

# Misleading Advertising

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## Introduction

If one had to go back in time to the now cream-coloured pages of the White Paper entitled "Rights for the Consumer", published in August 1991, one will read: "A new law regulating methods of commercial advertising is not an attempt at censorship. It is envisaged that remedial action shall be resorted to only in a few isolated cases, where decent limits of competition and correctness of information are violated. Nobody is interested in reducing advertising to a stale narration of cold facts; the extravagance, wit and humorous exaggeration present in much advertising, must remain untouched, and only be regulated if they degenerate into deception or wrongful misinformation".

Just less than ten years later, Section 48 of the Consumer Affairs Act, introduced by Act XXVI of 2000, came into force on the 1<sup>st</sup> January 2001. The purpose of this provision is to transpose into Maltese law the EU Directive 84/450 entitled "Misleading Advertising", which in fact has been faithfully copied, giving us the added benefit of being able to refer to the decisions of the European Court of Justice in interpreting our law.

So the law today provides that an advertisement is misleading if in any way, including its presentation, it deceives or is likely to deceive the persons to whom it is addressed or whom it reaches, and if by reason of its deceptive nature, it is likely to affect their economic behaviour or is one which for those reasons, injures or is likely to injure a competitor of the person whose interests the advertisement seeks to promote. In determining whether an advertisement is misleading account shall be taken of all its features, and in particular of any information it may have about:

- (a) the characteristics of goods or services, including their availability, nature, execution, composition, method and date of manufacture or provision, fit-

- ness for purpose, uses, quantity, specification, geographical or commercial origin or the results to be expected from their use, or the results and material features of tests or checks carried out on the goods or services;
- (b) the price or the manner in which the price is calculated, and the conditions on which the goods are supplied or the services provided;
- (c) the nature, attributes and rights of the advertiser, including his identity and assets, his qualifications and ownership of industrial, commercial or intellectual property rights or any awards and distinctions made to him.

## Interpretation of Misleading Advertising by the European Court

The identification of the level of protection required for the average consumer crystallised in the 1995 *Mars* judgement. *Mars* concerned a complaint that the application of a '+10%' marking whose dimensions exceeded ten per cent of the surface of the wrapper on ice-cream bars mislead consumers into believing that either the volume or the weight of the product had been increased by an amount greater than ten per cent. The Court adopted, for the first time, the notion of the "reasonably circumspect consumer" who might "be deemed to know that there was not necessarily a link between the size of the publicity markings relating to an increase in the product's quantity and the size of that increase".

That approach has since been firmly established, in particular by two recent cases. *Gut Springenheide* concerned a complaint brought before a German court relating to allegedly misleading information contained in both a trade mark used on and a notice supplied inside the packaging of eggs contrary, in that case, to Community legislation. The national court expressly asked whether the proper test was 'the informed aver-

age consumer or the casual consumer'. The Court's judgement is of general application: it drew particular attention to the existence of similar consumer-protection provisions in other Community legislation and referred to a number of its earlier decisions, including *GB-INNO-BM*, *Pall*, *Clinique* and *Mars*. It continued by enunciating (paragraphs 31 to 32) the following test:

"In those cases, in order to determine whether the description, trade mark or promotional description or statement in question was liable to mislead the purchaser, the Court took into account the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect, without ordering an expert's report or commissioning a consumer research poll. So national courts ought, in general, to be able to assess, on the same conditions, any misleading description or statement designed to promote sales."

Although couched as a test which the Court had itself already applied, it is clear that it was principally intended to be the test applied by national courts. This emerges clearly, to my mind, from *Sektkellerei Kessler*. That case concerned an allegation of confusion arising from the brand name of a German sparkling wine. The Court stressed the need to establish, 'having regard to the opinions or habits of the consumers concerned, that there is a real risk of their economic behaviour being affected' and later reiterated the *Gut Springenheide* test:

"... it is for the national court to assess in the light of the circumstances whether, bearing in mind the consumers to whom it is addressed, a brand name or its component parts are liable to be confused with all or part of the description of certain wines. In that respect, it is also apparent from the Court's case-law that the national court must take into account the presumed expectations of an average consumer who is reasonably well

informed and reasonably observant and circumspect ...”.

Thus it is clear that the test to be applied to any case of restriction on the sale or marketing of a product on the ground of protecting the consumer from misleading labelling or other accompanying information is whether its presence on the market would, in some material respect, be likely to mislead the hypothetical consumer so defined. This test should enable the Maltese courts, and the enforcement authorities, to assess the facts of each case against this standard on the basis of its own judgement of how such a consumer would be affected.

The standard involved, being based on a cumulation of four factors, is clearly a high one. Having regard to all the relevant surrounding circumstances of the case, and especially the selling arrangements employed by the vendor, the court must be satisfied that the average consumer, who is reasonably well informed and observant about the product in question and who exercises reasonable circumspection when using his critical faculties to assess the claims made by or in respect of it, would be confused. The approach is thus not statistical. Market surveys may, in certain cases, be of assistance, although it must be remembered that they are subject to the frailties inherent in the formulation of survey questionnaires and often subject to diverging interpretation as to their significance. Accordingly, they do not absolve the court from the need to exercise its own faculty of judgement based on the standard of the average consumer as defined in Community law.

*Estée Lauder Cosmetics GmbH & Co. OHG and Lancaster Group GmbH (13/01/2000 — Case C-220/98)* also teaches us that the name of a product would be misleading if the consumer believes it to imply that the product possesses characteristics which it does not have.

*Österreichische Unilever GmbH and Smithkline Beecham Markenartikel GmbH (28 January 1999 — Case C-77/97)* requires that the controls exercised by the enforcement authorities could take the form, *inter alia*, of an obligation requiring the manufacturer or distributor of the product in question, in the event of any uncertainty, to furnish evidence of the accuracy of the advertisements concerned.

## Advertising in the Financial Services Sector

For those who operate in the financial services sector, misleading advertising has been specifically regulated at least since 1994.

**In the investment services sector,** the Investment Services Guidelines issued by the MFSC under the Investment Services Act 1994, contain detailed rules (Guideline 9) prohibiting misleading statements in advertisements. Section 11 of the Act requires an issuer of an advert to obtain the prior permission of the MFSC and under Section 21 the MFSC may apply to the Court for it to order the rectification of any breach of Section 11.

**In the insurance sector,** Insurance Intermediaries Directive No. 5 issued by the MFSC under the Insurance Business Act 1998 provides in Section 6 that any statement made by or on behalf of an enrolled company when issuing an advertisement shall not be misleading or unrealistic. When an advert does not comply with the MFSC Directive, Section 48(4) of the Insurance Business Act gives the MFSC the power to order to the company which issues the advert:

- (a) to withdraw, wholly or partly, the advertisement or promotional activity; or
- (b) to amend any particular of the advertisement or promotional activity; or
- (c) to do such other thing as it deems appropriate in the circumstances.

According to Section 48(5) of the Insurance Business Act, if a company refuses or fails to comply with any order issued by the MFSC or refuses or fails to comply with such order within the time specified therein, without prejudice to any penalty which the company may incur under the Act, the MFSC will have the power to enforce, at the expense of the company concerned, the order issued by it under that subsection.

**For banking business,** Section 35(1) of the Banking Act, 1994 provides that any person who:

- (i) makes a statement, promise or forecast which he knows to be misleading, false or deceptive, or dishonestly conceals any material facts; or
- (ii) recklessly makes (dishonestly or otherwise) a statement, promise or forecast which is misleading, false or deceptive, is guilty of an offence if

he makes the statement, promise or forecast or conceals the facts for the purpose of inducing, or is reckless as to whether it may induce, another person (whether or not to the person to whom the statement, promise or forecast is made or from whom the facts are concealed) —

- (I) to make, or refrain from making, a deposit with him or any other person; or
- (II) to enter, or refrain from entering, into an agreement for the purpose of making such a deposit.

Further rules on advertising for deposit taking are contained in Banking Notice No. 5 issued by the Central Bank of Malta. However this Notice does not contain provisions authorising the competent authority under the Banking Act, which since the 1<sup>st</sup> January 2002 is now the Malta Financial Services Centre (MFSC), to order the correction or withdrawal of a non-compliant advert, although in practice there is no doubt that no bank would refuse to comply with such an order by the MFSC.

## Conclusion

The remedies which have been provided by the Consumer Affairs Act to combat misleading advertising come in three different flavours:

1. the criminal penalty for a misleading advertisement is a fine between Lm200 and Lm2000;
2. consumer associations have the right to challenge misleading adverts and;
3. the Director of Consumer Affairs can prohibit the issuance of misleading adverts or order their removal.

Misleading consumers has always been a risky business, however today the risks have gone beyond the merely reputational risk transmitted by word of mouth from one consumer to the next. Misleading advertisers will now have to put their money where their mouth is, and pay society's bill for corrective measures in the process.

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