
Consumer protection from false advertisement in the pre-contractual phase of electronic contracting⁽¹⁾

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Abstract

The general theory of obligations has been proven inadequate in consumer protection. Especially with era of information and technology revolution, which steered the necessity for laws and regulations specifically aimed at consumer protection, not only in the field of traditional transactions but also in relation to electronic transactions as well. In order to prevent the consumer from becoming victim of fraud or deceit by the other party through providing the best conditions that guarantee the free will and satisfaction of the consumer. This requires the enactment of special legislation to protect the consumer and restore the balance to the contractual relationship.

Therefore, Kuwait has recently introduced new legislations that are vital in this regard, which are related to the merit of this study. The Electronic Transactions Law No. 20/2014 was issued and which addressed transactions made via electronic means and electronic methods of payment, in addition to consumer protection Law No. (39) for year 2014, which was issued to put the general rules of consumer protection. Consumer protection in

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electronic transactions requires the implementation of the rules of both laws without exclusion of any of them.

Therefore this research paper is devoted to present consumer protection in the pre-contractual stage of the electronic contract, in specific, the protection against the fraudulent practices by the professional through advertisement.

Introduction:

Advertisements presented by professionals to market their productions and services, play a huge role in catching the attention of consumers and encouraging them to contract, where these ads are often attractive and tempting for consumers through their way of presentation and enticing colors that direct the consumer's attention to them, and which are most likely to be exaggerated and overstated as well as containing false information with no grounds of validity, for advertisers resort to all modern means of advertising to include their ads, which leads to misleading consumers and deluding them contrary to reality regarding the item or service subject to contract to push them into contracting with the aim of financial profit.

In this paper, we shall discuss electronic advertising and their legal nature in the first section, while addressing the means of legal protection from false advertisement in the second section.

1. The concept of electronic advertising and its legal nature

Electronic transactions made by consumers with professional contractors are preceded by an important stage that is often the

motivation for the contract, namely the stage of electronic advertising, where, in our age, advertising and promotion has become a modern, specialized and creative science in the development of attractive and appealing methods to urge consumers to contract without leaving them a wide choice of thinking and prudence to consider what they are coming towards when contracting for goods and services which they may not need.

Therefore, consumers, under ever-renewing advertising methods, do not differentiate between essential and luxury goods, and advertisers often resort to display incorrect and false information within their ads or deliberately include what keeps consumers lost in ambiguity regarding specifications and reality, as advertisers may also resort to publicity of compare by comparing the goods and services they offer with competitive products and services to degrade the value of these competing goods and services and delude consumers that they will get the greatest benefit if they contract for goods and services offered in the ad.

Because these ads have a large role in the electronic contract concluded between the consumer and the professional, and the fact that the consumer often falls victim to these ads, calls for legal protection and legal organization of this electronic advertising to protect consumer interests, being the weak party in the contractual relationship. Therefore, we dedicate this section to view the concept of electronic advertising, its characteristics, as well as its legal nature and consequences of determining this nature in regards to consumers.

1.1 The concept of electronic advertising

Here we discuss the definition of electronic advertising as stat-

ed in the Kuwaiti law and parallel organizations, while showing the characteristics that distinguish them from other businesses.

a) Defining electronic advertisement

Commercial advertising is defined as business or professional news or media intended to introduce a commodity or service by highlighting its advantages and merits, in order to create a good impression that leads audience to buy this item or service⁽¹⁾, and others defined as a communication process aimed to promote certain ideas or facilitate communication - in an economic framework - among certain people offering goods and services, and others expected to use these goods and services⁽²⁾.

The European Directive No. 450 for year 1984, amended in Directive No. 55 for year 1997, on misleading advertisements defines ads as “every form of communication that is in the context of commercial activity, industrial and artisan, or professional, in order to promote the supply of goods and services, including real estate goods and rights and duties”⁽³⁾.

However, in regards to electronic advertising, the Electronic Trade Directive No. 31/2000 defined “commercial communication” as “every form of communication that is aimed to market goods and services, whether directly or indirectly, or the form of a project or organization or person that has either commercial, industrial or artisan activity, or practices organized activity.”⁽⁴⁾

While the American Marketing Association defined commercial advertisement as “an impersonal means of presenting goods

(1) Alsadeek, Muna A., supra n1 at p138.

2 Ibid, p138.

3 OSCOLA, art. (21) from the European Directive No. 450/1984, modified in Directive No. 55/1997.

4 OSCOLA, art.(21 f) from the European Directive No. 31/ 2000.

and services by a known party in exchange for payments”.⁽¹⁾

Both the Egyptian law No. 67/2006 and the Federal UAE Law No. 24 /2006 have neglected mentioning a specific definition of advertisements. However, each has mentioned a specific definition of the advertiser. The UAE law defined the advertiser as “anyone who advertises an item and service or promotes it through different means of publicity and advertising”, and the Egyptian law defined an advertiser as “every person that advertises a good or service or personally promotes it through another by any means”.

However, the Egyptian legislature did not determine what these means are, and thus, the text is flexible enough to include traditional means and electronic means in advertising.

The Kuwaiti legislature, in Consumer Protection Law No. (39) for year 2014, devoted an entire chapter, Chapter VI, for the provisions and legal regulations relating to advertisement of goods and services, but it did not mention a specific definition of traditional or electronic advertisements in this law, but specified a definition of an advertiser in general in Article 1/8 of the Law mentioned as “any natural or legal person who, personally or through another, advertises a good or service, or promotes it through various means of publicity and advertising, whether the advertiser is the same provider or a person authorized to do so”.

However, the Kuwaiti legislator did not mention, in the Electronic Transactions Law or in the Consumer Protection Law, electronic advertising, but the previously mentioned definition was general and comprehensive in a way that enables it to apply to an electronic advertiser as well, where it stated the phrase “vari-

(1) Rotfeld, Herbert J., the stealth influence of covert marketing and much ado about what may be nothing, *journal of public policy & marketing*, vol. 27 (1), Spring 2008, 63-68.

ous means of publicity and advertising “without limitation, which is inclusive of electronic media and traditional media alike.

Thus, it could be argued that an advertisement is any activity related to the presentation of goods or service to an audience of consumers, by any means of advertising and promotion in an attractive way for a fee, in order to attract the attention of consumers to contract for the aim of making a profit⁽¹⁾, but electronic advertising is any commercial or professional news that merchants and service providers carry out, using electronic means for introducing consumers to goods and services to encourage them to contract⁽²⁾.

It is clear from this that the subject of advertisement must be a commodity -whatever kind- whose goal of production or distribution is to achieve a profit, or the subject of advertisement must be a service offered to the consumer, whether travel and tourism agencies, brokerage businesses, organizing presentations and conferences or others⁽³⁾. It is also inferred from the above definition that an advertisement must have two components together, the physical component represented in every action and activity or expression tool that is realized by the senses, and the moral component represented in achieving profit and material gain⁽⁴⁾.

b) Characteristics of electronic advertisement

Electronic Advertisements have a set of characteristics that distinguish them from other material businesses and which can be deduced from the aforementioned definitions in this regards. Generally speaking, it can be argued that there are four char-

(1) Omran, Sayed M., *supra* n19 at p94.

(2) Alsadeek, Muna A., *supra* n1 at p110.

(3) Ibrahim, Khalid M., *supra* n37 at p109.

(4) *Ibid*, p109.

acteristics that an electronic advertisement possesses together, stated briefly in the following:

First: An electronic advertisement is genuinely directed towards the consumer audience without specifying their description and persona, where it targets consumers in general and not a person in particular – through specialized advertisement websites which professionals can introduce goods and services they offer in exchange for an amount of money for the advertisement. A consumer, here, is every person who the advertising message is directed to or who may receive it, whether it is the final consumer or the distributor or the producer⁽¹⁾.

Second: An electronic advertisement is a tool for presenting goods and offering services, where the content of the ad is a directed newsletter from the professional contractor to the audience of consumers, which aims to introduce the good or particular service he offers in exchange for an amount of money, by highlighting its advantages and merits in the ad with the objective of urging the audience to purchase it and obtain it for their personal interest⁽²⁾.

Third: An electronic advertisement is a means for psychologically influencing the consumer, where the professional motivates – through advertising by any for a fee - consumers into contract, by presenting goods and services in a tempting way to attract the consumer's attention to contract in order to get the service or product subject to advertisement for him to make a financial profit⁽³⁾.

(1) Alsadeek, Muna A., supra n1 at p110.

(2) Ibid, p138

(3) Ibid, p140.

Fourth: An electronic advertisement is done through electronic means, so the electronic means is what distinguishes an electronic advertisement from the traditionally familiar advertisement, such as advertising through the internet, which is considered a broad space for electronic advertisements for goods and services⁽¹⁾.

Some European legislation stipulates that it is within the consumer's right to rely on some of the qualities that characterize goods and services as declared in the advertisement, even if it wasn't not stated in the contract, provided that this rule is always interpreted in favor of the consumer without the possibility of protest, by claiming that he was aware of any restrictions contained in the advertisement and accepted them⁽²⁾.

Electronic advertisement is either usually presented on the professional's private website or webpage, or presented on a popup at the top of a search engine page, where the popup ad appears at the top of the result list as soon as the consumer enters the search key, and an advertisement may also be through someone else's website which the consumer gets to by clicking on the professional's private website⁽³⁾.

Through the above-mentioned characteristics, we can distinguish between advertising and similar concepts to it, such as publicity and media, where publicity is in fact a physical activity that leads to affecting the public's conviction to make it believe in an idea or a particular faith and does not aim to achieve profit since publicity is often free and does not intend to achieve finan-

(1) Ibid, p112.

(2) Walden, Ian and Hornle, Julia, e-commerce law and practice in Europe, Woodhead Publishing Limited, England, 2001, P.87.

(3) Ibid, p260.

cial gain such as publicity to join a charity¹, whereas advertisement, as already mentioned, aims to display the good and service along with their characteristics to urge the public to contract for material gain.

On the other hand, media is the spread of information and news among the public with the aim of spreading culture and raising political and social awareness. It does not aim to gain profit, which makes it a means of connecting individual,² so differentiating between media and advertisement lies in their objective, where media aims to spread awareness and support confidence in a given system, not to merely display the characteristics of goods to gain financial profit.

1.2 The legal nature of electronic advertising

Generally speaking, a contract is not concluded until an offer is paired with an acceptance, where, initially, a final and absolute offer must be issued which is accepted by the other party. An offer may be directed towards a specific person or several specific people such as a category of contractors and whoever fits the terms of contract may proceed to accept it. However, a mere presentation without including the conditions of an offer is not considered an offer, rather an invitation to contract such as a presentation that is not definite and absolute, and should the other party accept this presentation, then the latter is considered an offer and not an acceptance that leads to the conclusion of the contract.

1 Ibrahim, Khalid M., *supra* n37 at p110.

2 *Ibid*, P.111.

Controversy arises in light of electronic contracts for the possibility of considering ads presented on web pages an offer that concludes the contract when the consumer accepts it or not, so determining the nature of an electronic advertisement is of great importance exhibited in what legal implications this determination leads to regarding the relationship between the professional and the consumer.

However, doctrines have disagreed in determining the legal nature of an electronic advertisement, where on the one hand some doctrine believes that an advertisement is only an invitation to a contract which must be followed by an offer associated with an acceptance for the conclusion of the contract, while another team believes that electronic advertisement is an offer that concludes the contract when followed by an identical acceptance. We shall discuss each opinion with the relevant consequential legal implications.

a) Electronic advertising between offer and invitation to contract

On the one hand some doctrine believes that electronic advertising is an offer directed toward a consumer, where the contract is concluded as soon as the consumer expresses acceptance by any means, and it is required that an advertisement is undeniably specific, absolute, to include the basic conditions of the contract that is desired to be concluded regarding the item or offered service, and must also state its prices, in order for it to be considered an offer, and to be valid for associating an identical acceptance to it, which in turn concludes the contract⁽¹⁾, or else it is considered no more than an invitation to contract, so, for a presentation to raise up to an offer in an electronic contract, the

(1) Alsadeek, Muna A., *supra* n1 at p133.

essential conditions of contract, nature of the product or type of service, along with the related price, must all be determined.

While on the other hand, a second doctrine states that a presentation directed to an audience of consumers, is not considered an offer rather an invitation to contract, if it does not include the essential conditions of a contract such as a statement of prices of the goods and services, method of delivery, and essential conditions of a contract⁽¹⁾, which is the doctrine we prefer, especially in electronic consumption contracts, where the professional advertises the goods and services to the audience of consumers, and may receive an acceptance from several⁽²⁾ so much so that it exceeds the stock of goods he has, or his stock may be enough but at a higher price than advertised because of the increase in demand or increase in market price⁽³⁾.

As stated in the Kuwaiti Civil Act, Article (40), that the presentation of goods with a statement of their price is an offer, while publishing, advertising and distribution of price lists for dealings are an invitation to contract and not an offer⁽⁴⁾, where the difference between an offer and an invitation to contract lies in the existence of absolute intention in making a legal effect or not, therefore, if you this undeniable intention is present – then it is considered an offer, and if such an intention is absent then it is regarded an invitation to contract⁽⁵⁾, and there is no doubt that the determination of whether such an intention exists or not, is a matter of facts of reality that is left to the trial judge.

(1) Ibrahim, Khalid M., supra n37 at p112.

(2) For more see: Walden, Ian and Hornle, Julie, supra n106 at p619.

(3) Ibrahim, Khalid M., supra n37 at p114.

(4) Almary, Aayedh R., supra n53 at p138.

(5) Ibid, p138- 142.

We agree with stipulation made in Kuwaiti law considering advertising a mere invitation to contract especially in electronic contracts considering its international nature where several people's acceptances may reach the professional. The professional may not be able to fulfill them all especially when receives acceptance from all over the world. This scenario is even more complicated in cases of websites that sell used goods such as the famous American website "Ebay", where rare goods are displayed which would make it difficult - in the event of considering Advertising and Publishing an offer – to imagine the professional's commitment to fulfill all consumers who have expressed for acceptance.

b) Legal implications relative to the determined legal nature of electronic advertising

Consequent to the distinction between an offer and an invitation to contract there are legal effects concentrated in two important aspects, the first relates to the exercise of the consumer of his right to retract, and the second relates to determining the nature of the professional's liability arising towards the consumer when a professional violates the implementation of the content of an advertisement, which we shall discuss in the following:

1- In relation to the exercise of the right to retract

If we decide that electronic advertising is only an invitation to contract, then it is not physical work, which arises to the level of legal action, and thus retraction from it does not result in any legal effect, unless this action has caused harm to the other party who is usually the consumer⁽¹⁾.

(1) Omran, Sayed M., *supra* n19 at p115.

With regard to retraction from an offer; despite the fact that the offeror has the right to retract from his offer if not accompanied with acceptance, if the offeror specifies a deadline for acceptance, then he is committed to keep his offer throughout that period⁽¹⁾, and retraction during that period has no effect or significance, so if a professional declares providing a particular commodity during a period willingly and individually determined, he is obliged to provide it until the end of that period, and because electronic contracting is a contract between absentees, the offeror is committed to his offer during the time needed to reach the will of those it was directed to and respond in acceptance, since the expression of will does not establish effect in the field of contracts unless associated with the knowledge of whoever it was directed to⁽²⁾.

Article (49) of the Kuwaiti civil law explains that correspondence contracting (i.e between absentees) is concluded in the time and space that connects acceptance with the knowledge of the offeror. Unless otherwise agreed or otherwise required by law or custom, so that an offer, in an electronic contract is binding both for the time period set out by the offeror or the time needed for the offer to reach consumer realization and get a response to it, whether acceptance or rejection.

2- Consequential liability when a professional violates the implementation of the content of an advertisement

The professional's rising liability can vary according to the determination of the nature of electronic advertisement, because

(1) Art. (42) of the Kuwaiti Civil Law.

(2) Lail, Ibrahim D., the contract and the unilateral will, dar al kutob publishing, second edition, Kuwait, 1998, P. 127 – 129.

electronic advertisement as an offer consequences contractual responsibility of the professional towards the consumer, where he is committed to compensate the consumer when he desires to retract from the offer after the acceptance of the consumer⁽¹⁾, so the basis of liability here is retraction.

Whereas the invitation to contract is not considered a legal act, but just physical work which doesn't result in legal effect, therefore, a professional is not held responsible for compensating the consumer if he retracts from the advertisement, unless the consumer is harmed because of it and which is attributed to the error or negligence of the professional, so the basis of liability here is the error of the advertiser and which results in responsibility for negligence and not for the retraction itself⁽²⁾.

2. False advertising and its effect on the consumer

Electronic advertising is a manifestation of fair competition and a tool to inform consumers about products and services⁽³⁾, and so it must not be misleading to consumers by displaying incorrect information about goods and services which causes confusion for the consumer and requires protection from deceptive advertising offered by a professional. In addition, the professional may degrade the value of goods and services offered by another professional through including incorrect data on the other competing professional contractor's products when comparing them to his products, which prompts harm to the consumer and the competing professional contractor at once.⁽⁴⁾ the Kuwaiti legislator, in its

(1) Omran, Sayed M., *supra* n19 at p116.

(2) *Ibid*, p116.

(3) Ibrahim, Khalid M., *supra* n37 at p117.

(4) Eid, Muwafag H., *supra* n3 at p57.

consumer protection law, has stated special provisions for the protection of the consumer from false advertising. The Kuwaiti law prohibits the inclusion of false information in the advertisement. It obligates the professional to get approval from relative authorities to display the advertisement. The law also includes means of protect the consumer from deception by granting him the right to retract from the contract without presenting justifications and also by obligating the professional to give insight to the consumer and inform him of all basic information related to the subject of contract.

In this requirement, we shall discuss the concept of false advertising and its effect on the consumer, along with the legislative structure to protect the consumer when confronting false advertisements that a professional may present, in accordance with the provisions of civil law.

2.1 The concept of false advertisement and its effect on the consumer

a) False advertisement

The European Directive No. 480 for year 1984, false advertising as “any advertisement in any way that contains in its presentation deception or what may lead to deception of those who the advertisement is directed to or may reach”⁽¹⁾, and Article three of the previous directive clarified that misleading advertising is through the omission of one of the essential properties of the product advertised.

(1) See art. (2) of the European Directive no. 480/84.

However, the Lebanese Consumer Protection law defines a false advertisement in Article (11) as “an advertisement that uses whatever means to address a good or service, and which includes a false presentation, statement or claim or the fact that it is formulated in phrases that could, directly or indirectly, lead to deception or fraud to the consumer”.

And the Kuwaiti legislature, in the Consumer Protection Law, has not provided a specific definition of a misleading advertisement, but stipulates in Article (22) that it is:

“Prohibited to advertise the sale or display or offer or promote goods or services by any means which includes false information or data, and also prohibits the advertising of any corrupt goods, where goods are considered corrupt or fraudulent if they do not conform to the specifications prescribed or are unusable or have an expired date.”

While some doctrine is directed towards non-discrimination between a false and a misleading advertisement, where it considers them synonymous terms, although there is a distinction between false and misleading advertising, because false advertising contains false and incorrect data, while misleading advertising does not false statements but is vaguely worded which leads to deceiving the consumer⁽¹⁾ to fall into mistake in regards to the basic qualities of the subject of sale.

Nevertheless, we agree with the doctrine that considers both terms to be synonyms since they lead to the same result, which is for the consumer to conclude the contract with an inaccurate will as to what is involved in the contract. So, as civil law considers both conveying false information and not conveying informa-

(1) Spanogle, John A. and others, consumer law: cases and materials, third edition, Thomson West, U.S.A, 2007, p37.

tion fraudulent, we also see that false advertising includes positive lies represented through information contrary to reality and negative lies represented in deception, so deception is achieved in one of two ways, where the advertisement is either vague and therefore its expressions can be interpreted in several meanings which leads the consumer to mistake, or through conveying a part of reality in its wrongful place without showing such content which is considered fraudulent.

In application of the above, the Federal Trade Commission (FTC) of the United States ruled that the misleading advertisement issued by Kraft company, which claims that each slice of Kraft cheese contains the amount of calcium equivalent to five ounces of milk, be removed, because although Kraft actually uses five ounces of milk for the making of each slice, they ignored to mention that the equivalent of 30% of calcium that is contained in milk evaporates during the preparation stage⁽¹⁾. The US Court of Appeals issued a decision in support of the Commission's decision⁽²⁾.

As a result, it can be argued that a false advertisement, is an advertisement which deceives the consumer or may lead to deception in a manner that harms the economic interests of consumers⁽³⁾, which is an advertisement that contains information that drives the consumer to fall into mistake in regards to the essential qualities of the item⁽⁴⁾.

(1) Spanogle, John A. and others, *supra* n134 at p45.

(2) Kraft, INC. v. Federal Trade Commission, United States Court of Appeals, Seventh Circuit, 1992. 970 F.2d 311.

(3) Omran, Sayed M., *supra* n19 at p127.

(4) *Ibid*, p127

The greater part of doctrine adopted the objective standard in determining whether an advertisement is misleading or not, which relies on the standard of the average intelligence of an ordinary person, where the advertisement is misleading if it misleads the average person without regarding the personal circumstances of each consumer individually⁽¹⁾.

An advertisement presented by a professional is misleading to a consumer if it contains two basic conditions as follows:

First condition: the use of false or misleading information about essential characteristics

The intended misleading is one that affects the essential characteristics and qualities of the subject of contract, whether it is a service or good, regarding its core characteristics, components, and nature – but mere exaggeration and overstating in an advertisement does not rise up to the level of misleading⁽²⁾. However, it is not enough that misleading affects the external elements of the good or service, such as production methods and conditions of the contract or the results expected⁽³⁾, in addition to considering deliberate silence about an incident or mishap misleading, if it can be proven that the consumer would not have entered into contract had he known about that incident, such as the professional concealing an important statement or hidden defect in the item of sale, where if the consumer had known about it, he wouldn't have concluded the contract⁽⁴⁾.

(1) Eid, Muwafag H., *supra* n3 at p62.

(2) Adnan, Kawther S., *supra* n10 at p181.

(3) Abdulbagi, Omar M., *consumer protection in contracts*, almaaref publishing, Egypt, 2008, P. 174.

(4) Abdul Maksood, Islam H., *supra* n7 at p246.

Second condition: misleading consumers to draw them into contracting

The professional, in his advertisement, includes information that may mislead the consumer into mistake to entice him to enter into contract by deluding him with unreal features of the good or service subject to advertisement, which is in the best interest of the professional and his gaining profit⁽¹⁾, while some doctrine believes that the professional's false intention of misleading the consumer by creating a false impression about the subject of contract to urge him to conclude the contract⁽²⁾ - is required as a condition to consider an advertisement misleading.

The Kuwaiti legislature, in the consumer protection Act, did not require false intention as a condition where article (22) states that it is "prohibited to advertise the sale or display or offer or promote goods or services by any means which includes false information or data". Hence, the Kuwaiti legislature did not require the professional's false intention to determine whether the advertisement is misleading. As long as the advertisement is misleading enough for the average consumer to fall into mistake.

b) Comparative advertising

Comparative advertising is advertising that focuses on the features of the product or service subject to advertising by comparing its specifications and features with another similar commodity, referring to the competing trader's name or the name of his product, in a manner that degrades its value and leads con-

(1) Adnan, Kawther S., supra n10 at p181.

(2) Mahmood, Godry M., consumer protection in electronic contracts, dar Arabic nahda publishing, Egypt, 2014, p158.

See also: Spanogle, John A. and others, supra n134 at p62.

sumers to fall in ambiguity and fraud¹, in order to convince the consumer audience that the good or service subject to advertisement is the best, and that it would return larger benefit for them than the competing good or service.

The European Directive No. 114 for year 2006, defines misleading advertising as “any advertisement that explicitly or implicitly addresses a reference to a competing product, or to the goods and services offered by a competitor”.⁽²⁾

It is deduced from this that a comparative advertisement is an advertisement that aims to achieve a double targeted purpose, where the professional is not content with only highlighting the features of the commodity he is introducing, but also degrades the features of another competing commodity and highlights its defects.⁽³⁾

The Kuwaiti legislature, in the Consumer Protection Act, has not stated a specific definition of comparative advertisements, but stipulates in Article (22) on the prohibition of advertising the sale, display or offer or promotion of goods or services by any means which includes false information or data, meaning that comparative advertising is strongly prohibited by law if it includes incorrect information, whether related to the commodity and service offered by the professional or the competitive item and service.

However, controversy about the extent of its legitimacy in the absence of legal text may rise if an advertisement had included incorrect information. In our opinion, it is imperative that the legislator interferes to apply strict conditions and limitations for this

(1) Eid, Muwafag H., supra n3 at p69.

(2) See Art. 2/3 from the European Directive 114/2006.

(3) Alsadeek, Muna A., supra n1 at p160.

type of advertisements, such as restricting comparisons to elements that are verifiable and confirmable with enough proof.

There is no doubt that if comparative advertising contains false information, whether partially or completely - it is considered illegal, and can be accountable for the crime of fraud in accordance with the provisions of Article One of Act No. 62 for year 2007 concerning the suppression of fraud in commercial transactions which stipulates the penalty of imprisonment for a period not exceeding one year or a fine not exceeding two thousand Dinars, or one of the two penalties, for anyone who has cheated or deliberately uses means to deceive the contractor in any way, whether deception focused on the reality of the goods, or its nature or essential features, or its content of useful elements and generally on the elements involved in its composition.

In addition to the advertiser's accountability in accordance with the provisions of (Article 235) of the Penal Law No. 16 for year 1960, which stipulates imprisonment for a period not exceeding five years and a fine not exceeding five thousand Rupees, or one of the two penalties for whoever manages an administrative, commercial, industrial or agricultural project ... proceeding with a fraudulent intent to deceive the public into giving him any amount of money for the benefit of the project ... by giving false information about essential matters that will mislead the public, with which they cannot verify the authenticity of such information, even if this act of fraud does not consequent in receiving anyone's money from the public.

However, comparative advertising is considered a form of unfair competition if it aims to broadcast lack of confidence in the competitor's project and degrade the value of its products and the value of whoever displays them, so prohibition does not ap-

ply on the principle of comparison itself, but on the illegal practices such comparison.⁽¹⁾

Also, for comparative advertisements to be legitimate, several conditions must be provided, first of which comparison must fall on similar goods and services, because similarity of goods and services is what calls for comparison, for example comparing between cars from different brands or between electric devices of different brands, and for services, comparison is between similar services, such as comparing between tourism services offered by various companies, thus, comparison must be fall on goods and services and not on the project itself in general, or else it is illegitimate.⁽²⁾

An advertisement must be objective and honest, not misleading for the consumer and does not result in ambiguity and confusion, and comparison should be between the basic characteristics of the goods subject to comparison, and should not reduce the value of a trademark or another competitor, in addition, it must not unrightfully benefit from a competition's famous commercial sign, and the advertiser must be able to prove the validity of the data contained in the advertisement within a short period⁽³⁾.

The French consumer law requires that an advertisement must be preceded by the previous knowledge of the owners of competitive businesses, which means that the competing party has been briefed the electronic comparative advertisement which the advertiser wishes to published⁽⁴⁾, these conditions have led to many advertisers refraining from this type of advertising because of the problems it raises.

1()Alsadeek, Muna A., supra n1 at p160.

(2) Adnan, Kawther S., supra n10 at p162.

(3) Eid, Muwafag H., supra n3 at p72.

(4) Ibid, p72.

2.2 Legal protection for the consumer from false advertisement

The professional contractor has the legal obligation to ensure that the advertisements displayed contain correct information which matches reality, and that is specific, accurate and clear, and that it does not contain false information likely to cause the consumer to error and mistake, and where if the professional does not heed to these provisions - the consumer has the right to sue the advertiser based on the provisions of civil liability for a harmful act resulting from false advertising.

The Kuwaiti legislature, in Article (34) of the Consumer Protection Act, states that the National Committee for consumer protection obligates the professional who violates provisions related to advertisements - to adjust his settings and remove the violation immediately or within a time limit set by the Committee, by removing the advertisement or amending it to the extent of vanishing anything misleading in the advertisement.

If the consumer is harmed as a result of misleading advertising, the Committee may issue a decision to stop the continuity of the advertisement so as not to allow other consumers to make the same mistake, until the completion of investigations or the ruling of a verdict regarding it. The Committee shall also take measures to inform consumers of a false advertisement.

The legislature has decided on a criminal penalty, in the event that a professional violates the constraints of the latter article - of imprisonment for a period not exceeding two months, and a fine equal to the value of the goods subject to those constraints, and which have been disposed of, or either of the two penalties in (Article 29).

The Kuwaiti legislature, in the Consumer Protection Act, did not address misleading advertisements and did not specify the competent authority to interpret ambiguity. However, we believe that in the event of a dispute over the ambiguous contents of an advertisement, the matter becomes the prerogative of the National Committee for Consumer Protection as it is the permanent and qualified body on consumer protection and safeguarding their interests, and the decisions of the Committee are final, but can be appealed to directly to the competent court, which restores some balance to the contractual relationship between the consumer and the professional.

A trial judge may order the removal of the advertisement and also has the right to rule the production of a new advertisement that addresses the violation that occurred by the misleading advertisement which is called a corrective advertisement⁽¹⁾. In application of the above-mentioned, the US Supreme Court upheld the Federal Trade Council's decision, which obligated Warner-Lambert Co. Inc.'s to present a corrective advertisement for mouthwash product known as "Listerine" by adding the phrase "contrary to what earlier ads mentioned, this product does not prevent colds or sore throats or minimize their severity", that is by placing it on all advertisements related to that product. The Committee clarified that stipulating corrective action is necessary to correct the content of a misleading advertisement, especially that this misleading advertisement is displayed for hundreds of years in the same manner, sealing it in the minds of consumers⁽²⁾.

(1) Abdul Maksood, Islam H., supra n7 at p243.

(2) Warner-Lambert Co. v. Federal Trade Commission, United States Court Of Appeals, District of Columbia Circuit, 1977. 562 F.2d 749.

Nevertheless, the consumer, according to the general rules of civil law, has the right to sue the professional for the implementation of contractual obligation. The consumer is entitled to demand that the professional delivers a product of the same characteristics advertised, as well as the right to sue for fraud, so as to invalidate the contract in the event of harm as a result of the false advertisement, while retaining the right to claim compensation in all cases, which we discuss in the following.

a) Lawsuit of kind implementation

If a professional contractor advertises a particular good or service through electronic means, and the consumer accepts his offer, then the professional contractor refrains from implementing his commitment as stated in the advertisement, the consumer – after excusing the professional – may force the professional to carry out his commitment in the same kind whenever possible, through resorting to lawsuit of kind implementation, and the Court shall have discretion, where if it considers that this implementation is exhausting for the professional, to limit the consumer's right to compensation, if it does not cause him serious harm – in accordance with the provisions of the Kuwaiti Civil Law (Article 284), and if the professional does not execute his commitment, the consumer - victim of misleading advertisement- may acquire a good or service of the same type guaranteed by the electronic advertisement, at the expense of the professional, or claim the value of the item of sale without prejudice to his right to compensation⁽¹⁾.

(1) Eid, Muwafag H., *supra* n3 at p80.

In this regards, the Kuwaiti Consumer Protection Act, states in Article (23) that any commercial agent or distributor has an obligation to execute all guarantees provided by the product or assigned to the item subject to agency, if the implementation of the guarantees, set in the previous paragraph, take a period exceeding fifteen days, the commercial agent or distributor is obliged to provide a similar product for the consumer to use, free of charge, until the execution of those guarantees.

Thus, law will have imposed protection for the consumer by obligating the professional, not just to execute the provisions of the contract as described in the advertisement, but quickly implement it as well so as not to harm the consumer. Such a decision reduces deception and misleading advertising, through the imposition of civil liability to the advertiser if he uses an advertisement in a manner that leads to deceiving consumers, which restores some balance to the contractual relationship between the consumer and the professional⁽¹⁾. So, protection recognized by law, begins with the conclusion of the contract and until the advertiser executes his commitment as outlined in the advertisement, and this protection closes the door of deception for the advertiser, through his knowledge that he is committed to fulfilling what he stated in the electronic advertisement towards the consumer⁽²⁾.

However, the consumer has the right to claim compensation independently from the kind implementation lawsuit and without interference with it, since each of these lawsuits has its own scope in terms of conditions and goals, where a lawsuit of kind implementation aims to force the advertiser to execute its commitment in kind or by payment, and the compensation lawsuit

(1) Ibrahim, Khalid M., *supra* n37 at p127.

(2) *Ibid*, P. 127.

works to redress the damage resulting from the issuance of such an advertisement, where the consumer's right of compensation is built on the error released by the advertiser represented in highlighting a quality or more in a good or service advertised, which is often essential for the consumer and drives him to contract believing it will meet the need which he aims for, so he enters into contract.

Therefore, the consumer may refer to court by claiming compensation for reparation of damage following the entry of a relationship folded in lies and deception with the advertiser⁽¹⁾.

b) Fraud lawsuit

The consumer may request the annulment of the contract because of fraud, if the tricks that one of the contractors has resorted to, are of such magnitude that the consumer would otherwise have not concluded the contract, such as if the fraud is in regards to the properties of the commodity or service and its essential qualities⁽²⁾. It is also considered fraudulent to be deliberately silent regarding an incident or mishap, if it is proved that the consumer would not have entered into the contract had he known of that incident, for example if the professional conceals an important statement or hidden defect in the item of sale, where if the consumer was aware of it, he wouldn't have concluded the contract⁽³⁾.

The consumer may also sue for compensation for damages resulting from the use of fraudulent means by the advertiser, even if they are not serious, based on the rules of negligence

(1) Eid, Muwafag H., supra n3 at p86- 87.

(2) Abdul Maksood, Islam H., supra n7 at p 246.

(3) Ibid, p246.

reliability.⁽¹⁾ However, it is not for the consumer to claim compensation for damage done as a result of a misleading electronic advertisement except by proving the error of the professional and the damage incurred, where if it were not for this error he would not have entered into the contract, which, in turn, burdens the consumer with proving this before the courts, placing the consumer and the professional on the same level without advantage for the consumer, despite his weak position when contracting.

In addition, in the relationship between a consumer and an advertiser, it must be required, to request annulment of the contract based on fraud, to be in the process of contracting and fraudulent business must relate to the other party, which represents an obstacle in the field of advertising, where circles of distribution of goods and services are broad including several parties, such as the manufacturer, producer, distributor, wholesaler and retailer, with which it is impossible to prove a direct relationship between the consumer and the professional contractor, and thus a failure of one of the conditions of lawsuit for fraud⁽²⁾.

Fraud must also be placed on the item or essential properties of the service, which applies to the intrinsic elements of the commodity subject to advertising, such as its existence, nature, origin, characteristics and components, but does not apply to external elements, such as production methods, conditions of the contract or the results expected⁽³⁾, which makes the scope of consumer protection limited and restricted to the scope of the intrinsic elements of the commodity subject to electronic advertising without any other.

(1) Ibrahim, Khalid M., *supra* n37 at p125.

(2) Abdulbagi, Omar M., *supra* n141 at p173.

(3) *Ibid*, p174.

The Kuwaiti consumer protection law places preventative solutions that would protect consumer satisfaction and prevent him from falling into mistake, by prohibiting advertisements of the sale, display, and promotion of goods and services, by any means that include false statements (Article 22), and also the advertisement of goods and services is not permitted until after obtaining a license from the competent authorities (Article 25).

The Kuwaiti legislator has imposed the same criminal penalty on the advertiser when he commits violation in regards to the introduction of goods and services. He is required by law to write down the basic data in Arabic (Article 30), which is no doubt to affirm the complete knowledge of the consumer of everything contained in the introduction, as well as the essential data of the commodity or service subject to advertising.

However, the legislator, in the previous article, may have excluded the advertiser and relieved him of penalty if he is not the provider, and it was proved that the information contained in the advertisement is of technical nature, which unlike himself, it is difficult to verify its validity, which we do not support. It would have been more useful to be included in the scope of punishment, so as not to invoke advertisers to claim lack of technical expertise and to take precautions of validity and accuracy when advertising, in order to protect consumers in traditional and electronic transactions.

The Kuwaiti consumer law requires the professional to give insight to the consumer and inform him of all the basic data related to the consumer. In particular, any specifications, date of production of the commodity and expiry date, along with its components and characteristics, and potential harm, in a clear comprehensive manner, all of which is in Arabic (Article 12).

It also decided the consumer's right to retract from contract without the need to provide justification or the obligation of financial penalty (Article 10), which no doubt achieves special consumer protection that was not previously recognized by Kuwaiti law, for what existed before, was only ministerial decisions that do not level up to law. In addition, according to those decisions the period for returning a commodity was short and does not compare to the specified period for return in the consumer act No. 39 for year 2014.

Finally, although the Kuwaiti electronic transactions law did not mention electronic advertisements, this does not obstruct the applicability of the provisions of the consumer protection law in all traditional and electronic transactions, because the text is inclusive and is not restricted to or limited in any certain way to advertise, where its provisions clearly indicate that they apply to all advertising media without restriction.

In conclusion, although the Kuwaiti legislature has provided some protection for the consumer in the pre-contractual phase of the contract in the Consumer Protection Act, we however don't find it sufficient. The legislature did not mention a specific definition for the misleading advertisement or the rules governing it as we find the law's only focus was on the procedural matters without getting in depth. The law was also remiss in setting rules to interpret these ads when there is a need for it as in a case of disagreement. Also, the law did not explicitly mention the professional's responsibility for terms declared in an ad, even if they were not included in the contract, which is, in our opinion, a shortcoming that should be redressed in the consumer's interest.