

## Legality of Comparative Commercial Advertising

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### *Abstract*

*The development and progress in various fields of trade and industry has played a major role in opening a wide horizon for different facilities for growth and occupation of many countries and markets that were not known before, and the multiplicity of types of products and services led to the need to find an effective way to link the product and the consumer so that the consumer trusts and is convinced of the quality of the products and services provided to him, and this means is advertising in general and commercial advertising in particular, the comparative commercial advertising has become at the present time a necessity that must exist for both the producer and the service provider and the consumer himself, and the comparative commercial advertisement did not have a prominent place among commercial advertisements because it was and is still in some legislation subject to dispute and non-recognition of its legitimacy, and comparative commercial advertising has passed through many stages, especially in France, and has been subjected to many criticisms and objections at all legislative, judicial and jurisprudential levels, But in the end, it was able to establish a foothold between the most important means of introducing products and services, as well as among other means of communication, so that it became the most important due to its advantages, especially in the speed and accuracy of information delivery compared to its counterparts to the receiving public, and it is also an effective way to introduce the consumer to market conditions and competing products and services of different kinds, and it also provides him with sufficient time to receive that information.*

*Keywords: Commercial Advertising, Profits, Market, Competition, Commercial Legislation.*

### **1. Introduction**

Comparative commercial advertising has become of benefit to other means of communication as it has become a profession that generates great profits for its workers and specialists in its field, through advertising offices, which represent a professional body because of its

capabilities, expertise, human cadres and mighty energies, and thus comparative commercial advertising has become an activity with an effective and important economic impact, as it is the most important returns of advertising for its profits. In view of the importance of the subject of comparative commercial advertising and its effects in commercial dealings, this importance has not been of sufficient interest to the legislator or even by researchers, although there are few of them who have been interested in it, but indirectly and without detail.

## **2. Study Problem:**

comes from the novelty of the subject and the lack of available sources, and the lack of awareness of the consumer made him look at the comparative commercial advertisement as a misleading and deceptive advertisement and therefore is illegal, and on the other hand the problem arises through the lack of legal regulation by the Iraqi legislator not at the level of commercial advertising in general or at the level of comparative advertising in particular, but the presence of some simple treatments here and there in some special laws, which necessitates the legislator shall regulate a law on comparative commercial advertising. Also, research on the subject of comparative commercial advertising requires answering the following questions:

A. What is meant by comparative commercial advertising, what are its images, what are its most important characteristics, and its most important elements?

B. What is the extent of its legality, and what are the most important conditions for that legality?

## **3. Study Objectives:**

The subject of the research aims at comparative commercial advertising, which distinguished the difference between products and services with their counterparts by highlighting the advantages of each, and out of the scope of the research all types of advertising, whether commercial or non-commercial, so the study will be determined by a statement of what is meant by comparative commercial advertising and the statement of its most important images and determine its most important characteristics and elements, as the study shows the most important jurisprudential and judicial trends that differed on its legitimacy, as well as determine the most important conditions that were set for its legitimacy, and focus In this study, some of the legislations that dealt with the subject of regulation, especially the French legislation, in order to identify the

strengths and weaknesses and compare them with the relevant Iraqi legislation wherever we find a way. We rely on the position of legislation specialized in comparative commercial advertising as well as other relevant laws, especially civil law, commercial law and other laws, and the focus will be on the position of the French legislator because he is the only one who came with legal rules that included all aspects related to the subject, as for the position of the Iraqi legislator, it has come with laws limited to the formal aspects of the subject and professionalism without delving into the objective aspects of it, and the study also depends on the analysis of jurisprudential opinions that have been put forward on this subject, as well as French judicial decisions, including as a result of the lack of the Iraqi judiciary for such a decision concerned.

#### **4. Study Methodology:**

Comparative analysis will be the approach in this study, moving between induction and inference from provisions of Iraqi laws, and comparison for subject coherence and the requirements of scientific research, in order to tackle all perspectives on the topic. We will also investigate jurisprudence approaches to bring about a comprehensive definition of comparative commercial advertising.ith the subject of comparative commercial advertising.

#### **5. The Concept of Comparative Commercial Advertising.**

The definitions of comparative commercial advertising as a practical means of communication with consumers varied, and commercial advertising was affected by several economic, social and legislative conditions, and this discrepancy comes as a result of its contact with other sciences such as economics, law, management, media and other sciences. There have been many jurisprudential definitions of advertising, as some have defined it as "a paid means to create a state of satisfaction and psychological acceptance in the masses for the purpose of helping to sell a good or service and with the consent of the public to accept the idea or guidance of a party itself." (Zaggared, 1995).

It is also defined as "a communication process aimed at influencing from seller to buyer on a non-personal basis, where the advertiser discloses his identity and is contacted through public means of communication," and he also defined it as ((various aspects of activity that lead to the dissemination and broadcast of visual or audible advertising messages to the public for the purpose of urging him to purchase goods or contract services, or for the sake of his context to

accept the good ideas, people or facilities advertised)). (Marhoon, 2012).

It is also defined as "a paid impersonal means of communication followed by businesses, for-profit institutions, and individual consumers with the intention of providing goods, services and ideas to a group of consumers or industrial buyers and persuading them to do so" (Ahmed, 2010). Another also defined it as a non-personal way to provide ideas, goods and services and promote them through a known party in return for a paid fee, and others defined it as every commercial news aimed at delivering knowledge and knowledge about a product or service by showing its advantages and advantages in a way that leads to creating good acceptance by the public that reflects positively on products and services by increasing the demand for them without limiting the news to a specific advertising medium. (Frag, 2009).

If we refer to the judiciary in the definition of the declaration, at the level of the Arab judiciary we did not find any reference to the definition of the declaration, but only what is in the legislation, and this is the approach of the Iraqi courts, unlike the French judiciary, it went to the definition of the declaration through the interpretation of some legal texts, as it interpreted some of the phrases contained in the text of Article (45) of the French Consumer Code No. (525) of 2011. It is defined Advertising as "Any advertising that compares goods or services by identifying, implicitly or explicitly, a competitor or goods or services offered by a competitor are lawful only if...", and therefore the French judiciary counted all the information or data published or shown about the service or product in the following media: telephone directory and information cards placed on the product, or the menu of food served in restaurants to the public and other multimedia such as advertising has expanded considerably in that. (Bakri, 1986).

The Commercial Chamber of the French Court of Cassation ruled in a judgment issued on January 13, 1971 that a commercial advertisement must be prepared everything that is published to the public in newspapers as long as it aims to induce the purchase of a particular product, and it was sufficiently indicated in these newspapers and some have specified their observations on this provision that it did not include all the elements of the advertisement, especially those related to the characteristics of the product of data on the advertised thing as well as the fact of contracting it. (Houston, 1959). As for the Iraqi legislator, he has defined advertising under the text of the first article of Law No. (45) of 1971, as amended, on advertising offices ((advertising means all means of advertising and publishing in newspapers, television or cinema, plastic and wall posters, as well as of different types)), and it is noted on this definition also focus on advertising tools through which the advertisement is delivered to the

recipient without specifying what it is, its components, purposes or objectives, and this is what is a deficiency in the definition that can be addressed by Legislator. (Azab, 2004).

The European Directive issued on 114 September 2006 by the Council of the European Union, which aims to bring legal texts and administrative regulations closer between member states with regard to misleading advertising, it is defined comparative advertising in Article 1 (C) as any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor". (Ibrahim, 2008). It was also defined by the American Marketing Association as ((the non-personal means of providing and promoting goods, services or ideas by a known entity and for a paid fee)), and it is noted on this definition that it included all types of advertising and this was not limited to advertising.

#### 5.1. Legality of Comparative Commercial Advertising.

The legality of a comparative commercial advertisement is not intended to publish an advertisement that does not conform to the truth, is not truthful and misleading to the recipient, but the intention of the legitimacy of this advertisement is the extent to which it is permissible or inadmissible to publish comparative advertisements that are identical to the truth, because the advertisement that does not conform to the truth is basically an illegal advertisement and is a false advertisement that entails responsibility in the first place. Through the texts of some laws that dealt with comparative advertising and at successive periods of time on the one hand, and the opinions of jurists on the other hand, it is clear that there are two trends regarding the legality of this advertisement, the first trend goes to say its illegality, but goes more than that to the point of prohibiting it, while the second trend goes to the comparative commercial advertising license, but with the availability of certain conditions, and each of these two trends has its arguments and justifications on which it is based (Al-Mohammadi, 2012).

#### 5.2. Inadmissibility of the Legality of Comparative Commercial Advertising:

Perhaps one of the well-known facts to man is that any new idea that did not exist or is in the process of existence may face strong opposition and more objection because it needs more convictions that it faces and more study and deliberation in its acceptance, and perhaps the idea of comparative commercial advertising and its emergence in the seventies of the last century faced strong opposition from jurists and supported by the judiciary in many of its decisions, especially the French judiciary, and all in the absence of legal texts regulating this subject and the difficulty here lies in the fact that there is a conflict

between two principles, namely the principle of freedom of expression on the one hand, which is guaranteed by most constitutions (Azab, 2004), as the freedom of advertising is one of its aspects, which can not be excluded or confiscated completely, and between the principle of the ideal advertising profession, which refuses to prejudice competing projects and not to prejudice the other by comparing them, and opponents of the idea of comparative commercial advertising have relied on some provisions of the French Civil Code, the French Penal Code and other legal texts, reasoning Their prohibition of comparative commercial advertising is that it is a form of unfair competition that is achieved when the merchant (advertiser) by several means that would spread distrust in the facility or project of the competitor merchant and his defamation and degrading of his products or services and abuse them, as well as keeping his customers away from him by comparative advertising as it targets one of the essential elements of that facility, project or commercial shop, which is the confidence of customers by misleading them and causing them confusion or ambiguity when it refers to the defects of the products and services compared to it and with the fact that showing the advantages of the comparative product compared to other competing products, and therefore comparative commercial advertisement addresses the inefficiency of the products and services of the competitor merchant, and this greatly affects the reputation of this competitor and the achievement of unfair profits and results.

The proponents of this trend, which calls for the prohibition of comparative commercial advertising, have relied on several arguments in their prohibition of it in this or that law, They are the provisions of the general rules in the French Civil Code in accordance with the rules of tort in it and some provisions of the French law of 1973 known as the RoyER law on shady advertising, and the European directive issued in 1984 and they finally relied on some provisions of the French Penal Code that talk about prohibiting the use of the trademark without its owner, and this is what we will address successively.

#### **6. Provisions of the General Rules of the French Civil Code on Tort:**

At the beginning of the emergence of comparative commercial advertisements in the seventies of the last century, there were no legal texts dealing with these advertisements directly, which prompted the French courts to resort to the general rules in the French Civil Code to address this deficiency in legislation (corresponding to the text of Article 186 / a of the Iraqi Civil Code, which states that ((If one destroys the money of another or decreases its value directly or caused, it is a guarantor, if this damage has been deliberately caused or

transgressed) they relied on the text of Article 1382 of the French Civil Code, which states that ((Any act whatsoever that causes damage to others obliges the person who committed this damage to compensate him)). (Ziggard, 1995). Accordingly, this article entails liability on the basis of error or so-called personal liability, that is, the judiciary established the responsibility of the advertiser on the basis that he committed (error) and this error is represented by the process of attracting customers and customers to his products or services by offending the other competitor and damaging his competitor and therefore the responsibility falls on the basis of an unfair competition lawsuit according to the general rules of tort liability, a civil lawsuit filed by the injured party on the one who committed this error and in this regard a case was presented to the Paris Court Its facts are summarized that one of the companies has been trading since 1968 in an antibiotic called ((Antipiotigue of a certain class), and another company began to manufacture the product at the beginning of 1974 is Company (B) and in 1978 the latter company distributed advertising messages to doctors comparing them between the antibiotics manufactured by them, and the antibiotic manufactured by Company A, in which it explained that the results of the comparison are in favor of its products and outweigh them over similar ones. The court of Paris decided that what the defendant company did was unfair competition and the defendant company committed an error that requires compensation based on the text of Article 1382 of the French Civil Code. (Ahmed, 1991).

This case and other cases brought before the French judiciary confirmed that the judiciary has adopted the determination of the advertiser's tort liability on the basis of the fault he commits, and thus it falls within the framework of unfair competition, which requires his accountability for what he did according to the general rules of tort liability based on the text of Article 1382 of the French Civil Code.

#### 6.1. Provisions of the French Penal Code:

Some french jurisprudence went to prohibit comparative commercial advertising based on the provisions of the French Penal Code, especially the text of Article (422/2) thereof, as it explicitly stipulated the prohibition of using the trademark without the permission of its owner, reasoning that when the advertiser uses the trademark of others without the permission of its owner, he must fall under penalty (Ahmed, 1991).

In the same context, this statement is similar in Iraqi legislation in the amended Trademarks and Trade Indications Law No. 21 of 1957, as Article (35), third paragraph of it, stipulates that ((Whoever puts in bad faith on his products a mark owned by others)) His responsibility for this work is fulfilled.

## 6.2. Provisions of the French Law of 1973 Known as ( ROYER) Law.

The French courts at that time were based on several punitive texts to prohibit misleading advertising, for example, crimes of fraud, fraud and the use of the trademark of others without the permission of its owner, as well as the use of punitive texts contained in special laws such as the Law on the Protection of Patents, Trademarks and Trade Names, and these texts were not all deterrent to reduce the prevention of advertising misinformation and in the absence of a legal text in the general rules in the French Penal Code, which explicitly punishes misleading advertising Several laws have been passed. (Marhoon, 2012), but it did not succeed in reducing this misinformation as it needs to be proven by the injured party, as well as the fact that the penalties issued in it are cheap in exchange for damage, so as a result of all this, the Royer Law was issued, which in turn regulated the work of the Union of Commerce, Commercial Crafts, Unfair Competition, Chambers of Commerce and Industry and Consumer Protection, as in Chapter III of it, related to unfair competition, Article (44) thereof stipulates that: ((No person may in any way broadcast an advertisement containing false offers or statements that lead or are likely to mislead the public .....)) With this text, misleading advertising has been prohibited as a form of unfair competition, and many courts have based their rulings on the text of Article (44) in prohibiting comparative advertising and considering it a form of misleading advertising as it leads to misleading the public or is likely to lead to misinformation (Ahmed, 1991).

The above law has expanded in defining the concept of lying and misinformation to include all the elements of the internal and external commodity through the text of Article (44) as well, which stipulated that misinformation can occur in one of the elements of the internal and external goods, which are (the nature of the product, the essential elements, the presence of the product, its origin, its amount, as well as its quality. As for the external elements, they are (price, date of production and method of manufacture, effectiveness of the product and service, conditions of sale, conditions of use, and the desired results of the use of the good or service) (Marhoon, 2012).

Many French judicial rulings have been issued based on the text of Article (44) of the RoyER Law, according to which it is considered that comparative advertising is a form of misleading advertising to which the provisions of the above article apply. In a case whose facts are summarized that one of the large distribution stores known as (SAVECO), a large store with sixty branches throughout France and achieves a large financial return per year, has led his campaign by publishing an advertisement on a large scale including the phrase ((It is impossible to find what is cheaper than us)) A lawsuit has been filed



against him by the Government Fraud Department as well as the Women's Civil and Social Union (U.F.G.S) after what he does is a misleading advertisement based on a comparison between prices and competitive prices, and comparative studies have proven that out of (100) products that have been studied, there are (61) products sold at SAVECO at higher prices than other distribution stores, and that (14) products are sold at a price equal to (SAVECO) prices, and that (25) products are sold at a lower price compared to stores. Accordingly, the court ruled that the advertisement of shops (SAVECO) is a misleading advertisement in accordance with the provisions of Article (44) of the law of December 27, 1973 (RoyER) with a compensation of (10) thousand French francs (Al-Zaqradi, 1995). The RoyER law also considers misleading advertising a crime punishable by imprisonment for a period of three months to one year, as well as a fine of (30) thousand francs to (60) thousand francs or one of these two penalties and the penalty for stopping misleading advertising, all without prejudice to the penalties stipulated in other laws.

### 6.3. Position of Iraqi Legislation on the Legality of Comparative Commercial Advertising.

Iraqi legislation was devoid of any legal regulation of the legality of comparative commercial advertising 1988 and the organization of the work of advertising offices and other laws and instructions (Instructions No. 41 of 2001 issued by the Center for Market Research and Consumer Protection established by the University of Baghdad in 1997), whether by rejection or acceptance of these advertisements, and it is not surprising, as mentioned above, for these legislations, as long as there is no law dealing with this type of advertising, but even commercial advertisements in general, With the exception of the Iraqi Trade Law No. 30 of 1984, amended and in force, which stipulated in Article V of it the commercial advertising only without reference to any regulation of advertising, as well as Law No. 45 of 1971 amended by Law No. 35 of the year, but without reference to this type of advertising and with the fact that the issuance of these laws, its work is organizational and has administrative objectives related to the organization of those offices and their functioning without focusing on the aspect of consumer protection or other of those declarations In a later development, the University of Baghdad established in 1997 a research center called the Center for Market Research and Consumer Protection, and it is then the first entity to contribute to consumer protection from fraud and misinformation that is exposed to it (Azab, 2004), and the Center issued special instructions No. 41 of 2001, and these instructions specified the objectives and tasks of the Center, which are limited to the preparation of research And theoretical and on-site studies and detection of cases of commercial fraud in general, including false advertisements, until the Iraqi Consumer Right

Protection Law No. 1 of 2010 came which came devoid of any reference to advertisements, whether comparative or other commercials, but came only with the definition of the advertiser in Article (1 / paragraph VII) of it, as well as the text of Article (2), which specified the objectives of the law in its paragraph first, which is to ensure and protect consumer rights .

The second paragraph of the same article has stipulated the role of the law in raising the level of consumer awareness of the consumer and the third paragraph of which stipulated the prevention of any contrary act that leads to misleading the consumer and related to marketing and import matters, as well as the provision of the law in Article / 9 paragraph I of it to prohibit some practices that would lead to misleading the consumer, as the law specified the penalty for violating this article by stipulating it in Article 10, paragraph I of the same law (Article 10 / first ((shall be punished by imprisonment for a period of not less than three months or a fine of not less than (1,000,000) million dinars, or both, whoever violates the provisions of Article (9) of this law).

## **7. Conclusion.**

Through research on the subject of comparative commercial advertising, it became clear to us a number of results and recommendations, which we will show as follows:

First: Results:

1. Comparative commercial advertising is one of the most effective means in the commercial medium because of its role in introducing the public to products and services through comparison between them and their counterparts in the market, and despite that role, it did not have in Iraq nor comparative legislation, especially Arab comprehensive legal regulation of all its aspects, but that those regulations came with procedural rules focused on the regulatory aspects of the practice of the advertising profession, with the exception of the French legislation, where it came with special laws. The Declaration includes all its organizational and substantive aspects and the conditions for its legality
2. Comparative commercial advertising is defined as the process of promoting products and services carried out by a person who advertises or sells by highlighting the advantages of these products and services and comparing them with similar products and services of another person, provided that these advantages exist and are real and do not have a nature that hits the consumer. Through that definition, it is clear that the comparative commercial advertisement

has two images, the first is about the value of products and services, the second is about commercial reputation, and the comparative commercial advertisement has its own elements, which is the presence of a comparative advertising message issued by the advertiser, as well as the existence of an actual comparison between products and services, and that advertisement must include a reference to the name of the competitor explicitly or implicitly.

3. Is a comparative commercial advertisement is a legitimate advertisement when all the objective and formal conditions stipulated by the French Consumer Code No. (949) on January 18, 1993, as well as the conditions stipulated by some other legal texts, as for the position of the Iraqi legislator of comparative commercial advertising has proven to be free from any legal regulation of this vital and important topic, and this is what is considered a legislative vacuum and this can be considered an implicit license for this type of advertising according to the rule (original) in permissible things) at the time when we did not find a text indicating that it is haraam.

Second: Recommendations:

1. Enacting a special law on commercial advertisements in general in line with developments in commercial life, and this law addresses the following aspects:

A. Establishing a general and comprehensive legal regulation for all commercial advertisements and determining the legal basis for them

B. This law shall include a special section for comparative commercial advertising in which it deals with all the definition, images, elements and characteristics related to it that distinguish it from other commercial advertisements and determines the conditions of its legality in an integrated manner in accordance with the provisions of comparative laws.

2. The need to amend the Iraqi Trade Law No. 30 of 1984 amended and include it, especially with regard to the need to stipulate unfair competition without leaving that matter to some laws that do not understand them sometimes.

3. Calling for the establishment of a government regulatory authority concerned with the control of commercial advertisements, especially comparative ones in Iraq, similar to what is in force in comparative laws, especially French and American, his task is to examine the advertisement and ensure the validity of the information contained in it by checking that information and matching it with the conditions of legality prescribed by the text of the law so that that advertisement is not harmful to consumers and competitors on the one hand and subject to appeal on the other hand.

4. Calling for the formation of the Consumer Protection Council and activating its role according to Article 4 of the Iraqi Consumer Protection Law.
5. We call for the creation of an international agreement that develops legal solutions on a unified basis on consumer protection, which is the minimum level of protection and adopted by most countries, which would eliminate different concepts and develop appropriate legal solutions.

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