

Turkey

Kenaroglu Law Firm

A new era for advertising

The first Turkish regulation allowing comparative advertising is due to come into force by the end of 2016. But what will it mean for rights holders?

Deceptive and misleading advertising can damage the market and harm consumers. Previously, the Turkish authorities governed this area extremely strictly – the former Regulation on Commercial Advertising and Unfair Commercial Practice not only banned deceptive and misleading advertising, but also prohibited comparative advertising, which is permitted in numerous countries. The new Regulation on Commercial Advertising and Unfair Commercial Practice – adopted on January 10 2015 – lifts this prohibition, although the provisions on comparative advertising are not due to come into force until December 31 2016.

The Commercial Code (6102) and the Consumer Protection Act (6502) also contain articles prohibiting deceptive and misleading advertising. Article 16 of the act establishes that “commercial advertising must comply with laws and public morals and must be fair and accurate”, and prohibits any advertisement or publicity which:

- deceives or misleads consumers;
- takes advantage of consumers’ lack of experience and knowledge;
- endangers a consumer’s life or property;
- encourages violence, violent acts or crime;
- endangers public health; or
- exploits people with disabilities, the elderly or children.

Deceptive and misleading advertising

Advertising is considered to be deceptive and misleading – and accordingly is prohibited by Articles 55 and 56 of the Commercial Code – where:

- the product’s qualities are not the same as those mentioned in the ad;

- the product is inadequate and perishable;
- the product fails to provide the advertised benefit;
- the product’s expected life or technical standards are not explicitly indicated in the ad; or
- the conditions of special promotions are not spelled out in detail.

The new regulation introduces no radical changes with regard to the characteristics of deceptive and misleading ads, although it has introduced stricter measures when it comes to verifying information about an ad’s content.

Under Article 9 of the new regulation, definitions, claims or examples of sustainable facts in ads must be backed up by reports from the relevant university department, accredited test and evaluation institution or independent research company. In order to consider research or studies from the advertiser’s own laboratory or headquarters as proof, these must be verified by a university department or accredited test and evaluation institution. In a recent decision issued by the Advertising Board (2016/40), an ad which claimed that a particular brand of nappy made babies feel twice as dry as rival products was found to contravene the law, since this claim was not supported by any of the reports required by Article 9.

Comparative advertising

In comparative advertising, a rival product or service is mentioned directly or implicitly in the course of advertising another product or a service. Limitations on comparative advertising have been mostly governed by Article 61 of the Consumer Protection Act, which allows comparisons to be drawn between rival

products or services where these meet the same need or aim to achieve the same purpose.

However, this provision does not regulate the manner in which comparative ads can be made and leaves these details to the former regulation. Article 11 of the regulation permitted comparative advertising only where:

- the compared product or service or brand was not named;
- the compared goods or services had the same quality or met the same need as the original product or service; and
- the ad complied with the principles of fair competition and did not mislead consumers.

Due to the strictness of these restrictions, even implied comparisons were considered illegal. In addition, comparisons which might have been permitted by the law were prohibited in practice. For instance, Decision 2014/1791 of the Advertising Board dealt with an ad promoting a Global System for Mobile Communications (GSM) operator providing internet services with the statement that: “X GSM operator is three times faster than the ones claiming to be the fastest one... If you use X GSM, you are well ahead of internet!” The board prohibited and banned the ad – even though the claim was supported by a technical test. The board based its decision on the fact that the GSM operator promoted in the ad served a restricted area only, while the operators it compared itself to offered a much broader service.

The new regulation will introduce more detailed and innovative provisions with regard to comparative advertising, allowing the use of a competitor’s name, trademark, logo and other distinctive figures,



expressions, titles and enterprise names.

Article 8 of the new regulation imposes some restrictions and provides that comparative advertising can be made only where the ad:

- is not deceptive or misleading;
- does not constitute unfair competition;
- compares goods and services which have the same quality and meet the same need;
- compares a matter to the benefit of consumers;
- compares typical features, including price;
- makes claims based on objective, measurable and numeric data which can be proved by a scientific test, report or documents;
- does not discredit or denigrate IP rights, trade names, enterprise names, any other distinctive figures, products, services, operations or other aspects of rival companies;
- compares goods and services from the same geographic area; and
- does not cause confusion between the trademark, trade name, enterprise name or other distinctive figure or goods or services of the advertiser and its rival.

As the enforcement date of this article has been postponed until December 12 2016, the relevant provisions of the old regulation will continue to apply until then. One of the reasons for this delay is the need for a more detailed regulation covering comparative advertising. The Ministry of Customs and Trade has been carrying out a study on an explanatory guideline which would clarify and explain how comparative advertising can be carried out in Turkey.

While waiting for the new regulation to come into force, the Advertising Board has been gradually relaxing its approach to comparative advertising. In Decision 2015/1816 it found that an ad promoting a GSM operator which provided internet services with the statement “Do not worry! The speed of our internet has been tested and recognized. We are the easier one!” fell within the permitted scope.

Other changes

Standards concerning the readability of subtitles in ads are also included in the



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new regulation, which sets out provisions to protect consumers from being confused or misled with regard to sale prices and conditions for promotions.

Additionally, while testimonial ads were previously allowed regardless of the practice area, the new regulation prohibits any kind of image or attribution regarding a health declaration by a doctor, dentist, veterinary surgeon, pharmacist or healthcare organisation.

Another change relates to covert advertising. Restrictions to this were determined in accordance with decisions issued by the Advertising Board, as there were no provisions specifically regulating this area. However, Article 23 of the new regulation establishes limits to covert ads and sets out the following conditions, which should be considered when they are being evaluated:

- The subject, content, presentation, positioning and duration of the ad should be unexaggerated, proportionate and compatible with the format of articles, news, publications or programmes; and
- Articles, news, publication and programmes that are broadcast within the scope of communication rights, publishing rights and right to information should provide consumers with clarification and enlightenment, without encouraging them to rent or buy goods and services through special introductory references.

Penalties

Advertisements which contravene the cited regulations can be banned through self-audits, administrative audits and special litigation proceedings. The self-audit process is conducted by the Advertising Board, which has the authority to ban the broadcast of an ad and to publish a corrected version.

Administrative audits are conducted by both the Advertising Board and the Turkish Radio and Television Institution. The board has the authority to impose administrative fines on advertisers that contravene the law's provisions, ban the ad and publish a corrected version. It can decide whether to impose these measures together or separately, based on the nature of the infringement.

Consumers are also protected against unfair advertising under the Consumer Protection Act and the Code of Obligations. Any affected consumer has the right to apply to a consumer arbitration committee or to file suit against the advertisers, depending on the price of the goods or services concerned.

Deceptive and misleading ads and comparative ads which breach the conditions set out by the law also count as acts of unfair competition according to Articles 55 and 56 of the Commercial Code. Any rival companies harmed as a result of the ad, affected consumers or concerned professional and economic organisations have the right to demand that the ad be banned. **WTR**