria as long as it is not opened; that it also notes that the sign "Confi'Pure" is a neologism resulting from the combination of the term "confi" and the adjective "pure" which, taken as a whole, is evocative of jellies, jams; Having thus sovereignly estimated that the consumer of average attention does not perceive the word "pure" as designating a particular quality that the competing products would not have but as constituting with the term "confi" and the figurative element a term of fantasy not presenting any misleading character to identify the origin of the products referred to by the registrations and not revealing any wrongful conduct. (Court of Cassation ,Commercial Chamber ,Audience of January 21, 2014 , Appeal no.: 12-24959).

Returning to the product or service mark is mandatory for any product or service offered, sold, or offered for sale in the national territory. Where the nature or characteristics of the products do not permit the affixing of a mark, the mark shall be worn on the packaging or where this is impossible, on the container(Article 03 of Algerian Ordinance n° 03-06 of July 19, 2003 on trademarks) ; otherwise, if the product or service is not marked, an offense is

committed, and this is the same qualification for the affixing of a non-registered mark.

For this, article 33 of Ordinance 03-06 stipulates that: The following shall be punished by imprisonment of one (1) month to one (1) year and a fine of five hundred thousand (500,000) to two million (2,000000):

(1) Those who do not affix a mark to their goods or services or who have knowingly sold or offered for sale one or more goods or services without a mark;

(2) Those who have affixed to their goods or services a mark that has not been registered or applied for,

It should be stressed that the obligation concerning the registration of the mark is not valid for packaging, since, according to Article 7 of Order 03-06, "The following are excluded from registration:…signs consisting of the form of the products or their packaging, if this form is imposed by the nature or function of the products or packaging". That said, packaging can only be registered as a trademark when it is not imposed by the nature of the product itself. And this even if the legislator according to Algerian Executive Decree n°. 90-367 (of November 10, 1990 on the labeling and presentation of foodstuffs) considered that all packaging intended for food products must be deposited (Article 3 of Executive Decree 90-367) , and this is "unfortunately" a position that was not affected by the amendment of Algerian Executive Decree n° 05-484 amending and supplementing Order in Council 90-367(Executive decree n°05-484 of December 22, 2005 modifying and completing the decree 90-367 of November 10, 1990 relating to the labeling and the presentation of foodstuffs) .

We note that the previous texts, sometimes paradoxical , meet the international requirements , mainly the provisions of the W.T.O World Trade Organization, by the O.T.C and S.P.S agreements.

The purpose of the Agreement on Technical Barriers to Trade (O.T.C) is to ensure that product requirement, and the procedures used to assess compliance with those requirements do not create unnecessary obstacles to trade. It applies to product requirements with which compliance is mandatory or voluntary. It covers product requirements developed by governments (central or local) or by private entities at the national or regional level.

The Agreement on Sanitary and Phytosanitary Measures (S.P.S) has the dual objective of recognizing the sovereign right of Members to provide the level of sanitary protection they consider appropriate; and of ensuring that SPS measures do not represent unnecessary, arbitrary, scientifically unjustifiable, or disguised restrictions on international trade.

Information on prices and prices of goods and services to the consumer must also be provided by means of marking, labeling, display, or any other appropriate process. Prices and rates must be clearly and legibly indicated. Goods offered for sale by unit, weight, or measure must be counted, weighed, or measured before the purchaser. However, if these goods are prepackaged, counted, weighed, or measured, the statements affixed to the packaging must

identify the weight, quantity, or number of items corresponding to the price displayed.(Article 05 of Chapter I: Information on prices, tariffs and conditions of sale, under Title II: Transparency of commercial practices, of Algerian Law n° 04-02 of June 23, 2004 establishing the rules applicable to commercial practices).

The obligation to inform the consumer imposes, in particular, on the trader to inform himself about the consumer's needs and to inform him of the suitability of the proposed good for the use sought;also, he must ask him about what he is looking for by making the purchase of the desired good. If this property does not meet these needs, the professional must dissuade him from making the purchase. There is a whole business mentality that is being challenged.(Guy RAYMOND, 2013, 45).

Illuminating a consumer, is not the same as advising on the operation, installation, or assembly of an acquired property . Thus, the information that a professional must provide before the conclusion of the contract differs from that which must be issued after the conclusion of the contract. Theoretically, the obligation to inform differs from the duty to advise and, a fortiori, from the obligation to inform in the performance of the contract, whether it is an ancillary obligation or the principal obligation of the contract.

Indeed, such an obligation is not homogeneous. Its purpose and intensity vary according to the quality of the parts (specialist, layman, consumer) and the type of goods sold (a dangerous thing, complex, etc. It is sometimes difficult to distinguish between the obligation to inform and that of advice, their borders being blurred . This was pointed out: the council is the connection of information with the objective pursued by the recipient of it, the obligation to provide information is difficult to distinguish from the duty to advise whenever the debtor knows – or could not legitimately ignore – that objective." (G. PIGNARRE).

Thus, the obligation of information becomes a duty of advice when its creditor is a layman unable to assess alone the scope of its activities. The duty to advise imposes a heavier burden on the debtor than the obligation to provide information.

In addition to the information it must give, it is up to it to advise its future co-contracting party on the appropriateness of the decisions to be taken, that is to say, to indicate to it the way that appears to it the best way, to urge it to adopt it and to warn it against serious risks that would exist if it were not listened to. The obligation to provide information has such an intensity when the creditor is a consumer. Presumed ignorant, the consumer is entitled to expect from his professional co-contractor «the connection of the raw information with the objective he pursues».(Laurent BRUNEAU, 2005 , p382).

As a result, too much information kills information: consumers often cannot manage the plethora of data and fail to identify the content of the information or its essential elements. Finally, the effectiveness of the information depends largely on the penalties provided for the violation relating to its transmission.

When a professional violates a specific duty to inform consumers, the consumer can in principle use the traditional instruments of the law of obligations. The professional may first be the subject of a claim based on the "culpa in contrahendo". However, it only allows for the remedy of the negative interest of the consumer –damage that it will sometimes have difficulty establishing – and does not allow the performance of the contract to be demanded in accordance with the erroneous information of the trader. Second, the consumer can argue a defect of consent – error or deception – to invalidate the contract. This tool is effective, but it requires the consumer to prove, in the concrete case, his error or deception as well as their influence on the flawed will. (Blaise CARRON)

After the obligation of information comes the obligation of warning which is more demanding. Indeed, the professional must not only inform the consumer about any objective element of the contract but also draw his attention to the risks incurred in case the warning thus carried out is not respected.

Then there is the obligation to advise, which is a much more demanding obligation than the obligation to inform or warn. It is no longer just a matter of informing the consumer about the product or service or drawing his attention to the risks involved. It is indeed a question of ensuring for the professional that the conclusion of the consumer contract is timely, that is to say, adapted to the needs of the consumer.

This means that the professional can go so far as to discourage the consumer from subscribing to the transaction. This duty to advise has two areas of choice: -The provision of complex devices or assemblies (for example: computers) ; -Or legal professionals such as notaries, lawyers, judicial officers, etc.

But contemporary jurisprudence tends to generalize the duty to advise . Thus in a judgment of October28,2010 , the First Civil Chamber of the Court of Cassation decided that the onus was on the professional seller to prove that he had fulfilled the obligation of advice requiring him to inquire about the needs of the buyer in order to be able to inform him as regards the appropriateness of the proposed thing to its intended use.

In this case, consumers had purchased tiles from a specialized company. They then laid the tiles around their pool. However, this tiling disintegrated insofar as it was incompatible with the treatment of the water of their swimming pool according to the process of salt electrolysis. For not having checked the adequacy of the materials sold to the needs of the purchasers, the professional thus engaged his contractual responsibility for failure in his obligation of the council. (Eric BAZIN, 2011, 21)

The breach by the professional of his obligation of information and advice may lead to the resolution of the sale under the conditions of ordinary law. Has failed to this obligation the professional who has made the consumer sign a legally irrevocable commitment resulting from the signature of a purchase order, then: - on the one hand, that the sale being concluded outside his domicile and without having a precise and detailed plan of his piece for use, the purchaser could not be sure of the suitability of the goods purchased with it

and that a partial indetermination of the thing and the price resulted, which was an essential feature of this convention; - on the other hand, that the professional does not justify having given him knowledge before signing of the legal scope of the general conditions of sale concerning the future modalities of adaptation of the property and the potential modifications of the price to be paid, without ever being able to challenge an amendment to this convention that could prove substantial and to its detriment.

The sale must be resolved since if the consumer had been fully informed of the legal and financial conditions of his contractual commitment, he would not have concluded it under such conditions.(Court of Appeal of Montpellier,1st chamber section 1, Public audience of January 15, 2015 , RG n°: 12/00197).

According to French law (Article L.136 al1 of the French consumer law states that: "the professional service provider informs the consumer by, by letter or dedicated e-mail, at the earliest three months and at the latest one month before the end of the period authorizing the rejection of the tacit renewal. This information, delivered in clear and understandable terms, mentions, in a box, the deadline for termination".)

The service provider must inform the consumer in writing within legal time limits, that is at the earliest three months and at the latest one month before the end of the term, of the option it has not to pursue the contract with a tacit renewal clause.

The information reminds him of his right to block the renewal of the contract and must allow him, during the period preceding the occurrence of the term, to compare competing offers on the market and to reflect on the continuation or not of the relationship.

Initially, the text did not require personal or personalized written information: it was often done via an invoice addressed to the customer, a catalog, or even in the magazine in lieu of a monthly television program, sent to subscribers for contracts relating to the sector. The legislation did not require separate mail and the processes used by professionals were a source of litigation.

For the consumer, they made the information less readable. For the professional, they did not allow him to prove that he performed correctly in time. In the absence of legal precision, electronic written information could be accepted as a durable medium. With the reform, the process of nominative letter or dedicated email is made mandatory. The law did not want to impose the use of a registered mail because of its cost and the desire to avoid consumers who are away from home having to go to the post office to receive the mail.

The evolution goes in the direction of better consumer information: effective and readable . It will be all the more so since Article L.136-1 concerning this obligation must also be reproduced in its entirety in the service contracts to which it applies. The consumer must therefore be informed twice: during the drafting of the contract and every year thereafter. (Delphine BAZIN-BEUST, 2015, 58).

According to Algerian law, procedurally, the creation of a National Council for Consumer Protection, which issues its opinion and proposes measures that contribute to the development and promotion of consumer protection policies.

It has been held that the Authority laying down procedures relating to the safety of foodstuffs , must be interpreted as not being such as to preclude a national regulation that allows information to citizens mentioning the name of the foodstuff as well as that of the company under whose name or trade name the foodstuff was manufactured , processed or distributed, in a situation where such a foodstuff, although not harmful to health, is unfit for consumption, but this authority has a position to take.(journal contracts , competition , consumption , n°6, june2013 , 23e year , 04).

Moving on to the quality of the consumer in order to defend his rights and to take legal action, we can find the consumer protection associations, which are legally constituted whose purpose is to ensure the protection of the consumer through its information, awareness, orientation and representation(Article 21 of law 09-03) ; they can benefit from legal assistance (Article 22 of law 09-03). They may even constitute a civil party, where one or more consumers have suffered individual harm, caused by the same intervenor and having a common origin.(Article 23 of law 09-03).

Thus, in case of violation of the obligation of information, it is the penal qualification that is necessary, from the time when is punished from a fine of one hundred thousand dinars (100.000 DA) to one million dinars (1.000.000 DA), whoever breaches the obligation of labelling of the product. (Article 78 of Algerian Executive Decree n°. 13-378 of November 9, 2013 setting the conditions and modalities relating to consumer information).

In addition, are described as a lack of information on prices and rates, infringements of the provisions concerning the obligation to provide information on prices and rates, and punishable by a fine of five thousand dinars (5,000 DA) to one hundred thousand dinars (100,000 DA). (Article 31 of law 04-02).

It should be noted that the legislator increased the fine, from the time the latter was increased from 100,000 to 1,000,000 DA in the old legislation (Article 28 of Law n° 89-02, which provided for the penalty of ten (10) days to two (02) months imprisonment and/or a fine of 100 to 1000 DA) to 100,000 DA or 1,000,000 DA in the new texts, previously mentioned. Contrary to the characterization of these offenses with respect to imprisonment, whose imprisonment was outright dismissed by the legislator from ten days to two months. Finally, it is clear that the qualification has shifted from the contravention to the offense.

3-Advertising violations:

Endowing the advertising object with a special semantic load and turning it into a kind of fetish, referring it to a certain type of behavior or attitudes, thereby advertising activity participates in the formation of social reality. At the same time, the idea inherent in advertising is often potentially a socially risky phenomenon, which leads to deformations of the basic foundations of

advertising activities and may entail not only property losses, but also social disorientation of its consumers.

The danger of advertising activity is associated both with the inability to accurately predict the possible reaction of consumers to the figurative and symbolic series of an advertising product, and with the fact that the use of various creative and marketing technologies often leads to the emergence of effective forms of advertising, but not fully compliant with legislation, which can lead to destructive consequences for a person, his psyche, as well as for society as a whole.(Anna KAMYSHANOVA, 2020, 176).

Advertising is a fundamental strategic variable that firms use to highlight their own product's quality in an attempt to gain a competitive edge over their competitors. For consumers, the value of the information conveyed by advertisements depends on its trustworthiness. Consequently, regulations typically restrict firms from making inaccurate or misleading claims. Courts can order injunctions to stop misleading advertising. The rules specifying which parties are allowed to file injunction suits or take other actions against false advertising differ across countries.

For example, in the European Union, Directive 2005/29/EC sets the rules concerning misleading advertising in the business-to-consumer relationship. Article 11 requires member states to "ensure adequate and effective means" to enforce firms' compliance in the interest of consumers; it explicitly stresses the role of persons and institutions with a legitimate interest in bringing forth claims. (Florian BAUMANN, 2020, 1211).

So, we find ourselves faced with the intervention of legal rules that aim to prevent unfair competition and those that aim to prevent the various infringements of advertising. Moreover, article 28 of the law n°04-02 of June 25, 2004 fixing the rules applicable to the commercial practices in Algeria stipulates that "it is considered as illicit publicity and prohibits any misleading publicity, in particular those :

1- Which include assertions, indications, or representations likely to mislead on the identity, the quality, the availability, or the characteristics of a product or a service;

2- Which includes elements likely to create confusion with another seller, its products, its services or its activity;

3- Which relates to a specific offer of products or services, when the economic agent does not have sufficient stocks of products or cannot provide the services that should normally be foreseen by reference to the extent of the advertising".

According to the article, a classic form of disparagement is that which consists in the comparison that a competitor makes between his products or his company and those of his competitors. This is known as "comparative advertising". This practice implies an uneasy reconciliation of two imperatives: preserving fairness in competition and ensuring the effectiveness of this competition by informing consumers.

For a long time, jurisprudence has ruled that comparative advertising is prohibited because it constitutes denigration according to the slogan "to compare is to denigrate".

According to the 1994 W.I.P.O (World Intellectual Property Organization) analysis on the protection against unfair competition, although it is argued that comparisons, if accurate, can be useful to the consumer, in practice, doctrine and jurisprudence only admit them in certain very special circumstances, for example, if they respond to an unlawful attack against the advertiser, or if they are necessary to explain the functioning of a system or, more generally, of new techniques.

In recent years, however, comparative advertising has been viewed less negatively: there is increasing recognition that truthful comparisons of relevant facts can not only reduce the cost to consumers of seeking information, but can also have a positive impact on the economy by improving market transparency.

Some argue in favor of allowing comparative advertising. Their opinion is based mainly on the need to inform consumers. But this form of advertising also has its opponents. They invoke several arguments: for example, they assert that the comparison can never be perfectly objective.

An advertiser will always be led to emphasize characteristics that are sometimes secondary because they confer superiority. They thus question the effectiveness of the process, because either it is based on technical and detailed considerations and risks creating confusion in the mind of the public, or it is locked into summary and superficial considerations and in this case, it can become misleading (Jean -Jacques BURST, 1993, 67).

According to a basic principle of competition law, it is forbidden to use the trade names, trademarks or other distinctive signs of competitors when marketing a product. This principle is well-founded because the use of competitors' trade names is often abused. It is a rule that traders market their products on their own terms and that they should not comment on the products of competitors.

However, since the middle of the 19th century, this principle has been modified with regard to comparative advertising. Starting in the United States, comparative advertising, which was anonymous at first but later named, has spread to most countries, even though it has met with strong opposition (Gazette du palais, May 23-27, 1999, 14).

While in the United States comparative advertising is an acceptable form of advertising, the majority of European countries have long rejected this form of advertising as an unfair commercial practice.

It was only as a result of Directive 97/55/EC of October 6, 1997, adopted by the European Parliament and the Council, that comparative advertising was introduced into the national legal order of each Member State in terms of principle, although it is governed by very strict conditions, including the circumstances in which this type of advertising is permitted.

To this end, Directive 97/55/EC amended Directive 84/450/EEC on misleading advertising so as to include comparative advertising on the basis of the

consideration that the acceptance or rejection of comparative advertising in the various national laws may represent an obstacle to the free movement of goods and services and may result in distortions of competition. Therefore, the freedom to use comparative advertising must be ensured. There are several ways to identify a competitor or its product in a comparative advertisement, even if the name is not mentioned.

Such a reference can be made directly or indirectly by implication or insinuation. The 2004 National Reports to the International League of Competition Law (I.L.C.L) indicate that any reference to a competitor or its product, implied or explicit, is considered comparative advertising. It is not necessary to mention the name of the competitor to be in the presence of comparative advertising. However, if the competitor is involved, the reference must be clearly identifiable and must in some way highlight the link between the advertiser's goods or services and those of at least one competitor. All reporters agree that the falsity of information depends on the public's understanding of it.

As a rule, the audience in this case is in fact the entire community. In some specific cases, when advertising is directed at narrow circles (such as doctors), their understanding of the advertisement will be a decisive factor. The average consumer or audience and their initial understanding, without further scrutiny, are decisive. The norm is a reasonably informed average consumer. The UK rapporteur cites some interesting cases.

In assessing whether or not an advertisement is misleading, the courts say that the public is used to the exaggerations of advertisers and that the information may be subject to certain conditions and fine print.

Therefore, an assessment must be made as to whether a reasonable person would tend to believe the truthfulness of the facts stated. Courts have ruled on situations where advertising is not misleading, such as when the court finds that consumers are aware of or expect additional information and conditions not mentioned in the advertisement.

For example, in a flight price comparison where the plaintiff's flights were to the city while the defendant's airports are several miles away. In addition, certain conditions applied to the defendant's flights. In this context, the fact that a merchant gave its advertising, for the promotion of its products (dishwashers), a connotation evocative of that belonging to a third party and accompanying the launch of a perfume is analyzed as a parasitic operation.

The evidence presented to the court shows that the perfume company accompanied the launch of its perfume with an image which, when used in advertising since then, has become the emblem of this perfume and has been identified with it; this image representing a woman seen in the bust with specific colors. While a campaign for dishwasher representing a woman holding in her hands a dishwasher reduced to the dimensions of a bottle, image which takes again so much the particular position of the hands of the woman of the previous publicity, which engages the responsibility of the advertiser and its publicity agency, the resemblance between the two publicities being obvious(C. Paris (4th ch. B) September 29, 1995: Company Guerlain C. Company Robert Bosch, Electro Ménager and Company S.A. Agence Z.).

Still on the jurisprudential level, by saying that a drug is the generic of another, the comparison of the two products is made on essential and objective elements, it is thus legal. Also, the reproduction of the sales receipts alone does not allow the consumer to be sure that the products compared have the same essential characteristics.

These two cases clarify the conditions for the legality of comparative advertising. According to the law, the elements of comparison must be objective and relate to essential, relevant, verifiable and representative characteristics of the products.

For the commercial chamber of the Court of Cassation, the mere fact of saying that one drug is the generic of another implies an objective comparison on essential elements. It is not necessary to go further and to develop the details of the composition of the drug. For the criminal chamber, the practice of comparative shopping can only be legal if it allows an objective comparison of products and prices.

However, in this case, if the receipts allowed a comparison of prices, it was not objective because the products inserted in the cart did not have the same characteristics of weight or quality and moreover, the consumer did not have access to these products since the cart was covered with a plastic film (Cass.com, March 26, 2008, Sandoz c/ Glaxosmithkline Laboratory. Cass.crim., March 4, 2008, Christian C. et a. Observations: G.R. contracts-competition-consumption, June 2008, p48).

Any advertising based on false or misleading statements about the advertiser's product or that of the competitor is prohibited in all countries.

However, it should be borne in mind that there are differences in the way in which what is "misleading" and, above all, what constitutes denigration, is understood. Some countries consider any advertising that touts the superiority or unique qualities of a product (such as the phrase "the best") as misleading and deceptive if it cannot be proven to be true, while others see it as nothing more than a harmless exaggeration. The other form of advertising infringement, according to Article 28 of Law 04-02, is "false advertising".

Under Algerian law, as under French law, advertising infringement is an offence "erga omnes", i.e. reprehensible by its mere existence, even if the person complaining of it has not objectively been the victim, as long as it is likely to mislead about the substantial qualities of the product or service.

However, when the misleading advertising has induced the user to conclude a contract, it can be considered as "fraud". But, whereas fraud can only be invoked by the injured party in order to obtain cancellation, the texts on misleading advertising are texts of a penal nature that can be raised by any user, even potential, as well as by consumer protection associations, and this in the absence of a contract, according to article 65 of law 04-02 which stipulates that consumer protection associations and legally constituted professional associations as well as any natural person or legal entity with an interest, can take legal action against any economic agent who has violated the provisions of the present law In the field of information technology, given the technical nature of the products concerned, the attitude of the courts tends to be more

rigorous: thus, according to classic jurisprudence, information that is not technically inaccurate but only overly flattering, which may consequently give the user an overly simplistic or overly optimistic conception of a computer system, is likely to engage the responsibility of the retailer (Andre BERTRAND, 1998, 108).

As for the repetition of the advertising idea, even if it is original, it cannot be the object of a misleading publicity, the idea which presides over the creation of the spirit belonging to all.

The repetition of elements necessary for the presentation of an unprotectable idea cannot be incriminated; in this case, if there are similarities in the overall presentation, these appear to be dictated by the adoption of the same promotional process and by the need to use elements and formulas necessary for its description; thus, an advertiser cannot reproach its promotion agency for having carried out a promotional action taking up the idea of that previously carried out by one of its competitors, the idea not being in this case appropriable and whereas, on the other hand, the realization which was made is not the slavish reproduction of the anteriority.

In addition, the advertiser cannot seriously claim to have been unaware of the advertising operation carried out by one of its main competitors less than two years earlier, such knowledge prohibiting it, in any event, from invoking a fault against its agency in the repetition of the promotional operation criticized (C. Versailles (12th ch.1re sect) November 24, 1994: Tabasco v. Lindt et Sprungli.).

In order to determine whether an advertisement is misleading, the market to which the advertisement is addressed must be taken into consideration. If it is a particular market, for example the medical market in the case of advertising for prescription-only drugs, the character of the advertising must be determined according to the professional standards of physicians.

With respect to the sale of ordinary goods, this principle does not normally pose a problem. In the case of advertising directed primarily at children, great care must be taken.

The International Chamber of Commerce emphasizes this fact since the "International Code of Advertising Practice" contains special guidelines for advertising to children. In addition, there is a special set of rules to protect children from misleading advertising. In practice, and even according to article 28, another infringement may be encountered, namely that of the trader who intends to take advantage of the notoriety attached to a product in order to attract customers who, attracted by the brand name of this product, will go to his stores and will buy, at the same time, products of another brand. This is known as the "loss leader" or "loss leader" practice.

This practice consists of a retailer offering a certain product, generally a product with a known brand name, at an advantageous price to attract customers to the point of sale. But very often the products that are the object of this practice are not in stock at the retailer's in sufficient quantities to meet the demand; the retailer then directs the customer to other products. Violations of advertising are punishable by law 04-02; thus, they are qualified as unfair trade

practices and punishable by a fine of fifty thousand dinars (50 000 DA) to five million dinars (5 000 000 DA).

Also, the goods, materials and equipment used to commit the offences may be seized subject to the rights of bona fide third parties. The seized goods must be the subject of an inventory report according to the procedures defined by regulation.

With regard to the seizure, it may be real or fictitious. It is understood that by real seizure, any physical seizure of goods ; fictitious seizure means any seizure of goods that the offender is unable to present for any reason whatsoever. In addition to financial penalties, the judge may order the confiscation of the seized goods.

If the confiscation concerns goods that have been seized, they are handed over to the administration of the Domains, which proceeds with their sale under the conditions provided for by the laws and regulations in force. In case of fictitious seizure, the confiscation concerns all or part of the value of the seized goods.

Finally, when the judge pronounces the confiscation, the amount of the sale of the seized goods is acquired by the Treasury. Finally, to assess the existence of the offence, the courts refer to the reader or consumer, "a normally attentive and intelligent medium".

CONCLUSION

The obligation to inform depends on the consumer's ignorance in the contractual framework with the professional, and the greater the conventional weakness, the heavier the obligation to inform; in fact it is a protean obligation. This obligation protected by the Algerian legislator, according to sometimes paradoxical texts, in order to meet the needs of consumers, while adopting international provisions.

Whose main text remains Law 09-03, this law that has not prevented other texts to intervene in the matter of consumer information, which can on the one hand lead the consumer to renounce, and on the other hand, represent unstable and dispersed protection.

Finally,This gap is left to the discretion of the Algerian legislator, because such an approach does not seem to be in conformity with the spirit of consumer law which tends to be harmonized in order to respond to a logic of unification.

Thus, we conclude the following recommendations:

-The infringement of the advertising is an infringement of the trademark, so we find ourselves in front of the obligation to register the advertising, and in case of non-registration, it must be qualified as an offence, according to the Algerian legislation.

-The counterfeit advertising is a form of unfair competition, according to the Algerian text, the law 04-02, so the legislator did not differentiate between the

infringement of a right, which is the counterfeit, and not being in conformity with the custom, which characterizes the unfair competition.

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