



STATUTORY INSTRUMENTS.

S.I. No. 774 of 2007

EUROPEAN COMMUNITIES (MISLEADING AND COMPARATIVE
MARKETING COMMUNICATIONS) REGULATIONS 2007

(Prn. A7/2136)

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I, MICHEÁL MARTIN, Minister for Enterprise, Trade and Employment, in exercise of the powers conferred on me by section 3 of the European Communities Act 1972 (No. 27 of 1972) and for the purpose of giving effect to Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006¹, hereby make the following regulations:

1. These Regulations may be cited as the European Communities (Misleading and Comparative Marketing Communications) Regulations 2007.

2. (1) In these Regulations—

“code of practice” means any code, agreement or set of rules or standards that is not imposed by or under an enactment but purports to govern or define (with or without other matters) matters relating to the marketing communication of one or more traders (whether generally or in respect of a particular trade, business or profession) who agree, commit or undertake to abide or be bound by such rules or standards;

“code owner” means any person responsible for either or both of the following:

(a) formulating or revising a code of practice;

(b) monitoring compliance with the code by those traders who agree, commit or undertake to abide or be bound by it;

“comparative marketing communication” means any form of representation made by a trader that explicitly or by implication identifies a competitor of the trader or a product offered by such a competitor;

“Directive” means Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006¹;

“goods” means real or personal property of any nature or description and includes—

(a) ships, aircrafts or other vehicles,

(b) animals,

(c) minerals, trees or crops, whether on, under or attached to land or not,

¹ OJ No. L376, 27.12.2006, p.21.

- (d) gas, electricity or water,
- (e) computer software,
- (f) tickets or like evidence of a right to be in attendance at a particular place at a particular time or times or a right of transportation,
- (g) any voucher, coupon, or other document or thing intended to be used as a substitute for money in the payment, in whole or in part, for a product or otherwise exchanged for a product, and
- (h) any description of interest (present or future, vested or contingent) or obligation arising out of, or incidental to, goods;

“marketing communication” means any form of representation made by a trader in connection with a trade, business or profession in order to promote the supply of a product;

“product” means goods or services;

“representation” includes—

- (a) any oral, written, visual, descriptive, or other representation by a trader, including any commercial communication, marketing or advertising, and
- (b) any term or form of a contract, notice or other document used or relied on by a trader in order to promote the supply of a product;

“services” means any service or facility provided for gain or reward or otherwise than free of charge, including—

- (a) services or facilities for—
 - (i) banking, insurance, grants, loans, credit or financing,
 - (ii) amusement, cultural activities, entertainment, instruction, recreation or refreshment,
 - (iii) accommodation, transport, travel, parking, or storage, or
 - (iv) the care of persons, animals or things,
- (b) membership in a club or organisation or any service or facility provided by the club or organisation, and
- (c) any rights, benefits, privileges, obligations or facilities that are, or are to be provided, granted or conferred in the course of services,

but does not include services provided under a contract of employment;

“supply”, in relation to the supply of a product to a trader, includes any of the following:

- (a) sell, lease, take by way of mortgage or other security, assign or otherwise effect a disposition of;
- (b) offer or agree to supply;
- (c) expose or display for supply;

“trader” means—

- (a) a person who is acting for purposes relating to the person’s trade, business or profession, or
- (b) a person acting on behalf of a person referred to in paragraph (a).

(2) A word or expression that is used in these Regulations and is also used in the Directive shall have the same meaning in these Regulations as it has in the Directive.

3. (1) A trader shall not engage in a misleading marketing communication.

(2) A marketing communication is misleading if—

- (a) in any way (including its presentation), it deceives or is likely to deceive in relation to any matter set out in paragraph (4) the trader to whom it is addressed or whom it reaches, and
- (b) (i) by reason of its deceptive nature, it is likely to affect the trader’s economic behaviour, or
- (ii) for any reason specified in this paragraph, it injures or is likely to injure a competitor.

(3) In determining whether a marketing communication under paragraph (2) is misleading, the marketing communication shall be considered in its factual context, taking account of all its features and the circumstances.

(4) The following matters are set out for the purposes of paragraph (2)(a):

- (a) the existence or nature of the product;
- (b) the main characteristics of the product, including any of the following:
 - (i) its geographical origin;
 - (ii) its commercial origin;
 - (iii) its availability at a particular time or place, or at a particular price;
 - (iv) its quantity, weight or volume;

- (v) its benefits or fitness for purpose;
- (vi) the results to be expected from it;
- (vii) the risks it presents;
- (viii) its usage or prior history;
- (ix) its composition, ingredients, components or accessories;
- (x) the specifications of the product, including the grade, standard, style, status or model of the product;
- (xi) the after-supply customer assistance available in relation to the product;
- (xii) the handling of complaints in relation to the product;
- (xiii) the method or date of—
 - (I) the product's delivery, supply or provision, and
 - (II) in the case of goods, their manufacture;
- (xiv) the results and material features of test or checks carried out on the product;
- (xv) in relation to a service, its execution or performance;
- (c) the price of the product, the manner in which that price is calculated or the existence or nature of a specific price advantage;
- (d) the need for any part, replacement, servicing or repair in relation to the product;
- (e) the existence, extent or nature of any approval or sponsorship (direct or indirect) of the product by others;
- (f) the nature, attributes, and rights of the trader who made the marketing communication, or on whose behalf it was made, including any of the following:
 - (i) the trader's identity, qualifications, assets or status;
 - (ii) the trader's affiliation or connection with others;
 - (iii) the existence, extent or nature of—
 - (I) any industrial, commercial or intellectual property rights the trader may have, or
 - (II) any award, distinction, approval or sponsorship (direct or indirect) the trader has or has received;

- (g) the extent of the trader's commitments;
- (h) the trader's motives for the commercial practice;
- (i) the nature of the trader's supply process;
- (j) the legal rights (whether contractual or otherwise) of the trader to whom the product is supplied, or matters respecting when, how, or in what circumstances those rights may be exercised.

(5) Where the geographical origin of goods manufactured or produced in more than one country is a matter to be determined under paragraph (4)(b)(i), consideration shall be given to where the goods underwent their last substantial and economically justified processing or working (in a place equipped for that purpose), resulting in the manufacture of new goods or representing an important stage of the manufacture.

(6) Without prejudice to the generality of paragraph (3), where—

- (a) the price of a product, the manner in which that price is calculated or the existence or nature of a specific price advantage is a matter to be considered under paragraph (4)(c), and
- (b) the marketing communication concerned involves a representation or creates an impression that the product was previously offered at a different price or at a particular price,

consideration shall be given to whether the product was previously offered openly and in good faith at that price and at the same place for a reasonable period of time before the representation was made.

(7) Without prejudice to the generality of paragraph (3), where—

- (a) the price of a product, the manner in which that price is calculated or the existence or nature of a specific price advantage is a matter to be considered under paragraph (4)(c), and
- (b) the marketing communication concerned involves a representation or creates an impression that the product is being offered by a trader at or below a price recommended by the manufacturer, producer or supplier of the product (other than the trader),

consideration shall be given to whether that recommended price was a price recommended in good faith by that manufacturer, producer or supplier.

4. (1) A trader shall not engage in a prohibited comparative marketing communication.

(2) A comparative marketing communication is prohibited if, as regards the comparison—

- (a) it is misleading under Regulation 3,

- (b) it is a misleading commercial practice under any of sections 43 to 46 of the Consumer Protection Act 2007 (No. 19 of 2007),
- (c) it does not compare products meeting the same needs or intended for the same purpose,
- (d) it does not objectively compare one or more material, relevant, verifiable, and representative features of those products, which may include price,
- (e) it discredits or denigrates the trade marks, trade names, other distinguishing marks, products, activities, or circumstances of a competitor,
- (f) for products with designation of origin, it does not relate in each case to products with the same designation,
- (g) it takes unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products,
- (h) it presents goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name, or
- (i) it creates confusion among traders—
 - (i) between the trader who made the comparative marketing communication and a competitor or,
 - (ii) between the trade marks, trade names, other distinguishing marks, goods or services of the trader who made the comparative marketing communication and those of a competitor.

5. (1) A trader or other person may, upon giving notice of the application to the trader against whom the order is sought, apply to the Circuit Court or the High Court for an order prohibiting that trader from—

- (a) engaging in, or
- (b) continuing to engage in,

a misleading marketing communication or a prohibited comparative marketing communication.

(2) If, in any proceedings under this Regulation, the truth of a factual claim in a representation is an issue, and the trader against whom the order is sought does not establish on the balance of probabilities that the representation is true, then the representation shall be presumed to be untrue.

(3) In determining an application under this Regulation, the Court shall consider all interests involved and, in particular, the public interest.

(4) If the Court considers it necessary or appropriate in the circumstances, taking into account all the interests involved and, in particular, the public interest, the Court may make an order under paragraph (1)(b) without proof of any actual loss or damage on the part of the person making the application, or any intention or negligence on the part of the trader against whom the order is sought.

(5) In making an order under this Regulation, the Court may impose terms or conditions in the order that the Court considers appropriate, including a requirement that the trader publish a corrective statement, at the trader's own expense and in any manner the Court considers appropriate, in respect of matters the subject of the order.

(6) An application under this Regulation to the Circuit Court shall be made to the judge of the Circuit Court for the circuit in which the misleading marketing communication or prohibited comparative marketing communication is being made.

(7) The Circuit Court shall have jurisdiction to hear and determine an application under this Regulation that it is satisfied it is appropriate for it to deal with as a court of local and limited jurisdiction and, for the purpose of the Court's satisfying itself of that matter, the matters to which it shall have regard include—

- (a) the nature and extent of the misleading marketing communication or the prohibited comparative marketing communication concerned, and
- (b) the estimated cost of complying with the order to which the application relates.

(8) If, in relation to an application under this Regulation to the Circuit Court, that Court becomes of the opinion, during the hearing of the application, that it is not appropriate for the Circuit Court to deal with the application, it may, if it thinks fit, transfer the application to the High Court.

(9) Paragraph (8) is without prejudice to the jurisdiction of the Circuit Court to determine an application under this Regulation which, at the time of the making of the application, it was satisfied it had jurisdiction to deal with.

(10) Where an application is transferred under paragraph (8) to the High Court, the High Court shall be deemed to have made any order of a procedural nature that was made by the court from which it is so transferred in the proceedings in relation to the application.

6. (1) Where a code of practice or its code owner promotes a misleading marketing communication or prohibited comparative marketing communication, a trader or other person may apply to the Circuit Court or the High Court for either or both of the following:

- (a) an order prohibiting the code owner from such promotion;

(b) an order requiring the code owner to withdraw or amend the code as the Court considers necessary to prevent such promotion.

(2) An application under paragraph (1) shall be on notice to the code owner.

(3) In determining an application under this Regulation, the Court shall consider all interests involved and, in particular, the public interest.

(4) In making an order under paragraph (1), the Court may impose terms or conditions in the order that the Court considers appropriate.

(5) Paragraphs (6) to (10) of Regulation 5 apply to an application under this Regulation with the following modifications:

(a) in paragraph (6), by substituting “in which the code owner is promoting the misleading marketing communication or prohibited comparative marketing communication, or in which the code owner resides or carries on any business or profession” for “in which the misleading marketing communication or prohibited comparative marketing communication is being made”, and

(b) in paragraph (7), by substituting the following for subparagraph (a):

“(a) the nature and extent of the misleading marketing communication or prohibited comparative marketing communication being promoted by the code of practice or its code owner.”.

7. The European Communities (Misleading Advertising) Regulations 1988 (S.I. No. 134 of 1988) are revoked.



GIVEN under my Official Seal,
20 November 2007

MICHEÁL MARTIN.
Minister for Enterprise, Trade and Employment.

EXPLANATORY NOTE

(This note is not part of the Instrument and does not purport to be a legal interpretation.)

These Regulations implement Directive 2006/114/EC of the European Parliament and the Council of 12 December 2006 concerning misleading and comparative advertising. Their purpose is to protect traders against misleading marketing communications and the unfair consequences thereof and to specify the circumstances in which comparative marketing communications are prohibited.

The Regulations provide that a marketing communication is misleading if, in any way (including its presentation), it deceives or is likely to deceive in relation to any matter specified in the Regulations the trader to whom it is addressed or whom it reaches, and by reason of its deceptive nature, it is likely to affect the trader's economic behaviour or, for those reasons, to injure or be likely to injure a competitor.

The Regulations define a “comparative marketing communication” as any form of communication made by a trader that explicitly or by implication identifies a competitor of the trader or a product offered by such a competitor, and set out the circumstances in which such communications are prohibited.

A trader or other person may, upon giving notice of the application to the trader against whom the order is sought, apply to the Circuit Court or the High Court for an order prohibiting that trader from engaging, or continuing to engage, in a misleading marketing communication or a prohibited comparative marketing communication.

The Regulations revoke the European Communities (Misleading Advertising) Regulations 1988 (S.I. No. 134 of 1988).

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