

Distinction of Comparative Advertising from False Advertising and its Relation to Illegitimate Competition

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DOI: 10.26821/IJSRC.10.11.2022.101102

ABSTRACT

The use of comparative advertising is on the rise, which creates some important questions for the development of public policy around it. Comparative advertising may be useful to advance the consumer information program. To be certain, though, that the information customers receive via comparison advertising is advantageous. It should concentrate on deciding which kinds of comparison claims should be permitted and what the standards for substantiating comparable claims need to be. It should be the comparative advertising not contrary to public order and morals, and not to be false, misleading, or deceptive, or that causes the consumer to be in error, and that also includes sufficient information for a good or service provided that would foster conscious thinking, discerning the will of the works to form an enlightened and is demand for the contract. The research themes in this thesis offer a comprehensive review of comparative advertising in the US and EU (France), Iraq, and Egypt. This study is extracted from the doctoral thesis.

Keywords: Comparative Advertisements, False Advertisements, Illegitimate Competition, Consumer Protection Agency, Comparative Experiments

1. INTRODUCTION

Modern economies aim to promote rational competition and allow players to move freely within their marketplaces. The relevant market in comparative advertising is the market in which one or more goods and services compare and compete. Competition is beneficial because it leads to reasonable comparison among business people themselves, and promotes them to avoid false or illegitimate competition for markets consumer by comparative advertising. Hence, the customer sometimes may be the victim of this battle, since he/she gets pampered with the greatest deals available. This study will divide into several sections including the distinction between comparative and false advertising. Then, the relationship between comparative advertising and illegitimate competition.

Methodology:

The researcher attempted to employ a qualitative methodology, which took into account several significant cases about the use of comparative advertising in some countries, the distinction between comparative advertising and false advertising, as well as the relationship between such advertising and unfair competition.

Research Question:

- How to distinguish comparative advertising from false advertising and illegitimate competition?
- What are those actions for civil protection against illegal comparative advertising?
- What are the situations under the legal protections against illegal comparative advertising?

2. REGULATING FALSE ADVERTISING: LEGAL AND FRAMEWORK PROVISIONS

False in language means contradict to reality, whether intentionally or wrongly,¹ or it is the opposite of truthfulness.² It is claiming contrary to the truth intentionally with the intention of deceit.³ In the sense that it includes everything that can be considered a change of the whole truth or a part of it, and it may also come with a general term to include all kinds of falsehood and its methods, because at the same time it may be described with specific qualities depending on the angle through which it is viewed, depending on the implications of its rise, as if these effects are represented by the realization of a specific crime such as fraud or false reporting.⁴ The false may be either positive methods, through a certain behavior or doing something, then it is called a positive false, and it may be repeated that the false is evident by refraining from conducting any action and being content with not stating the truth or taking what contradicts it, and it is known at the time as a negative false.⁵

It should be noted that there are those who criticize a certain description of the false above without the other descriptions. It is unacceptable for him to divide the false according to the means of its perpetration, because there is a difference between

simply being silent and commit false by positive means, which is that the first involves negative behavior by abstaining and concealing the truth, while the second is a positive behavior by saying something that contradicts the truth, and accordingly, the first is a lack of frankness and the second is false.⁶

A false advertisement is one that tells people about something other than what it is in reality; similarly, a false declaration is one whose content includes a false claim, statement, or offer.⁷ Causing the intended advertisement to be mistaken and induced by this in order to use or acquire the good or service. As for the declaration that contains a false statement, it is necessary to contain the data that is based on lying in order to reach the destination of the person to consume or acquire goods or services. As for an advertisement that includes false information, it means that the advertisement contains the display of goods or services that are not related to the truth.⁸

The French legislator defined false advertising as a false advertisement or one that, by its nature, leads to a mistake.⁹ However, in articles L.121-1 et seq. of the Consumer Code, the French legislature did not explicitly use the term "false"; it used the terms "ambiguity and error," which some jurisprudence saw as a deception, not necessarily a falsehood, because a falsehood may lead to misleading the victim, but disinformation may occur without a falsehood.

¹ "Misinformation" vs. "Disinformation": Get Informed On the Difference, Published May 15, 2020,

<https://www.dictionary.com/e/misinformation-vs-disinformation-get-informed-on-the-difference/>

² Ibn Manzur - Lisan Al Arab - Part 5 - Dar Al Maaref Press - Cairo - without a year of printing - p. 3840.

³ Hala Miqdad Al-Jalili, *ibid*, p.149.

⁴ See: The decision of the French Court of Cassation issued on January 26, 1982.

⁵ Ahmed Sami Abd, Legal Protection for Consumers from Commercial Fraud (a comparative study), Master's thesis, College of Law, University of Babylon, 2010, p. 70.

⁶ Dr. Husam Al-Din Al-Ahwany - The General Theory of Obligation - Voluntary Sources of Obligation - Part 1 - I 3 - Dar Al-Nahda Al-Arabiya - Cairo - 2000 - p. 211 (Arabic Book)

⁷ Nawal Benami, Criminal Protection of Consumers from Deceptive Advertisements, <https://maraje3.com/2012/03/protection-consumers-deceptive-advertising/> > accessed 16 May 2021

⁸ Dr. Thikra Muhammad Husayn, Legitimate Lying in Commercial Ads, research published in Al-Mohaqqiq Al-Hilli Journal for Legal and Political Sciences, Fourth Year, Issue One, p. 212. (Arabic)

⁹ BRAIN avocat, Definition of false advertising. Available at: <https://braun-avocat.com/en/misleading-advertising/> > accessed 12 May 2021. (Law of December 27, 1973.)

In this regard I believe, this is due to French legislation, which was the first to address misleading advertising and did not distinguish between false and misleading advertisements on the grounds that each would cause harm to the consumer.

As for the Iraqi legislator, the Iraqi Consumer Protection Law No. 14 of 2010 did not include any definition of misleading advertising or false advertising. Moreover, the provisions and texts of this law were very weak.¹⁰

In any case, a false declaration from a scientific, theoretical and jurisprudential point of view differs from a misleading declaration, for lying is one thing and deception is another. That would deceive the consumer and push him to contract.

Based on the foregoing, we can define false advertising as advertising includes data or any information that contradicts the truth and reality in whole or in part to the truth of the advertised product or service, or the terms or details of the mechanism for obtaining the product or service, whether with intent purpose or without.

However, jurisprudence¹¹ prefers the term "false" in expressing the content of misleading advertising for two reasons: the first is that it carries with it the claim, and the claim is defined as a claim contrary to the truth. The second is that it also includes the meaning of deception, and the advertiser in his announcement intends without a doubt to deceive the consumer.

According to French legislation Article L.121-8(1) C. con., the comparison must be truthful and not likely to mislead consumers.¹² The *Cour de cassation* provided an illustration of a false comparative advertising case.

¹⁰ We believe that the Iraqi Consumer Protection Law is a weak law and it is criticized with evidence that most issues related to consumer protection, especially misleading or deceptive commercial advertisements, are still governed by the general rules in the civil law or the general rules in the Penal Code.

¹¹ Irston R. Barnes, the law of trade practices-Il false advertising, Ohio state law journal, V23, N4, 1962, P. 601. Available at: <https://core.ac.uk/download/pdf/159587904.pdf> accessed 23 March 2021.

¹² French law do not differ from those of the 1992 Act, Article L.121-8(1) C. con. of Article 10 of the 1992 Act.

The court decided that a cosmetics store's representation of specific goods at the lowest price on the market was deceptive because the products were really cheaper in superstores.¹³ Similarly, the Cour d'appel de Versailles recently found an advertising comparing the national rates of two telecom firms are false and untruthful.¹⁴

In the United States, the false comparative advertising is punishable under both federal and state law, the same outcome may occur. The Lanham Act's Section 43(a) gives competitors a federal right of action for deceptive or fraudulent advertising.¹⁵

As a result of Section (5) of the FTC Act, the FTC may now intervene in cases involving false advertising.¹⁶ Advertisers who engage in abusive comparative advertising might utilize the FTC Acts and the Uniform Deceptive Trade Practices Act to their advantage.¹⁷ Different state law grounds of action, such as tortious interference with economic benefit, carelessness, and product or trade disparagement, can also apply to comparison advertising.¹⁸

FTC and courts, states' "little FTC Acts" and false advertising acts all have varying definitions of misleading comparison advertising. Advertiser try to deceive or mislead customers in order to influence their purchase decisions and expedite sales. As soon as it is proven that the plaintiff's product is better than the defendant's, US courts prohibit the use of equivalency arguments. Because the imitator did not duplicate "the particular region

¹³ Cass. com., July 1, 2003, J.C.P. 2003 E, 38, 1461.

¹⁴ Jamal Henni, *La publicité comparative de Tele 2 condamnée en appel*, Les Echos, Aug. 20, 2004, 19.

¹⁵ Section 43(a) of the Lanham Act reads in the pertinent part. 15 U.S.C. § 1125(a) (2004). *Skil Corp. v. Rockwell Int'l Corp.*, 375 F. Supp. 777, 783 (N.D. Ill. 1974); *see also, e.g., Tacquino v. Teledyne Monark Rubber*, 893 F.2d 1488, 1500 (5th Cir. 1990).

¹⁶ Section 5 of the FTC Act declares unlawful. 15 U.S.C. 45 (2004). *Kraft Inc. v. F.T.C.*, 970 F.2d 311, 314 (7th Cir. 1992).

¹⁷ U.D.T.P.A. § 2(a) (amended 1966). *Mass. Gen. Laws Ann. Ch. 93A, § 2(a)* (2003). *Fla. Stat. Ann. § 501.204* (West 2003).

¹⁸ *See: Harrison, supra* note 2, at 232-34.

and regional conditions" of the tobacco used in the original cigars, summary judgment was granted against a cigar maker who claimed to sell identical copies of more expensive famous cigar brands and also claimed to perform a certain amount of work... in an effort to duplicate the original Superiority claims,¹⁹ on the other hand, it is found that is untrue if it can be demonstrated that the plaintiff's good is comparable to or superior to the defendant's. A television commercial claiming that testing indicates Quaker State 10W-30 [motor oil] protects [engine components] better than any other leading 10W motor oil" was declared to be fraudulent and in violation of the Lanham Act. The promised motor oil did not provide protection to engine and so was not superior.²⁰

In a world business in which the merchant try to attract consumers to his goods or services through advertisements include that praise of goods is cheap and his services are perfect, the people may have impression that a commercial advertisements free from any falsehoods²¹, and that lead the consumer to believe that the information provided by merchants in their advertising messages is true and consistent with reality, but the effect of this ads is not achieved in many cases, and the consumer may found that is a deceptive advertisements.²²

Based on the foregoing, the effect of false advertisements is similar to the comparative advertisements if we look at the latter from its negative side which some jurists said,²³ as they said the effect of the comparative advertisement is the advertisement that degrades the value of goods or

services in the interest of the goods or services advertised, which results in the confusion and ambiguity of the consumer and leads to misleading results, and this is the same result that is achieved through both false advertising. Except that if we look at the comparative advertisement with a different view, as stated by the other side of the jurists,²⁴ we find that it is completely different from both false advertising. He was true and truthful in his statements, and thus completely different from false commercials.

Likewise, a comparative advertisement differs from false advertisements in terms of the aim of each of them. If the advertiser's goal of false advertisements is to deceive the consumer by means of false data that his advertising message includes, and without being exposed to competing goods or services in the market, the aim of a comparative advertisement is to promote specific goods or services and highlight all their positive aspects compared to the goods and services that other competitors offer in the market, even if this is promoted at the expense of that third party.²⁵

3. THE DISTINCTION BETWEEN COMPARATIVE ADVERTISEMENTS AND FALSE ADVERTISEMENTS

False commercials means that a trader can attract consumers to his commodity or service through advertisements addressed to them praising his goods and glorifying his services. False commercial is contradict to they have the right of consumer to receive honest commercials free from any false or misinformation²⁶, such as, the

¹⁹ Heckler v. Chaney, 470 U.S. 821, 830 (1985).

²⁰ Castrol, Inc. v. Quaker State Corp., 977 F.2d 57, 63 (2d Cir. 1992).

²¹ Dr. Rafik Sukkari, Introduction to the Study of Advertising and Commercial Advertising, first edition, Modern Book Foundation, Tripoli, 2016, p. 97.(Arabic Book)

²² Dr. Abdel Moneim Musa Ibrahim, Consumer Protection - A Comparative Study, First Edition, Al-Halabi Human Rights Publications, Beirut, 2007, p. 187.(Arabic Book)

²³ Kaylene C Williams, Robert A. Page, Comparative Advertising as a Competitive Tool, Marketing Development and Competitiveness, 2003, pp. 10-22. Also see: Bruce Buchanan and Doron Goldman, Us vs. Them: The Minefield of Comparative Ads, 1989. Available at : <https://hbr.org/1989/05/us-vs-them-the-minefield-of-comparative-ads> accessed 1 October 2020.

²⁴ Bruce Buchanan and Doron Goldman, Us vs. Them: The Minefield of Comparative Ads, From the Magazine (May-June 1989). Available at: <https://hbr.org/1989/05/us-vs-them-the-minefield-of-comparative-ads> > accessed 18 may 2021

²⁵ In all Arab countries, it does not distinguish between false and misleading commercial advertisements, but in other countries such as America and France, it distinguishes between them.

²⁶ Pushpa Girimaji (Senior Journalist & Consumer Activist), Misleading Advertisements and Consumer, Consumer Education Monograph Series-2, Centre for consumer studies indian institute public administration, New Delhi, 2013, p 47. Available at: <https://consumeraffairs.nic.in/sites/default/files/file-uploads/misleading->

information provided to consumer by traders in their advertising in consistent inconsistent with reality. On the other hand, a false declaration contains an allegation, a statement, or a false display in order to luring the consumer through it for the use or acquisition of the item or service. In other meaning a false statement means it is based on false data contradict with the aim of the consumption or acquisition of goods or services. An ad that includes a false display means that the ad contains the display of goods or services that are not relevant to the truth.²⁷

Misleading advertising is an ad that deceives the consumer or can lead to it, as misleading advertising does not mention false statements but is formulated in a way that deceives the consumer.²⁸ Thus, misinformation in advertising only misleads the average consumer in terms of intelligence and culture. The ad may be misleading by deliberately or inadvertently ignoring the trader's reference to some of the material data in his ad, to urge the public to acquire a commodity or service in a way that inflates and deceives the consumer's contracting benefits, i.e. it makes the consumer wait for what the advertiser will not offer.²⁹ Therefore, an ad that contains correct data gives a false overall impression is a misleading ad, and that is the boundary between misleading advertising and false advertising.

[advertisements/misleading_advertisment_and_consumer%20%281%29_0.pdf](#)> accessed 5 July 2021.

²⁷ Maria D. Molina, S. Shyam Sundar, Thai Le, ..., "Fake News" Is Not Simply False Information: A Concept Explication and Taxonomy of Online Content, *American Behavioral Scientist*, October 14, 2019. Available at: <<https://journals.sagepub.com/doi/full/10.1177/0002764219878224>> accessed 19 April 2021.

²⁸ Rishi Raj Sharma and Subhash Chander, What's Wrong with Misleading Advertising? - An Empirical Investigation, *Asia-Pacific Business Review*, Vol. VII, No. 1, January - March 2011, p 192. Available at: <[file:///C:/Users/IT/Downloads/sharma2011%20\(1\).pdf](file:///C:/Users/IT/Downloads/sharma2011%20(1).pdf)> accessed 21 April 2020.

²⁹ Milton Handler, False and Misleading Advertising, *The Yale Law Journal*, Vol. 39, No. 1, the Yale law journal company, Inc., (Nov., 1929), pp. 22-51. Available at: <<https://doi.org/10.2307/790334>> <<https://www.jstor.org/stable/790334>> accessed 2 March 2022.

A false declaration is an allegation or allegation contrary to the truth intended to deceive and lie to the recipient, with a degree of clarity that the average person is aware of. While misleading advertising would deceive the consumer but not have to contain false statements, the concept of misleading advertising is the concept of false advertising because every false ad is misleading without the opposite. It should be noted, however, that its legal effect is the same, i.e., whether the ad is false or not, it has the same legal effect as it is an illegal commercial and punishable by law.

For example, Elizabeth Holmes, the former CEO and founder of Theranos, a failing blood-testing business, was convicted guilty on four counts of cheating investors, closing off a remarkable fall from grace for a former tech celebrity. One count of conspiracy to deceive investors, as well as three counts of wire fraud involving particular investors, was found guilty of Holmes. For each count, Holmes faces up to 20 years in jail, a \$250,000 fine, and restitution.

Notably, the jury of eight men and four women found Holmes guilty on all counts involving investors, but not on any counts involving patient scamming. The government called just three patient witnesses to the stand during the 11-week trial, two of whom were directly linked to wire fraud allegations. Holmes' case was an once-in-a-lifetime opportunity for a Silicon Valley entrepreneur to face criminal fraud charges. Jurors were to decide whether Holmes was a well-intentioned founder who made mistakes in building her firm, as her defense claimed, or whether she misled investors and patients to help her and her company prosper, as federal prosecutors said.³⁰

One of the fact that justifies a product or professional responsibility as some jurisprudence sees it,³¹ is the role played by advertising for products, as it is not possible under any circumstances to exclude the effective role played

³⁰ (CNN Business), Holmes, now 37 <https://edition.cnn.com/2022/01/03/tech/elizabeth-holmes-verdict/index.html?utm_term=link&utm_medium=social&utm_content=2022-01-04T00%3A38%3A53&utm_source=fbCNN&fbclid=IwAR08wsthxvXzWf9CXkkd-2iQJZ8TeGQzeIR1hKNcEaFa4ygYCft19FbMQ> accessed 20 January 2022.

³¹ Ibid.

by advertising in attracting and influencing the consumer.

3.1. *Distinguish between a Comparative*

Declaration and Similar Concepts.

If we distinguish between comparative advertising and other similar concepts, we see that it is necessary to distinguish between comparative advertising and comparative experiences by noting a comparison in both concepts, as we will distinguish between comparative advertising and misleading advertising, noting that both concepts are from advertising images but each has its own aims, and will distinguish between comparative advertising and a commitment to foresight in the information provided by both terms to the consumer public.

3.2. *Distinguishing a Comparative Advertising from a Comparative Experiences*

Comparative experiences are derived from researches and laboratory studies regarding on commodities offered in the markets that perform the function of different producers carried out by specialized agencies such as consumer protection organizations for the purpose of knowing and discover the best of those goods that satisfied the needs and desires of the consumer. Accordingly, we can highlight the similarities and differences between the comparative declaration and the comparative experiences: the similarities, both are based on the principle of differentiation and determining which of the goods or services is better than others including the criticism of those goods and services. Both of them are based on publishing and announcing the results of comparison to the public opinion and to consumers. Both of them focus on identical of goods and services that perform the same function for different orders. Differences: the comparative advertisement is made by the advertiser, whether it is the producer, agent, or maker of the advertisement, while the comparative experiences are carried out by specialized agencies, which are often organizations or associations aim to protect the consumer's aspects, as for those consumer that has no interest for particular commodities.

The (FNAC) has institutions that sell audio-visual equipment and books. An organization called the Different French Lands has a research laboratory to

conduct comparative experiments of a group competing devices and the result.³² The court accepted the lawsuit and ruled that product critique should be only by a completely independent agency that prohibited comparative propaganda as what (FNAC) has done to achieve profit rather than informing the consumer and identifying the best audience for consumers.³³

The results of comparison experiments are based on very accurate laboratory and technical experiments that take place in specialized laboratories where the goods offered in the market and chosen according to a scientific method, while the subject in announcement is not based on the comparison in a scientific manner and according to laboratory and technical experiments. Advertiser is relied on comparative experiences in his comparative declaration. He is not permitted to disclose it in his declaration because he did not do those experiments himself, then his goal is not to publish the results of experiments to protect the consumer, but to highlight the advantages of his commodity and the defects of competing goods. A French court ruled that the advertiser may use the results of comparative experiments that The National Consumption Institute (LINC) accomplished it.

The goal of comparison in advertising and other comparative experiences is to inform the consumer of the objectivity and quality of the goods and services offered in the market. The French

³² Fnac Darty: 2021 full-year results, Press Release, 23 Feb 2022 17:45 Cet <<https://live.euronext.com/en/node/8966849>> and Copyright Law, Digital Content And The Internet in the Asia-Pacific, Sydney University Press, 2008. Available at: <<https://eprints.qut.edu.au/215933/1/13598.pdf> > accessed 1 March 2022.

³³ In 2004 the French retailer Fnac and music publisher EMI Group were sued by the French consumer association UFC-Que Choisir on behalf of purchasers of audio CDs containing a copy protection scheme. The copy protected CDs allegedly cannot be played on many home and car stereo systems or on most personal computers. EMI and Fnac are accused of 'deception over the material qualities of a product.' See Copy Protected Audio CDs Strike Discordant Note in France. Available at: <http://solum.typepad.com/copyfutures/2004/09/copy_protected.html > accessed 1 February 2022.

judiciary stresses in this area, and rules that if it is proven that the objective of comparative experiences is to harm a particular manufacturer, distributor or product of a commodity, we will be facing a form of unfair competition and arranges responsibility for whoever carried it out so that it can reach criminal accountability.³⁴

Comparative experiments mean scientific or laboratory studies regarding goods or services in the market by different brands that perform the same function, such as mobile devices, televisions, refrigerators, heating systems, or food. In addition, different brands are subject to laboratory experiments in specialized laboratories and are compared in terms of essential characteristics, as safety, use or price, to know which ones are best for the consumer, and then publish the findings in specialized newspapers and magazines in the field of consumption and consumer. This shall be done by independent organizations or associations specialized in consumer protection affairs, in order to educate the consumer and enlighten the way for him to make his decision to acquire the item or service based on technical experiments and accurate scientific foundations carried out by specialized laboratories or laboratories, and therefore these experiments are in the interest of the consumer and not for the purpose of offending, misleading him. Therefore, the criticism of goods and services and the statement of all their positive and negative aspects through comparative experiences help to develop fair competition as each trader claim that his commodity or services has higher quality specifications than his rival competitors who offer the same commodity or service in the market with a lower price, in order to gain a greater profit. It is clear if a consumer leads those to provide important and accurate information on goods and services in the market and is the trustee particularly if they are provided by independent and impartial organizations.

However, if these organizations or associations depart from their neutrality and favour one party

over another, or if their goal in conducting these experiments is not to inform the consumer honestly and objectively about the benefits and drawbacks of goods and services in the markets, they contradict their associations or organizations principles when they publishing the results, or if they carry out comparative experiments within the limits of honesty and objectivity and their main objective is to favor one party over another, they bypass the rules of independent associations or organizations when publishing the results. They incur legal liability for what they have done through an unfair competition lawsuit, as it is considered abusive in the use of the right and in the implementation of the general rules on the abuse of the right mentioned in the majority of countries' civil law. Accordingly, these organizations must perform their tasks objectively, free of any personal or subjective influence, all to protect the interests of consumers and to prevent unfair competition between traders.³⁵

Based on the above, we find that comparative advertising is distinct from comparative experiences, as the source of comparative advertising is the same advertiser and therefore the information contained in it is not impartial and objective but his aim from promoting a commodity or its services by highlighting its advantages compared to other goods or services, to achieve commercial profits, while comparative experiences are usually conducted by an independent source, namely, organizations or associations specializing in consumer protection affairs and not for profit, i.e. they are not utilitarian systems and their comparison is included in consumer information, so the information they contain is objective and honest in most cases.

Regarding the position of the Iraqi legislator of comparative experiences and the possibility of conducting them in Iraq, it should be noted that the importance of these experiences and their great role is educating of the consumers, about the goods and services offered in the markets. we did not find at present time any national body that carrying out such experiments in Iraq to educate the Iraqi

³⁴ Policy roundtables, Judicial Enforcement of Competition Law, Organisation for Economic Co-Operation and Development, Oecd, 1996, p 16. Available at:

<https://www.oecd.org/daf/competition/prosecutionandlawenforcement/1919985.pdf>> accessed 17 June 2021.

³⁵ Julia Wulf and Alan Sutin, Unfair Trade Practices: A Global Comparative Law Survey, World Law Group, 2016, p.5. Available at:<<https://www.theworldlawgroup.com/writable/documents/news/P1413-WLG-Unfair-Competition-Survey.pdf>> accessed 27 January 2022.

consumer to avoid them from to be victim to bad counterfeit, or fraudulent goods or services, which we find it a lot in our markets. This is despite the establishment of a center on behalf of *the Center for Market Research and Consumer Protection in (1997) by order of the Ministry of Higher Education and Scientific Research*, as an official institution concerned with market and consumer issues and directly associated with the President of the University of Baghdad. Although, this center is of research, it does not play an active role in conducting comparative experiments and educating consumers about the advantages and disadvantages of goods or services in the market.

On the other hand, it should be noted that although more than seven years have passed since the passage of the Iraqi Consumer Protection Act, which provided for the formation of a council to protect Iraqi consumers and raise consumer awareness through the use of consumer protection associations, we have not found any role for these associations in protecting and appointing consumers. We therefore call on the Iraqi legislator to add another paragraph to Article (5) of the Consumer Protection Act on the identification of the functions and competences of the Consumer Protection Council, under which it decides to establish national laboratories for experimentation and quality operating under the supervision and control of the Said Council, whose main task is to educate consumers, conduct comparative experiments and publish their findings to the public to provide them with the necessary information and warn them of poorness and non-conforming goods that do not conform to the required standard specifications. This is similar to what exists in most countries our present time.

4. THE RELATIONSHIP BETWEEN COMPARATIVE ADVERTISING AND ILLEGITIMATE COMPETITION

Advertising, in general, plays an important role in market strategies; it is a tool for the producer to exercise his freedom of expression and to communicate with the public consumer to inform them of the advantages of the products he offers. The importance of advertising also appears in its increasing ability to bring about fundamental changes in consumption patterns and influence their choices. In addition, advertising has become a

major tool in stimulating the spirit of competition among producers, thus pushing the wheel of production, which is reflected in improving the quality of products and lowering prices.³⁶ Comparative advertising is a type of advertising that allows advertisers to show how the offered goods and services are better than those of rivals. This has the added benefit of increasing the amount of information available to the consumer, allowing them to make more educated purchase decisions when deciding between competing goods and services.³⁷

Although comparative advertising has been widely used for decades in the United States, it is a relatively recent phenomenon in European countries. Most of these countries have taken a hostile attitude towards this type of advertisement as a form of unfair competition. However, this trend has changed at present time, and competition authorities are encouraging the use of this type of advertising as an important means of stimulating competition among traders, and to inform consumers in order to enables them to make purchasing decisions. This change is due to the desire of strength and support a competition among the Member States, to pass the prohibition of comparative declarations in many national laws that prevent free movement of goods and services between the markets. In addition, the principle of freedom of expression, which inevitably combines with freedom of expression, is maximized. However, this shift in the European position has not made a qualitative shift in the use of comparative advertising in practice, with statistics indicating that they are rarely used in most European countries; consumers continue to view them as illegal advertising.³⁸

³⁶ D. Ahmed Abdel-Khaleq, *Analytical Study on the Economic Aspects of Commercial Ads*, Arab Renaissance House, 1997, p. 14.(arabic)

³⁷ Al-Olayan (S. F.) and Karande (K.); *A Content Analysis of Magazine Advertisements from the United States and the Arab Journal of Advertising*, Vol. 29, No. (3) , 2000, P. 73. , World, Available at: <<http://www.jstor.org/stable/4189153>>.

³⁸ Romano (J. Ch); *Comparative Advertising in the United States and in France*, Nw. J. Int'l L. and Bus. (Northwestern Journal of Business), Northwestern University, School of & International Law, Vol. 25, Issue (1), Winter 2005, P. 371.

Comparative ads are becoming increasingly important day after day, and statistics indicate that they represent the predominant form of advertising that is currently being done in the United States.³⁹ It should be noted that market mechanisms in our Arab countries did not define the use of comparative advertising as a means of promoting goods and services until recently.⁴⁰ However, we note that it has recently become increasingly used in Egypt and in the Arab world, especially in the field of television advertising.

Illegitimate competition is only between two persons who engage in a similar or at least similar activity. It is likely to the judge's assessment whether this promises illegitimate competition or not. Usually, this competition is focused on the existence of a mistake that one party commits against and how the other party responds to the damage as a result of this mistake. Therefore, we will divide this topic into the two demands in the first requirement, defining illegitimate competition and its types. As for the second requirement, we shed light on the distinction between comparative advertising and illegitimate competition.

4. AN OVERVIEW OF ILLEGITIMATE COMPETITION: LEGAL AND FRAMEWORK

Before stating what means by illicit competition is, we must recall that commercial competition itself is a desirable in business life because it grants it activity and vitality. The competition between traders or manufacturers regarding their products or services through honest and fair competition leave the freedom of choice to the consumer without misleading them, develop, the prosperity of trade, and improve the quality of goods and services. In other meaning encourages traders to improve the levels of their goods and services in order to outperform other competitors in the market? The Iraqi Competition and Antitrust Act defined competition as "efforts for economic superiority". According to the Iraqi law a competition based on

legitimate competitive shall be protected by law, so free and fair competition among traders is a legitimate business,⁴¹ even if it results in the decline of the customers attraction toward another rival trader, as long as it takes place in an atmosphere of honor, integrity and honesty. A competition shall not be intended to mislead the consumer or monopolize the market, since competing traders offer their goods and services to the public. Increase in the number of trader's customers must be offset by a shortage of other customers.

Competition has been associated with commercial activity, in particular, until it was characterized as one of the necessary conditions for its professionalism. The principle of freedom of competition entitles every merchant to use all appropriate legitimate means to attract customers. It is notable to say that, even if the freedom of competition based on the rules of integrity, honesty, and observance of laws and commercial customs, it is necessary to protect the one who is harmed by it. When a person bypasses the legitimate means and uses methods that violate the laws, commercial norms, and the integrity of dealing that is required by commercial life, and that leads to harm others who engage in the same activity, this act is considered unfair competition.⁴²

³⁹ Donthu (N.); A Cross-Country Investigation of Recall of and Attitude Toward Comparative Advertising, *Journal of Advertising*, Vol. 27, No. 2, 1998, P. 99.

⁴⁰ Al-Olayan (S. F.) and Karande (K.); *Op., Cit.*, P. 72.

⁴¹ Economic and Social Commission for Western Asia (ESCWA) , Economic Governance Series , Competition and Regulation in the Arab Region, United Nations, 2015, p12, 71. Available at: <<file:///C:/Users/IT/Downloads/economic-governance-series-2015.pdf> > accessed 2 March 2022.

⁴² Hassan Qaqaya and George Lipimile, The effects of anti-competitive business practices on developing countries and their development prospects, United Nations Conference on Trade and Development, United Nations, New York and Geneva, 2008, p29 Available at: <https://unctad.org/system/files/official-document/ditcclp20082_en.pdf > accessed 1 October 2021.

Concerning the definition of unfair competition, we find that the Iraqi legislator did not define it either in the Commercial Law or in the Competition and Anti-Monopoly Law, and also that he did not clarify the general provisions for it except by referring to it casually in the Competition and Anti-Monopoly Law⁴³, as it seems that he left a Unfair competition for the general rules related to commercial obligations and the special provisions contained therein in some laws, such as the Patent and Industrial Models Law No. (65) of 1970, as amended by Coalition Provisional Authority Order No. 81 of 2004, and Trademarks and Data Law No. (21) of 1957, as amended by Law No (9) for the year 2010, and some rules related to the trade names included in the Trade Law.

The new Competition and Anti-Monopoly Law No (14) of 2010 did not define unfair competition setting definitions falls under *the jurisdiction of jurisprudence and the judiciary, not the legislature*. In this regard I think set the definition, in general, is not the task of the legislator, but the action of jurisprudence. If this issue defined it will be complex and difficult to limit it, and may push traders to find modern methods of unfair competition that may be difficult to include within the specific definition of unfair competition. However, the Iraqi legislator did not clarify or set the rule that prohibits any act of unfair competition with a description of it, and he did not present any sample of it. In contrast to that the Paris Convention aims to protect industrial property, from unfair competition in as well as the majority of other legislation. Therefore, we suggest adding another article to the Competition and Anti-Monopoly Law clarifies the concept of unfair competition with the inclusion of some images of it as an example and to be distinguishing from what the majority of other undeveloped state legislations have done.

⁴³ Dr. Ahmed Abdel-Hassani Kazem Al-Yasiri, Assistant Lecturer Hassan Daef Mahmoud Mamouri, Legal protection from unfair competition - a study in Iraqi law, College of Law / University of Babylon, Al-Mohaqqiq Al-Hilli Journal of Legal and Political Sciences, third issue / twelfth year 2020, p. 316. Available at: <https://www.iasj.net/iasj/download/12946d6dc01d914c> > accessed 1 February 2022.

Whereas, the repealed Iraqi Commercial Law No. 149 of 1970 addressed the issue of unfair competition by establishing a general rule, defining what it means, and listing some of its forms and penalties. Article (2/98) stated that “any act that violates the honorable customs and principles observed in commercial transactions is considered illegal competition, and this includes, in particular, the assault on third parties’ trademarks, trade names, or patents that he has the right to invest in and incitement to increase his shop.” divulge his secrets or leave his work and every act or claim that is different from the truth that would cause confusion in the store or its products or weaken confidence in its owner or those in charge of its management or its products).⁴⁴ Concerning the penalty imposed on the perpetrator of unfair competition, the third paragraph of the same article states that (without prejudice to any penalty stipulated by law, the perpetrator of unfair competition shall be punished by imprisonment for a period not exceeding three months and a fine not exceeding one hundred dinars or one of these two penalties), meanwhile the present Iraqi legislator has dispensed these objective provisions and has not mentioned any alternative to them, neither in the law of commerce nor in the law of competition and the prevention of monopoly. Likewise, Article 66 of the Egyptian Trade Law came close to Article (2/98) of the repealed Iraqi Trade Law, where the article clarified the concept of unfair competition and then enumerated what counts as such. For example, because it is not easy to identify all the acts that it constitutes a violation of unfair competition exclusively, while the laws of some other countries.

Concerning the judiciary’s position on the statement of what is meant by unfair competition, we did not find a judicial decision of the Iraqi Court of Cassation specifying its meaning. However, the Egyptian Court of Cassation mentioned in one of its decisions that “unfair competition is the commission of acts contrary to the law or customs or the use of means contrary to honor and honesty.” Moreover the court considered any transactions, when they are intended to cause confusion between two commercial establishments or create confusion within one of them as unfair

⁴⁴ Iraqi Commercial Law No. 149 of 1970 Article (2/98).

competition.⁴⁵ Likewise, the decision of the Beirut Commercial Appeal Court stated that “unlawful competition is a professional error committed by a merchant or industrialist, desiring illegal benefits, at the expense of the rest of his competitors, in violation of the prevailing legal and moral principles in dealing, and the integrity and honesty imposed in commercial custom.”⁴⁶ It was also stated in one of the decisions of the French Court of Cassation that unfair competition is the perpetration of acts that violate the laws and are inconsistent with commercial customs.⁴⁷

Some of jurists mentioned⁴⁸ that unfair competition occurs when a commercial project or merchant follows methods of competition that are inconsistent with the usual practices and impartiality of dealings required by commercial life and lead to harming others who engage in the same activity. While another defined it as a person’s use of methods and means contrary to the law, or a violation of honor, and honesty, of another trader to harm him. It is noted in this group of jurists consider a competition is illegal when it is done with the intent to harm another trader with bad faith.⁴⁹ However, we agree that there is no need for

bad faith to achieve unfair competition. Rather, it is sufficient to have an act of infringement, even if it is the result of negligence or carelessness, in which this competitive behavior may result in harm to others. It constitutes unfair competition.

Although there are some differences between the above definitions and concepts of unfair competition, even they agree that the essence of unfair competition's illegality is the use of illegal means to violate the law, custom, or commercial customs.

Finally, it should be noted that it is clear that comparative commercial advertising that highlighting the advantages of the advertised goods or services compared to other competing goods and services belonging to other rival traders in the market affects one of the most important elements of the shop, which is the confidence of customers.

The sole grounds for infringement are unethical conduct or the use of a trademark in a way that harms the brand's reputation or uniqueness. The phrase "honest practice" isn't defined anywhere. According to the jurist Kerly, the term ‘honest practices’ is a hybrid derived originally from the Paris Convention (article 10 bis),⁵⁰ “honest practices in industrial and commercial matters” and words found in articles (4) and (5) of the European Directive: where use of a sign without due cause takes advantage of the distinctive character or repute of the trademark.⁵¹

The honest practices that intertwined with comparisons that harm a trademark owner's reputation should be regarded as dishonest. A trader cannot declare that a rival's goods are unwanted or terrible while making a comparison.

⁴⁵ Linda Hamed Malkawi, Al- Balqa' Applied University, the legal system for unfair competition lawsuit to protect the trade name, Journal of Legal, Ethical and Regulatory V 24, issu1, 2021, p 4. Available at:

<https://www.abacademies.org/articles/the-legal-system-for-unfair-competition-lawsuit-to-protect-the-trade-name.pdf> accessed 12 September 2021.

⁴⁶ A set of decisions issued by the Commercial Court of Appeal in Fez on the subject: Unfair competition and industrial property, Decision of the Commercial Court of Appeal in Fez, No. 512 issued on June 13, 2000, File No. 1007/99. Available at: <https://www.droitentreprise.com/> accessed 10 December 2000.

⁴⁷ Simon Whittaker, Unfair terms in commercial contracts and the two laws of competition: French law and English law contrasted. Available at: <https://ora.ox.ac.uk/catalog>

⁴⁸ Sally Kane, What Is Unfair Competition?, the balance careers, 2020, <https://www.thebalancecareers.com/unfair-competition-2164416> accessed 9 February 2022.

⁴⁹ Dr. Ashraf Wafa Mohamed, Unfair competition in private international law, research published in Journal of Law and Economics - Issued by the Faculty of Law, Cairo University, No. 72, 2002, p. 162. (Arabic book) also see: Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, Study on the

conditions of claims for damages in case of infringement of EC competition rules, Ashurst, 2004, p. 50. Available at: https://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf accessed 25 February 2021

⁵⁰ Uphar Shukla, Comparative Advertising and Product Disparagement vis-à-vis Trademark Law, Symbiosis Society's Law College, Senapati Bapat Road, Journal of Intellectual Property Rights, Vol 11, November 2006, p 414. Available at: <http://docs.manupatra.in/newsline/articles/Upload/597132AB-96EC-4DB0-8A82-8D732D603A14.pdf> accessed 3 April 2021.

⁵¹ David Kitchen, David Llewyn, et. al.(eds.), Kerly's Law of Trademarks and Trade Name 366 (14th ed., Sweet & Maxwell, London 2005).

Slandering or defaming the competitor and his goods, or services would not be honest practices because it is damaging a trademark's reputation.⁵²

Illegitimate competition is only between two people who engage in a similar or at least similar activity, and the assessment of that is left to the judiciary. The existence of competition in itself is not sufficient occur in responsibility, but the error must be accompanied with competition in the sense that there is illegitimate competition and that this competition is harmful. Thus, illegitimate competition can be defined as a person's uses for a competitor of methods and means contrary to the law, customs, honor, or commercial customs. To regard it as an unfair act of competition, it is not required to commit acts intentionally or in bad faith, but it is sufficient that the act deviates from the usual behavior of the ordinary person to be considered an error that leads to liability as the basis for calling for illegitimate competition. For example, illegitimate competition in Algerian law finds its legal basis in Article (124) of the Civil Code, which stipulates that every act, no matter what one commits, causes harm to others, and obliges the person who caused it to pay compensation.

6. CIVIL PROTECTION AGAINST ILLEGAL COMPARATIVE ADVERTISING

The authorities or independent bodies, through preventive measures, may be able to prevent illegal comparative advertisements to harm that a public or the public audience. However, it is necessary to provide the affected people with the mechanisms guarantee their rights to file a case before the judiciary to challenge fake advertisements and to obtain compensation if they harmed. This address would be divided into three parts, as follows:

Firstly, we show the legal basis for the competitor's lawsuit against the advertiser. Secondly, we address the civil protection established under the lawsuit and unfair competition. Finally, we conclude with a statement on some aspects of civil protection against harmful comparative advertising. The legal basis for the competitor's claim against the advertiser is the comparative ad did not meet the legal rules. The competitor can also sue the offending advertiser based on the idea of unfair competition.

⁵² Ibid.

However, the allegations may be taken into account by the prosecutor, if they provide the consumer with a misperception or understanding of the truth. The content of the comparative ad that reaches the consumer through comparative advertising must be correct.⁵³

We address the position of different legislation as the US law, the legal basis for the advocacy of the competitor in France, and then show the legal basis for the advocacy of the competitor in Iraqi and Egyptian legislation as follows:

6.1. The legal basis for the competitor's lawsuit against the Advertiser in American law:

In the past, an advertiser who engages in comparative advertising by citing false statements about the competitor or the goods and services he displays has been seen as having violated special rules prohibiting defamation or derogation of the competitor.⁵⁴

The suit of Cosgrove Studio and Camera Shop, Inc. against Paine was one of the few applications in which the competitor based the idea of libel.⁵⁵ In this case, the plaintiff published an advertisement in a newspaper offering every consumer who purchased the advertised product would receive another free product. The next day, the defendant published an advertisement in the same newspaper stating that the trader offering a free product had engaged in a deceptive business that was contrary to honest business practices. The Court did not hesitate to consider this a defamation of the competitor, although his name was not expressly mentioned in the declaration. The Court ruled that it was not necessary to authorize the mention of the competitor in the declaration if the advertiser mentioned the qualities or referred to certain circumstances that would help to identify it.⁵⁶

It is worth noting that despite the difficulty of drawing clear lines between defamation and reduction in practice, a defamation suit is better for the plaintiff than a defamation suit. Where it is not required in the first to prove the advertiser's bad faith? As for the retaliation lawsuit, it is required that the defendant prove that the defendant

⁵³ Barigozzi (F.) and Peitz (M.), *ibid*, P. 7.

⁵⁴ Gaughan (L. D.); *ibid*, PP. 446 - 447

⁵⁵ Sterk (E. S.); *ibid*, P. 83.

⁵⁶ Gertz v. Robert Welsh, Inc., 418 U.S. 323 (1974).

advertised had published false information in the advertisement or that he intended to harm him or hurt his interests.⁵⁷

Some argue that it has become, in practice, rare to resort to the idea of defamation to challenge comparative advertisements; whereas, in most of these advertisements, the focus is on the essential features of the competitor's products rather than on the commercial practices of the latter.⁵⁸

The case against the advertiser, which is mentioned in the comparative declaration of the Trademark Act (1/43), can also be established by false statements about its competitor to the US commercial article, where this provision determines the civil liability of any person who mentions false statements in commercials, about the nature or quality of goods or services or any creation of another person's business activities, characteristics, or quality or geographical.⁵⁹

The competitor must establish evidence that the ad contained a false statement about reality in order to successfully establish claim based on false advertising by the said text. This false statement was made in the advertising or promotion of goods or services. It has actually resulted in the deception or misinformation of a large number of potential customers, influencing their purchasing decisions. The competitor should be harmed by the mention of these false statements in the commercial.⁶⁰

In addition, a competitor harmed by a comparative advertisement may establish his claim against the advertiser on the Section 43/3 of the US Trademark

Act. The legislator aims with this provision to prevent underestimating the ability and strength of the brand in attracting customers. Thus, if the company is a comparison of the Declaration, it can establish its judicial invitation to this text if the advertising campaign includes an amendment or mounting for its brand in any way so that it can be seen as a simulation of the brand.⁶¹

However, this lawsuit is for the well-known brand only, to succeed in establishing a fundamental invitation to this text, to prove that their brand is famous. Therefore, the trademark may result in the devaluation of its value by reducing its ability be identified. Discrimination in the sale of goods and services assess whether a brand has achieved this degree of recognition and fame, courts must take into account all relevant factors:

- The duration, extent and geographic scope of advertising and publicity for the trademark, whether the advertisement is carried out by the trademark owner or a third party.

- Quantity, size and geographic extension of sales of trademarked goods and services.

- The extent of fame or actual recognition of the brand.

It is worth noting that the competitor referred in his comparative advertisement always to benefit from the provision of Article 43/a of the US Trademark Law, for several reasons:⁶²

- The text gives immediate legal protection against illegal comparative declarations.

- It obliges the advertiser to publish a correction of false advertisements.

- It allows the companies affected by the advertisement to obtain monetary compensation from the advertiser.

6.2. The legal basis for a claim against the advertiser in French law:

Comparative advertisements in France before 1992 were seen as a form of devaluation of the brand,⁶³ so the courts usually ruled that they were illegal, even if the advertiser did not mention any false statements about the competitor's trademark or had the desire to discredit the latter.⁶⁴ After the 1992 law, the French courts prohibited much

⁵⁷ Sterk (E. S.); *ibid*, P. 83.

⁵⁸ Gaughan (L. D.); *ibid*, P. 452.

⁵⁹ Section 43(a) of the Lanham Act reads in the pertinent part: (1) Any person who ... (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act. 15 U.S.C. 1125(a) (2004).

⁶⁰ Sterk (E. S.); *ibid*, PP. 92:93; See also: *Skil Corporation v. Rockwell International Corp.*, 375 F. Supp.777 - Dist. Court, ND Illinois 1974. Available at:

http://www.leagle.com/xmlResult.aspx?Xmldoc=19741152375FSupp777_11062.xml&docbase=CSLWAR 1-1950- 1985; *Taquino v. Teledyne Monarch Rubber*, 893 F. 2d 1488 - Court of Appeals, 5th Circuit 1990.

⁶¹ Barigozzi (F.) and Peitz (M.), *ibid*, P. 8.

⁶² Bixby (M. B.) and Lincoln (D.), *ibid*, P. 145.

⁶³ Romano (J. Ch), *ibid*, P. 405, Goldman (L), *ibid*, P. 503.

⁶⁴ *Idid*.

comparative advertising either on the base of devaluing the competitor's trademark or unfairness and illegality of comparisons made by the advertiser.

However, after adopting the provisions of the European Directive the text of article 3/2 of European Directive No. 7 of 1997 and regulating comparative declarations under the article (121) of the French Consumer Code, the competitor established his claim against the advertiser based on this provision if the advertiser violates any of the rules provided in this Act to allow comparative advertising. The prohibition of comparable declarations by the text of article (121/ 9-1) of the Consumer Code provides a strong basis for the prosecution against advertisers who has mentioned their trademarks only to benefit from the fame and reputation of these trademarks.⁶⁵

6.3. The legal basis for the competitor's lawsuit against the advertiser in the Iraqi law:

Since the unfair competition lawsuit is the legal means to protect the merchant from unfair competition, the merchant resorts to it to ward off the harms of illegal competition. Unfair competition does not exist unless certain elements are provided for the liability of the competing merchant, and accordingly, we divide this subject into two branches, the first section is about the nature of the lawsuit and the second section about its elements.

The opinions of Iraqi jurisprudence differed in determining the legal nature of the unfair competition lawsuit. Some of them⁶⁶ it is as a tort liability lawsuit, while others are seeing it as a contractual liability lawsuit.⁶⁷ As far as determining the nature of the unfair competition lawsuit, we

dedicate this section through the following paragraphs.

First - as a tort claim

According to the Part of Iraqi civil law⁶⁸ jurisprudence the damage consequent as the commitment of the person to compensate the damage caused by his personal activities or by those whom under his care as under his actual control within the limits drawn by the law.⁶⁹

On this basis, acts committed outside of the legal limits are considered unfair competition, giving rise to a tort liability lawsuit.

Secondly - as a contractual liability lawsuit

Contractual liability is realized whenever there is a breach of the obligation originating from the contract.⁷⁰ Examples of agreements to prevent unfair competition between merchants are considered valid according to a certain condition as long as they are not in violation with public order or an express provision in the law.

We believe that the the unfair competition lawsuit is based on tort liability, but this does not prevent it from being based on contractual liability if the illegal acts represent a breach of the obligation of the source of the contract.

Legitimate competition may turn into unfair competition when the merchant resorts to methods that are incompatible with the integrity and principles of commercial dealings, which leads to harm other merchant, so the legislator had to find a necessary means to protect him against this kind of competition and compensate his lost inflicted by this unfair competition.

The dominant opinion in jurisprudence tends to the fact that this lawsuit is based on the idea of tort responsibility, and that it should contain the elements of responsibility for an error, damage, and causation.⁷¹

⁶⁵ Cochoy (F.) and CANU (R.); *ibid*, P. 88; Romano (J. Ch); *ibid*, P. 406.

⁶⁶ Dr. Ahmed Abdel-Hosni Kazem Al-Yasiri, assistant teacher. Hassan Daeef Hammoud Al-Maamouri, as legal protection from unfair competition - a study in Iraqi law, Al-Mohaqqiq Al-Hilli Journal for Legal and Political Sciences, third issue / twelfth year 2020, p. 325 Available at: <<https://www.iasj.net/iasj/download/12946d6dc01d914c>> accessed 3 February 2021

⁶⁷ *Ibid*.

⁶⁸ Iraqi Civil Code No 40 of 1951 article 202-205.

⁶⁹ Dr. Abdul Majeed Al -Hakim, Professor Abdel -Baqi Al -Bakri and Assistant Professor Muhammad Taha Al -Bashir, Al -Wajeez in the theory of commitment in the Iraqi civil law, vol. 1, 1980, p. 189.(Arabic book)

⁷⁰ Dr. Bassem Muhammad Salih, Commercial Law, House of Wisdom for Printing and Publishing, Baghdad, 2, 1992, pp.170-172(Arabic book)

⁷¹ Dr. Ismat Abdel Majeed Bakr, d. Sabri Hamad Khater, Legal Protection of Intellectual Property, House of Wisdom, Baghdad, 2001, p. 193.

The Egyptian judiciary establishes the unfair competition lawsuit based on the tort liability stipulated in Article (163) of the Egyptian Civil Code, as it states, "Every mistake that causes harm to others obliges the one who committed it to compensate." The Egyptian Court of Cassation stated that "the lawsuit was based on unfair competition. The legitimate claim does not go beyond a normal liability lawsuit based on a harmful act. Everyone who has been harmed by an act of unfair competition has the right to file a lawsuit requesting compensation for the damage he sustained as a result of it against everyone who participated in causing this damage when the conditions of that lawsuit are fulfilled, which are the fault, damage, and causation link between error and harm."⁷²

And since the illegal competition lawsuit is based on this opinion on the same basis on which the case of failure is based, causing harm and illegal work, according to the following detail:

The first condition is the emergence of a state of unfair competition.

This condition implies that competition has been established first, and therefore this competition must be unfair.

1. The state of competition

Competition is the competition between traders or commercial manufacturers to attract customers, for the benefit of one of them at the expense of another. If a person seeks to divert some customers from the commercial store who are accustomed to dealing with him without having an activity that he practices and wants to attract these customers to him, there is no competition, and if such work is considered a mistake that entails the responsibility of the doer according to the provisions of tort responsibility, but if the purpose of the competition is to attract these customers to deal with his future project that considered as unfair competition.⁷³ In addition to the foregoing, it is required for a state of competition to maintain the existing similar commercial activity because competition is only established between traders who provide the public

with identical or at least similar goods or services. The customers of the other competitors are attracted to him and leave dealing with rival competitor, and the possibility of realizing deception is a matter of facts to be assessed by the subject judge. The competition requires the possibility for customers to abandon dealing with one of the stores by dealing only with the other store.⁷⁴

From what has been said that an unfair competition lawsuit may be raised against a person who practice a similar business, whenever the plaintiff has a trading name or a well-known trademark that attracts customers to deal with him, and the defendant's use the same name or trademark in his various trade which leads to the customers' belief that this trade is related to the defend don't, this type of competition is known as "intrusive competition".⁷⁵

However, it should be noted that similarity in commercial activity as a condition for the establishment of a state of competition does not mean identical of both activates; it is sufficient that the two activities are close to the extent that one of the competitors can affect the customers of the other competitor, such as competition between the one who produces the commodity and the one who trades which it, the similarity should exist in the total commercial activity. It is sufficient for the similarity to exist even when there is a partial similarity in one type of activity, such as the merchant practices more than one activity in his commercial place. There is no unfair competition if the activity does not aim to make a profit, as is the case of cooperative societies activates, whose activity aim to take care of the interests of members without the main objective being profit.⁷⁶

According to the most of Arab jurisprudence⁷⁷ the establishment of competition requires of the same legal capacity in the competitors. As a result, there

⁷² The decision of the Egyptian Court of Cassation issued on 14/6/1956.

⁷³ Izz al-Din al-Dinosauri, d. Abdul Hamid Al Shawarbi, Civil Responsibility in the Light of Jurisprudence and the Judiciary, House of Books and Arabic Studies, Edition: 1, Volumes: 4, 1988, p. 1291(Arabic)

⁷⁴ Dr. Muhammad Hussein Ismail, Jordanian Commercial Law, Dar Ammar for Printing and Publishing, Amman, Jordan, 1985, pp. 216-217. (Arabic book)

⁷⁵ Dr. Hosni Al-Masry, Commercial Law, Wahdan House for Printing and Publishing, 1986, 1, p. 294. (Arabic book)

⁷⁶ Ali Hassan Younis, The Commercial Shop, (Cairo (Egypt): Arab Thought House, 1974, pp. 138-139. (Arabic book).

⁷⁷ Dr. Muhammad Hussein Ismail, *ibid*, p. 215.

is no competition between the merchant and the non-merchant, as if a person who lacks commercial capacity used a method unknown in commercial custom to dispose of a commodity that he had purchased, because the effect of his action will be repeated only rarely and because the person who did it lacked commercial capacity.

It seems that the requirement for existence of commercial capacity of the competitors is condition for the establishment the state of competition.⁷⁸ In the case a person who engages in a single business, such as buying movable or real estate to sell it again for a profit, it is not possible - according to our estimation - to say that this is completion because this action as will be repeated except rarely. The logic of this opinion is that the aggrieved party must not bear the damage as long as it occurs once and will not be repeated.

In summary, our opinion is that the significance of the establishment of the state of the unfair competition lawsuit is in the nature of the work, as the work must be commercial, and the capacity of the person carrying out this work, and he is accustomed to doing business.

In addition to the above, we find that the state of competition requires that the purpose of the work is to achieve profit and attract customers, therefore competition between merchants and cooperative societies, is not imagined as unfair competition, because cooperative societies do not aim to gain profit. In other cases, it is regarded as a competition even in cases a trader, performs a specific act that does not aim to make a profit or to attract customers, but intends to harm other trader. In such a case, unfair competition is also considered to exist.

2. To be unfair competition

The most of jurists classifying the acts of unfair competition as following:⁷⁹

- A. Unlawful acts: This competition takes place as a result of any act that contradicts the data of the commercial transaction, whether such data is legally or customarily established.
- B. Unlawful competition by agreement: It means an agreement between traders that

contradict the rules of unfair completion, such as the buyer's condition that the seller of the commercial store should not open a similar store in the same area within a specified period.

While another aspect of jurisprudence divides acts of unfair competition based on their effect into three cases:⁸⁰

1. Acts that may cause confusion among establishments or products.
2. Acts aimed to disrupt a competing project or in the market.
3. False allegations that contradict the truth.

However, the most of Arab jurists agrees that⁸¹ it is not possible to list all the actions that are considered a unfair competition, because the trader always try to find a new means of competition permanently. Legitimate cases are the most common meanwhile other cases are left to custom and commercial customs. In this regard Article (66) of the Egyptian Trade Law, states that "it is considered unfair competition every act that violates the customs and principles observed in commercial transactions, and is included in this in the form of, in particular, assaulting non-trademarks, his trade name, patents, or industrial secrets that he has the right to invest in, inciting his store employees to divulge his secrets or quitting work, as well as every act or claim that would confuse the store or in the products or weakening confidence in its owner or its management or products."⁸²

The second condition: damage

It has already been pointed out that the terms of the unfair competition lawsuit are the same as the conditions of the tort liability lawsuit, and the damage is the most important pillar and essence of liability, whether it is tort or contract. Morally, so the damage is one of the objective conditions necessary for liability in the case of unfair competition, whether this damage is material or moral, or a damage is equal to the present or the future. The responsibility for the unfair competition is determined by the verification of the damage and

⁷⁸ The text of Article (5) of the Iraqi Trade Law No. 30 of 1984.

⁷⁹ Dr. Bassem Muhammad Salih, Commercial Law, House of Wisdom for Printing and Publishing, Baghdad, 2, 1992, p. 168. (Arabic book)

⁸⁰ Dr. Mustafa Kamal Taha and others, The Basics of Commercial and Maritime Law, Mansha'at al-Maaref, Alexandria, 1983, p. 161.

⁸¹ Ezzedine El-Danasori and Dr. Abdul Hamid Al-Shawarbi, Civil Responsibility in the Light of Jurisprudence and the Judiciary, 1988, p. 1294.

⁸² Ibid

it is not important whether the damage is small or large,⁸³ therefore, the damage that justifies the initiation of the unfair competition lawsuit does not require that it be verified, that it actually occurred or will inevitably occur, but it is sufficient for the damage to be probable. If the damage occurs, however, it must be compensated, so the unfair competition lawsuit appears as a preventive lawsuit that prevents the occurrence of the damage, and not only as a remedial lawsuit aimed at redressing the damage⁸⁴. For example, if A merchant has done an act that would cause confusion between his business and his competitor, the latter may initiate an unfair competition lawsuit without the need to prove the damage since the purpose of the lawsuit, in this case, is to stop these actions that led to the creation of a confusion between his commercial premises place and the defendant's, however, the damage that is considered in assessing compensation as a damage is not the potential damage, but verified damage and the compensation is estimated in proportion to the loss suffered by the aggrieved party in terms of loss of sale and loss of gain a profit.⁸⁵

The third condition: causation

Through the foregoing, it was found that the damage is required to be achieved immediately in the case of unfair competition but the damage may be problem but not inevitable.⁸⁶

Article (209/2) of the Iraqi civil law stipulates that the compensation will be estimated in cash, the court may however depending on the circumstance, and upon application being filed by the victim, order that the situation be reinstated to its state or adjudge performance of a certain specified matter or restitution of a similar thing of the fungibles by way of compensation.

According to this article a compensation, includes all the damage that has befallen the aggrieved party, and it is equal whether the compensation is in-kind or monetary, or in material or moral. The compensation includes all direct damage, whether

expected or unexpected and includes compensation for the loss suffered by the aggrieved party.⁸⁷ If it is not possible for the court to determine a sufficient amount of compensation, it may reserve the right for the aggrieved party to be affected, within a reasonable period, to reconsider the assessment of compensation.⁸⁸

6.4. The legal basis for the competitor's lawsuit against the advertiser in the Egyptian law:

The competitor may evaluate his claim to the advertiser based on the provisions of the Egyptian law Intellectual Property Rights Protection Act No 82 of 2002,⁸⁹ where the Egyptian legislator granted each stakeholder to file a lawsuit court of the first instance competent in the usual ways to demand that the use of any geographical indicator that not a registered as trademark shall be prohibited to use it if such use would mislead the public about the true origin of the item.⁹⁰

The legislator also required that the commercial statement shall be identical to the truth in all respects, whether it was placed on the same products, on the covers, invoices, letters, in the media, or in the mass media,⁹¹ it also prohibited the use of any means of naming or displaying a commodity in a way that misled the public that it is originated in a geographical area unlike its true origin,⁹² moreover the Egyptian punish with imprisonment and a fine for violating this provision.⁹³

The competitor is more likely bases his claim against the advertiser according Egyptian consumer protection law of No. 67 of 2006, where the legislator in Article VI obliged the advertiser to provide the consumer with correct information of the nature and characteristics of the product and

⁸³ Dr. Ali Hussein Younes, previous reference, p. 146

⁸⁴ Dr. Hosni Al-Masry, *ibid*, pp. 300-306

⁸⁵ Dr. Abdul Majeed Al-Hakim, *The Brief Explanation of Civil Law, Part 1, Sources of Obligation*, Al-Ani Press, Baghdad, 4th edition, 1974, p. 525 and beyond.

⁸⁶ Izz al-Din al-Danasori, d. Abdul Hamid Al-Shawarbi, *ibid*, p. 1297.

⁸⁷ Dr. Abdul Majeed Al-Hakim, *ibid*, p. 550 and beyond.

⁸⁸ Article (208) of the Iraqi Civil Code No (40) for the year (1951).

⁸⁹ This law was published in the official newspaper, No. 22 bis, on June 2, 2002.

⁹⁰ Article 112 of the Egyptian Intellectual Property Rights Protection Law.

⁹¹ Article 101 of the Egyptian Intellectual Property Rights Protection Law.

⁹² Article 106 of the Egyptian Intellectual Property Rights Protection Law.

⁹³ Article 7/114 of the Egyptian Intellectual Property Rights Protection Act.

avoid what may create an unreal or misleading impression of the consumer or to be confused and false.

The case against the advertiser can also be established based on the text of Article 17 Egyptian of the Consumer Protection Act's Executive Regulations. It prohibits the advertiser from stating in comparative advertising, a false statement or claim or any other matter when it would directly or indirectly create an untrue or misleading impression, when this is particularly focused on one or more of the following elements:

- The nature of the good, its composition, its essential qualities, the elements that make up this good, or its quantity.
- The source of the commodity, its weight, size, method of manufacture, production date, validity date, conditions of use or caveats of such use.
- The producer of the commodity and service provision.
- The type of service, the location of its service, the caveats of its use and its essential recipes, whether it is focused on its quality or the benefits of its use.
- Terms and procedures of contracting including after-sales service, warranty, price and how to pay for it.
- Awards, certificates, or quality marks.
- Trademarks, data, or logos.
- The characteristics of the product and the expected results from its use.

7. LEGAL PROTECTIONS AGAINST ILLEGAL COMPARATIVE ADVERTISING

Comparative ads that meet all the requirements set by the legislator can promote free competition rider between in the market and provide consumers with beneficial information that enables them to make reasonable purchasing decisions. Illegal comparative ads are misleading consumers, damage the reputation of competitors and affect consumer choices. For this reason, it is necessary to have sanctions on illegal comparative ads.

Protection is achieved by several self-regulatory organizations, as consumer protection associations and institutions having the power to monitor and take action on comparative advertising. This protection can also be achieved by granting stakeholders who have been affected by the illegal comparative declaration the right to resort to the

competent judiciary to obtain compensation for damages.

First, we address preventive measures to prevent illegal comparative advertising. Second, we address the issue of civil protection from comparative advertising, as shown below.

7.1. Preventive measures to prevent illegal comparison advertisements

Legal protection against illegal comparative advertising it is not only punishing the offending advertiser for the publication illegal ad, but it is include some measures that prevent the advertiser from exploiting comparative advertising to harm reputation of rival competitors, or at least to get advantage of the privileged competitors in attracting customer to private goods and services. Such actions represent as a fence to prevent spread of this type of illegal advertising. This protection is achieved by allowing independent bodies to play a supervisory role in comparative advertising to verify that it meets legal controls and complies with applicable texts. These forms perform their role before publishing the announcement and prevent any violation to occur. However, if the illegal announcement has been published, these bodies are keen to settle the disputes that arise by amicable means between the different parties before filing a case before the judiciary. We will first present this type of procedure in the American system, then in the European system, finally in Iraqi and Egyptian law.

7.2. Preventive Measures to Prevent Illegal Comparative Ads in the U.S. System by the Federal Trade Commission

The U.S. legislatures have given the commission broad authority to prevent all unusual acts or fraud and actions affecting business activity,⁹⁴ in addition

⁹⁴ Kraft, Inc. v. FTC, 970 F. 2d 311 - Court of Appeals, 7th Circuit 1992. <<https://law.justia.com/cases/federal/appellate-courts/F2/970/311/269778/>> accessed 3 July 2021.; FTC v. Staples, Inc., 970 F. Supp. 1066 - Dist. Court, Dist. of Columbia 1997. <<https://law.justia.com/cases/federal/district-courts/FSupp/970/1066/1639260/>> ; FTC v. QT, Inc., 512 F. 3d 858 - Court of Appeals, 7th Circuit 2008; Novartis Corp. v. FTC, 223 F. 3d 783 - Court of Appeals, Dist. of Columbia Circuit 2000; FTC v. Swedish Match, 131 F. Supp. 2d 151 - Dist. Court, Dist. of Columbia 2000.

the legislators have given a power to commission board to prevent the publication of misleading allegations,⁹⁵ in certain areas, such as food, medicine, equipment, services or preparations.⁹⁶ The USA Federal Cosmetology controls all forms of misleading advertising, including comparative advertising cases involving false allegations about the competitor or products displays.⁹⁷

The Commission's stipulates that it must take the necessary action against the offender for in the public interest. The law gives the Commission itself the power to determine procedures in the public interest.

"Cease and Desist" orders are one of the Commission's main means of implementing its efforts to prevent false advertising in general, including comparative declarations. The Committee has the right to ask the advertiser to stop displaying misleading and deceptive ads.⁹⁸

The commission directs these orders not only against producers but also against advertising agencies. This enhances the effectiveness of the committee's role in preventing misleading advertisements. A product that offers more than one good is more sensitive than exposure to commission orders; because this negatively affects the competitive position of other products in a greater proportion than the advertised products. These decisions also put advertising agencies in an even more awkward position. Because, it leads

customers to cancel dealings with them and search for other agencies.⁹⁹

However, under stop and desist orders, the Commission does not have the power to impose financial sanctions on the offending advertiser. Likewise, the potential delay between the Commission's decision-making and enforce such decisions greatly limits the effectiveness of this procedure; by challenging the Committee's decisions before the Court of Appeal, the advertiser can postpone the implementation of these decisions until the matter is decided by the competent court.¹⁰⁰

To increase the effectiveness of the role played by the Federal Trade Commission, the courts give it broad discretion to take the necessary measures to prevent the occurrence of such misdemeanors.¹⁰¹

The Committee is considering all relevant factors in the process of determining appropriate action to prevent such illegal practices. These factors include the magnitude of the advertiser's current offense, taking into account past violations, and the extent to which such violations may occur in the future in the process of advertising other products.¹⁰²

Accordingly, some courts have upheld the committee's decisions against one of the companies to stop advertising of all its products based on the latter are misrepresentation of one of its products.¹⁰³

It should be noted that preventing the advertiser from repeating or republishing misleading ads does not erase the harm done to the consumer as a result of this ad. The FTC, therefore, asks the offending advertiser to take several actions, including:

- Publish a correction of false statements in the ad.¹⁰⁴
- The caveats of the use of advertised products and the risks that may result from such use should be mentioned in the declaration itself, or that there is

<https://law.justia.com/cases/federal/district-courts/FSupp2/131/151/2580029/>.

⁹⁵ Section 5 of the FTC Act. 15 U.S.C. § 45. accessed 3 Aril 2022.

<https://www.federalreserve.gov/boarddocs/supmanual/cch/200806/ftca.pdf>

⁹⁶ Sections 12-15 of the FTC Act. 15 U.S.C. §§ 52-55

<https://www.law.cornell.edu/uscode/text/15/52> > accessed 3 Jan 2022.

⁹⁷ FTC Advertising Enforcement, Lesley Fair, March, 2008, P. 2. Available at:

<https://www.jstor.org/stable/45119415> > .

⁹⁸ Gaughan; Advertisements Which Identify 'Brand X': A Trialogue on the Law and Policy, Fordham L. REV., Vol. 35, Issue No. (3), 1967, P. 452. Available at:

<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1898&context=flr> > accessed 12 July 2021.

⁹⁹ Sterk (E. S.); *ibid*, P. 110.

¹⁰⁰ Grimes; Control of Advertising in the United States and Germany: Volkswagen has a Better Idea, HARV. L. REV., Vol. 84, 1971, P. 1775. Available at: <http://www.jstor.org.ezproxy>

¹⁰¹ Sterk (E. S.); *ibid*, P. 97 ;Werner (O. R.); *ibid*, P. 87.

¹⁰² Sterk (E. S.); *ibid*, P. 110.

¹⁰³ Sears, Roebuck & Co. v. FTC, 676 F.2d 385, 391 (9th Cir. 1982). Available at: <https://cite.case.law/f2d/676/385/>

¹⁰⁴ Novartis Corp. v. FTC, 223 F.3d 783 (D.C. Cir. 2000).

no scientific evidence to substantiate the allegations made about the health benefits to human beings from the use of declared products.¹⁰⁵

- The Committee may also require the advertiser who mislead the consumer by fake allegations his declaration to publish awareness to the customer as a kind of correction to these allegations.¹⁰⁶

- The committee requires the advertiser to deposit cash amounts in a bank account to pay compensation that may be awarded for the benefit of consumers.¹⁰⁷

- The committee may prevent a violator from engaging in any activity related to marketing, advertising a specific product, or using a particular means of advertising for rest of his life.¹⁰⁸

- The Federal Trade Commission also monitor and examine comparative ads, and prosecutes advertisers for alleging that their products outperform rivals when these allegations are misleading or deceptive.¹⁰⁹

7.3. Preventive Measures to Prevent Illegal Comparative Advertising in the European System

The European Directive in the interests of traders and competitors of 2006/114/ EC started that "*Member States shall ensure that adequate and effective means exist to combat misleading advertising and enforce compliance with the provisions on comparative advertising in the interests of traders and competitors...*".¹¹⁰ So, the European legislator by this Directive oblige the member state with following principles:¹¹¹

¹⁰⁵ FTC v. Christopher Enterprises, Inc., No. 2:01 CV-0505 ST (D. Utah Nov. 29, 2001).

¹⁰⁶ United States v. Bayer Corp., No. CV 00-132 (NHP) (D.N.J. Jan. 11, 2000); Exxon Corp., 124 F.T.C. 249 (1997).

¹⁰⁷ United States v. Telebrands Corp., No. 96-0827-R (W.D. Va. Sept. 2, 1999); FTC v. iMall, Inc., (C.D. Cal. Apr. 12, 1999).

¹⁰⁸ FTC v. International Research and Development Company of Nevada, No.04C 6901 (N.D. Ill. Aug. 22, 2006).

¹⁰⁹ Novartis Corp. v. FTC, 223 F.3d 783 (D.C. Cir. 2000).

¹¹⁰ Directive 2006/114/Ec; Official Journal of European Union, L 376/21), Art. (5), Parag., No. (1).

¹¹¹ Ibid, Art (5), Parag., No. (2:6).

- A judicial bodies of member state are authorized to take legal measures against illegal comparative advertisements.

- The administrative bodies of member states should have sufficient powers to monitor all violations of Ad, and ensure that their decisions are not immunized against judicial oversight which should be respected and effective.

- The staff of administration should be entitled to request to publish the decision of suspension of Ad and request the publication of a correction of false allegations in the declaration.

Here we are trying to show the extent to which the member states of the European Union follow these guidelines when defining the mechanisms that ensure the prevention of illegal comparative advertisements. There is no room here to state the position of all Member States. Therefore, we will focus on the position of the French legislator.

Under article 2/121 of the Consumer Code, the French legislator granted representatives of the General Directorate for Competition Protection, the General Administration of Consumption and Fraud Prevention, the General Food Department of the Ministry of Agriculture, and the Department of Standards of the Ministry of Industry the authority to control data contained in comparative declarations throughout France and prove that they violated the controls set out in the French Consumer Code that states the following:¹¹²

- The offending declaration must be submitted to the competent administrative bodies to accept the compliant, or reject it or order to precede it with appropriate legal action.

- The competent administrative bodies must have the power to stop the publication of the offending declaration on their own or to bring the case before the courts. If the ad has not yet been published, but its publication is imminent, it may obtain an order from the competent court.

These public bodies are entitled to require advertisers to submit all documents proving the truth of allegations contained in their the ad, and they can also require advertisers, advertising agencies, or media operators to allow them access to comparative ads that have already been published. In the event of refusal, the court may order the confiscation of these documents and may impose a fine of 4,500 euros on each day of delay

¹¹² FCC (French Consumer code); Article L121-2.

after the date specified for the submission of these documents.¹¹³

If the published comparative advertisement is found not meet the legal controls provided for, the court to which the case has been referred to it if not be satisfied with the Ad, may be either at the request of the Public Prosecutor's Office or on its own, order the suspension of the offending declaration. This decision is enforceable, although it can be appealed. This decision can be overturned by the authority issued it or by the court to which the dispute has been referred. This procedure has no effect if the case is rejected.¹¹⁴

The French legislator also required the publication of the rulings in this regard, in addition to publishing one or more corrective statements at the expense of the offending advertiser under the terms of procedures and within the time frame set by the court. In the event of an omission or delay, the fines may be imposed on the advertiser, and the Public Prosecutor's Office may order such actions.¹¹⁵

7.4. The Role of the Consumer Protection Agency in Preventing Illegal Comparative Advertisements in Egypt

The Consumer Protection Agency was established under Section 12 of the Consumer Protection Act No. 67 of 2006 to protect consumer rights and safeguard¹¹⁶ their interests and prevent anyone from engaging in activities that would violate these fundamental rights. The Egyptian legislator entrusted the Consumer Protection Agency to setting necessary plans and work programs to ensure the protection, promotion, and development of consumer rights by selection active means to achieve its goals. This body also specializes in receiving and investigating complaints from consumers as individual and from consumer protection associations.¹¹⁷

To ensure the effectiveness of the role played by the Consumer Protection Agency, the legislator decided to grant the employees of the agency.¹¹⁸

¹¹³ FCC; Article L121-2 and Article L121-7.

¹¹⁴ FCC; Article L121-3.

¹¹⁵ FCC; Article L121-4.

¹¹⁶ Article 12 of Law Consumer Protection Agency.

¹¹⁷ Article 12 of the Consumer Protection Law.

¹¹⁸ Article 21 of the Consumer Protection Act No. 67 of 2006.

The capacity of judicial inspector to access books and documents to any governmental entity non-governmental entity and to obtain the information and data necessary to examine complaints submitted to the agency.¹¹⁹ Decisions issued by the authorities under the provisions of this law are final and may be appealed directly to the Administrative Court.¹²⁰

Egyptian a legislator states according the mentioned law that the freedom to carry out economic activities shall be guaranteed to all and prohibited an agreement or exercise of any activity that would be breaching the basic consumer rights, especially their right to access information and data of products that they purchase, as well the Egyptian legislature guaranteed their right to freely choose products that meet the qualifying conditions that comply with specifications.¹²¹

The legislator also required the supplier and the advertiser¹²² to provide the consumer with correct information about the nature and characteristics of the products they are being offered and to be prevent from any action that might lead to the creation of an unreal, false, or confusing impression.¹²³

There is no doubt that illegal comparative advertisements are considered a violation of the basic rights of the consumer, including false data and information, or the deceptive, misleading impression they give to the consumer. All kinds of these Ads are forbidden because they affect the consumer's freedom to choose between different alternatives for competing goods.

The legislator has decided that the Board of Directors of the Consumer Protection Committees would hear separate arguments on the implementation of the provisions of this law, which are between consumers and suppliers or

¹¹⁹ Case C-245/20, Regulation (EU) 2016/679.

<<https://curia.europa.eu/juris/document/document.jsf?text=&docid=247105&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=5763643>> accessed 26 may 2021

¹²⁰ Article 22 of the Consumer Protection Act.

¹²¹ Article 2 of the Consumer Protection Act No. 67 of 2006.

¹²² See Article (1) of the Consumer Protection Law and Article (8) of the Law's Implementing Regulations for further information.

¹²³ Article (6) of consumer protection law No. 67 of .2006.

advertisers, and that the committees' decisions would be appealed to the competent court of appeals under the rules established in the Civil and Commercial Arguments Act.¹²⁴

If the comparative advertisement is including false information, or if it would generate a deceptive or misleading impression and could make the consumer fall into a mistake, the latter or consumer protection associations could file a complaint against the advertiser with the Consumer Protection Agency.¹²⁵

The Department of the Authority shall examine the complaint referred to by the Executive Director immediately upon receipt¹²⁶ and must settle the conflict in a period not exceeding thirty days, after completing the complaint examination procedures in preparing a report by opinion and submissions to the Executive Director of the Authority, which is presented and taken to the head of the agency's board of directors, no later than seven days after receiving the report.

If the Agency finds that the comparative advertisement violates any of the provisions of the Consumer Protection Law, it may take one of the following measures:¹²⁷

- 1- The agency shall compel the advertiser to modify or remove the violation of provision of the law immediately or within a period of time specified by the Board of Directors.
- 2- Stop displaying the offending advertisement.
- 3- The Chairman of the Board of Directors of the Authority may issue a decision that shall be referred to the competent authorities of the state.

An example of these decisions that the Prosecutor's Office of Financial and Commercial Affairs in Egypt due to the publication of an announcement in the newspaper Al- Akhbar issued on Saturday 2012/12/22 claiming that mobile services in Egypt

has a high quality, and relied in this claim on the official report on the quality of mobile services in Egypt issued by the National Telecommunications Regulatory Authority, which in its turn confirmed that the announcement published by the company did not convey the exact content of this report; Reports issued by the agency are aimed to strengthen the foundations of free competition between companies and motivating them to develop performance and improve the level of quality provided to customers, and there is no arrangement in these reports for companies operating in the market. The company's announcement thus creates an unreal and misleading impression among the consumer public, which is contrary to consumer protection law No. 67 of 2006 and its executive regulations.¹²⁸

The Consumer Protection Agency also referred one of the car companies to the appropriate authorities for publishing an advertisement the newspapers al-Ahram and Akhbar al-Youm on 2012/10/13 claimed that the car supplements or from the UK, despite company imports it from China. The published ad thus creates an unreal and misleading impression among the consumer audience and causes them to mix and make a mistake about the original origin of the advertised car.¹²⁹

8. THE RELATIONSHIP BETWEEN COMPARATIVE ADVERTISING AND ILLEGITIMATE COMPETITION

The complementary regulations that established to protect consumers from unfair competition is consumer protection laws, which aim to safeguard and encourage fair competition in the market. In this sense, there is arguably a convergence of interests between customers and market rivals, both of which are safeguarded by fair competition standards.¹³⁰

Perhaps it is appropriate to retain, in this regard; that an unfair competition's purpose may be to attack the general organization of the market or one of the merchants by creating confusion about his

¹²⁴ Article (19) of the Consumer Protection Act No. 67 of 2006.

¹²⁵ The Consumer Protection Agency "CPA" was first established by the Law No. 67 of 2006. Such a law was totally repealed and replaced by the Law No. 181 of 2018 to regulate Consumer Protection and the Agency.

¹²⁶ Article 19 of the Consumer Protection Act No. 67 of 2006.

¹²⁷ M. Saleh, Eslam, An Overview of the Consumer Protection Agency in Egypt (January 11, 2021). Available at SSRN: <https://ssrn.com/abstract=3764047> or <http://dx.doi.org/10.2139/ssrn.3764047>

¹²⁸ Law no. 67 of 2006 on the Consumer Protection < <https://wipo.lex.wipo.int/en/text/191742> > accessed 19 May 2022.

¹²⁹ Consumer Protection Agency in Egypt.

¹³⁰ The Interface between Competition and Consumer Policies. Available at: <<https://www.oecd.org/daf/competition/40898016.pdf>> accessed 16 may 2021

shop or his merchandise.¹³¹ It is clear that a comparative advertising is degrades the value of competing products for the advertised products or the institution that produced them, resulting in consumer confusion about these products or services or their providers.¹³²

Comparative advertising has an impact on the consumer by comparing the advertised commodity with other commodities and highlighting the advantages of the advertised commodities and the disadvantages of other competing commodities, which may result in consumers' reluctance to deal with the commodities their value has devalued by Ad, and then dealing with the advertised commodities only. Comparative advertisement shall not be degrading the competitor's commercial reputation, or publishing incorrect information about his merchandise or his business.¹³³

There is no doubt that comparative advertising is considered unfair competition by convention whenever it is unreal and leads to harm the market and consumers or it's goal is to harm the competitors.¹³⁴

A question may be a raised about if requirement of bad faith of a trader in his action is necessary to describe the competition as unfair competition. To answer this question, man can refer to the development of the French judiciary's position in this regard, that stipulated a bad faith of the merchant and his intent to harm the competitor is unfair competition case unlike a good faith. The judgment of the Court of Appeal in France rejected a claim because the aggrieved trader could not

prove the bad faith of the other competitor. The French judiciary gradually retracted the requirement of bad faith, on the basis that harming others is an inevitable matter inherent in the acts of competition, whether legitimate or illegal and therefore it became sufficient for the unfair competition lawsuit to be based on the rules of civil liability.¹³⁵

9. CONCLUSION:

The most of legislations agreed that if the consumer falls into an actual confusion between the advertiser and the competitor so we face process of unfair comparisons, except according to American law, it is enough if the consumer is simply exposed to the risk of confusion or camouflage to make the comparative advertising illegal.

The Iraqi legislator did not deal with the issue of unfair competition just in the law of competition and the prevention of monopoly, and he did not clarify the general provisions for it except by referring to it casually, as it seems that he left the matter of unfair competition to the general rules related to commercial obligations and to the special provisions that are contained in some special laws.

The Iraqi legislator's failure to define unfair competition is a commendable position because setting the definition, in general, is not the work of the legislator, but rather the task of jurisprudence judiciary, especially if the issue of definition is so broad and complex that it is difficult to limit it if a specific definition is given to it makes it more complex that it is not consistent with the continuous development of trade prevailing, which may push traders to find modern methods of unfair competition that may be difficult to include the concept of unfair competition in details.

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¹³¹ Word group law, unfair trade practice, a global comparative law survey, 2006, pp. 12-28. Available at: <https://www.theworldlawgroup.com/writable/documents/news/P1413-WLG-Unfair-Competition-Survey.pdf> > accessed 16 may 2021

¹³² Dr. Hussein Fathy, The Legality of Commercial Advertising to Protect the Store and the Consumer, Egypt Contemporary Magazine, Eighty-Third Year, Issue 427, Cairo, 1992, p. 33.

¹³³ Hala Al-Jalili, previous reference, p. 166.

¹³⁴ In Article 1 of the Comparative Advertising Law, the French legislator provided a definition for it and determined the legality of this advertisement. In this article, it was stated that "An advertisement that compares property, services, trademarks, trade name or store mark with similar ones is not legitimate unless it is real and has no nature of would cause harm to the consumer."

¹³⁵ Dr. Muhammad Hussein Ismail, previous reference, p. 219.

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