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Misleading Advertising Practices in Consumer Transactions: Can Arab Lawmakers Gain an Advantage from European Insight?

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Abstract

Only a few years after their enactment in several Arab states, consumer protection regulations were already demonstrating their inability to attain their objectives, with regard to the use of misleading commercial advertising in market transactions. Because the regulations are not equivalent to specific rules and prohibitions to address the use of misleading advertisements, many local parties have demanded that the regulations be amended. Although Islamic law also prohibits the use of misleading advertising, its guidelines do not provide specific prohibitions with which to control deceptive practices. In 2005, European legislators regulated Directive 2005/29/EC in an attempt to combat the use of unfair commercial practices, including the use of misleading advertising in market transactions. This Directive provides clear and specific measures enabling control to be carried out. This article will address how Arab lawmakers can benefit from this European experience.

Keywords

misleading advertising; consumer protection; unfair commercial practices; Islamic law

1. Introduction

To break down the use of misleading advertising, the consumer protection law must be amended; such advertising frequently appears in the press, media and telecommunications, particularly in advertisements for Slimming Devices, Herbal products and Baldness remedies.

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The committee for a consumer protection law in Egypt made the call, which the Minister of Trade and Commerce approved.¹ This claim was made in spite of the fact that a consumer protection law was enacted in 2006,² with a bylaw that includes a special chapter entitled “Misleading Advertising”.³ Misleading advertising can be defined as an advertisement that contains false information, that omits relevant information which a consumer needs, that deceives or is likely to deceive a consumer and that causes or is likely to cause a consumer to take a transactional decision that he would otherwise not have taken.⁴ Consumer protection regulations enacted in other Arab legal systems are not much better.⁵ In Lebanon,⁶ Palestine,⁷ the United Arab Emirates (UAE),⁸ Qatar,⁹ Syria,¹⁰ Iraq¹¹ and Tunisia,¹² misleading advertising are frequently used in market transactions, in spite of the fact that Islamic ethics underlines that market transactions, including the use of advertisements, must be conducted fairly. Islamic law provides many controls, given in detail below, to guarantee the best use of advertising in market transactions.¹³ Islamic law is not only a basic source

¹ This call is published online at: <http://www.egynews.net/wps/portal/news?params=85908>, visited on 12/2/2011.

² Law No. 67/2006.

³ Chapter 2 in the Decision of the Minister of Commerce approving the Bylaw for the Egyptian Consumer Protection Law, No. 67/2006.

⁴ See Articles (2/e), (6/1) and (7/1) of Directive 2005/29/EC of 11/5/2005 concerning unfair business-to-consumer commercial practices in the internal market, *Official Journal of the European Union*, L 149/22, 11/6/2005.

⁵ S. Al-ʿAwādli, “Advertising and the Protection of Consumer Rights”, *Proceedings of the International Community for Media and Communication Research* (Cairo: American University, 2007).

⁶ Law No. 659, enacted on 4/2/2005; available at: <http://www.arabruleoflaw.org/compendium/Files/LEB/0113.pdf>, visited on 26/7/2011.

⁷ Law No. 21/2005, enacted on 27/5/2005, the *Palestine Gazette* (Palestinian National Authority), Issue No. 63, at 27/04/2006, p. 29.

⁸ Law No. 24/2006, issued on 13/8/2006; available at: <http://www.shjmun.gov.ae/v2/arabic/docs/rule.pdf>, visited on 23/12/2008.

⁹ Law No. 8/2008, enacted on 15/5/2008; available at: <http://www.justice-lawhome.com/vb/showthread.php?t=4977>, visited on 25/07/2011.

¹⁰ Law No. 2/2008, enacted on 6/3/2008; available at: www.dcc-sy.com/files/laws/protect%20law.doc, visited on 21/7/2011.

¹¹ Law No. 1/2010, enacted on 4/1/2010; available at: <http://www.iraq-ig-law.org/en/node/452>, visited on 19/7/2011.

¹² Law No. 117/1992, enacted on 7/12/1992; available at: http://www.ghazouani-law.com/conference_fin_de_stage.pdf, visited on 24/7/2011.

¹³ See: Gh. ʿAnāyah, *The Legal Organization of Markets in Islamic Economy* (in Arabic: *Ḍawābiṭ tanzīm al-iqtisād fī l-fiqh al-islāmī*) (Beirut: Dār al-Nafāʿis, 1992) 21; A. Mushtaq,

of law for Arab legal systems, it is the axis around which Muslims evaluate all behaviour, including transactions. Therefore, these rules must be considered when making or amending any law before acceptance by a Muslim nation. How can Arab lawmakers benefit from the European approach without breaching Islamic rules? This article will try to answer this question.

With regard to the European approach, Directive 2005/29/EC on Unfair Commercial Practices (hereafter the Directive) was signed by the European Parliament and the Council on 11 May 2005. The purpose of this Directive is to contribute to the proper functioning of the internal market and to achieve a high level of consumer protection.¹⁴ A commercial practice is an activity that is linked to the promotion, sale or supply of a product to consumers. It covers any act, omission, course of conduct, representation or commercial communication—including advertising and marketing—which is carried out by a trader. If it is unfair, this means that it is deemed to be unacceptable with regard to the consumer. The Directive applies to commercial practices before, during and after a contract is drawn up. The Directive contains a general prohibition of unfair commercial practices and, in particular, contains prohibitions directed at misleading and aggressive commercial practices. With regard to misleading advertising, the Directive prohibits commercial practices which are misleading (whether by action or omission), either causing or likely to cause the average consumer to take a different decision.

2. General Rules of Prohibition

2.1. *European Insight on General Rule of Prohibition*

2.1.1. *General Rule of Prohibition*

The Directive sets out general criteria to determine whether a commercial practice is unfair in order to establish a limited range of dishonest practices that are prohibited throughout the European Union.¹⁵ Two cumulative

“Business Ethics in Islam”, *International Institute of Islamic Thought and Economics* (1995): 104.

¹⁴ See Recital (8) of the Directive; see also Hans W. Micklitz, “Full Harmonization of Unfair Commercial Practices under Directive 2005/29: Case comment”, *International Review of Intellectual Property and Competition Law* 40-4 (2009): 372; S. Norelid, “The Unfair Commercial Practice Directive”, *The European Lawyer*, 76 (2008): 42.

¹⁵ It also establishes the difference between misleading practices and aggressive practices and describes the criteria for identifying such practices.

criteria are used to identify unfair commercial practice:¹⁶ (a) the practice is contrary to the requirement of professional diligence;¹⁷ (b) the practice materially distorts or is likely to materially distort the economic behaviour of average consumers. The criterion “to materially distort the economic behaviour of consumers” means using commercial practice to appreciably impair the consumer’s ability to make an informed decision,¹⁸ thereby causing the consumer to take a transactional decision that he would not have otherwise taken.¹⁹ In order to ensure its effective control, European member states must ensure that those persons or organizations with a legitimate interest may bring a court action against misleading advertising and bring the advertising before a competent administrative body to rule on the complaints or to institute the appropriate legal proceedings. In this regard, these courts are authorized (1) to order the withdrawal of misleading advertising or institute the appropriate proceedings to that end and (2) to prohibit misleading advertising, the publication of which is imminent, or institute the appropriate proceedings to that end, even without proof of actual loss or damage or of intentional negligence on the part of the advertiser. In addition, these measures may be the subject of an accelerated procedure with provisional or final effect.²⁰

2.1.2. *Unfair Commercial Practices*

Under the notion of unfairness, the Directive organizes two main categories of unfair commercial practices: “misleading” and “aggressive” practices. Aggressive commercial practices are those that significantly (or are likely to) impair the average consumer’s freedom of choice or conduct in relation to the product concerned through use of harassment, coercion or undue influence and thereby cause consumers to make a transactional

¹⁶ See http://europa.eu/legislation_summaries/consumers/protection_of_consumers/l32011_en.htm, visited on 8/3/2011.

¹⁷ Professional diligence is the special skill and care which a trader may reasonably be expected to exercise, commensurate with honest market practices and/or general principle of good faith in the trader’s field of activity. In this case, the term in question is to be judged as unfair.

¹⁸ O. Bray, “EU Sweep Interim Results: Misleading Advertising and Unfair Practices on Airline Ticket Websites”, *Computer and Telecommunications Law Review*, 14/7 (2008): 179.

¹⁹ See G. Howells, “The End of an Area: Implementing the Unfair Commercial Practices Directive in the United Kingdom: Punctual Criminal Law gives way to a General Criminal/Civil Law Standard”, *Journal of Business Law*, 2 (2009): 184; Norelid, *supra* note 14 at 42.

²⁰ F. Besemer, “New Rules on Misleading and Comparative Advertising”, *Entertainment Law Review*, 19/5 (2008): 116.

decision that they would not have otherwise taken.²¹ Effectively, the Directive prohibits trading practices which are unfair to consumers; it provides four different types of practices considered to be unfair:

- (A) Thirty-one (31) specific practices which are always and in all circumstances considered to be unfair (the Black List).²² Here one need not consider the likely effect on consumers; the average consumer is of no importance in this case. The Black List contains practices which are obviously unfair or reprehensible. It also includes practices paralleling similar products, such as promoting a product similar to one from a particular manufacturer in such a way as deliberately to mislead a consumer into believing that the product is made by the same manufacture;²³
- (B) Misleading actions and omissions: in conformity with the laws and practices of the European member states on misleading advertising, the Directive classifies misleading practices into misleading actions and misleading omissions. You are told “your washing machine cannot be repaired and you need a new one”. If this is not true, the trader is committing a misleading action.²⁴ When a trader advertises the sale of mobile phones without mentioning that they are reconditioned, he is withholding important information that the buyer should have been told. Therefore a misleading omission is takes place;²⁵
- (C) Aggressive practices;
- (D) General obligation not to trade unfairly.

For types (B) and (C), it is necessary to show that the trader’s action has an effect (or is likely to have an effect) on an average consumer’s decision making. A practice can mislead by action, omission, or both. These prohibitions are to ensure that consumers get from traders, in a clear and timely fashion, information they need to make informed decisions. In addition,

²¹ Sweet & Maxwell Ltd., “Unfair Competition and Comparative Advertising, New Regulations Criminalize Misleading Marketing and Unfair Commercial Practices and Advertising”, *European Intellectual Property Review*, 30/9 (2008): 73.

²² Micklitz, *supra* note 14 at 373.

²³ Sweet & Maxwell Ltd., *supra* note 21 at 73.

²⁴ See <http://www.desktoplawyer.co.uk/dtl/index.cfm?event=base:section&node=A76076B76114>, visited on 6/3/2011.

²⁵ *Ibid.*

in some commercial practices (referred to as ‘invitations to purchase’), certain specific information must be given to consumers, unless apparent from the context.²⁶ In fact, the vast majority of unfair practices will fall under these provisions. When applying the above provisions, practices are assessed in light of the effect they have, or are likely to have, on the average consumer.

2.2. *General Rules of Prohibition in Islamic Law*

2.2.1. *General Rules of Fair Trade in Islamic Law*

In Islamic ethics, trade and commerce are based on justice, honesty and fairness. The Holy Qur’ān stipulates that:

...and Allāh has allowed trading and forbidden usury;²⁷ who [Prophet Muḥammad] enjoins them good and forbids them evil;²⁸ and help one another in goodness and piety, and do not help one another in sin and aggression; and be careful of (your duty to) Allāh; surely Allāh is severe in requiting (evil);²⁹ Those who love (to see) scandal published broadcast among the Believers, will have a grievous Penalty in this life and in the Hereafter: Allāh knows, and ye know not.³⁰

Prophet Muḥammad (pbuh) was inspired by God. The Holy Qur’ān provides: “Your Companion [Prophet Muḥammad] is neither astray nor being misled; nor does he say [ought] of [his own] Desire; it is no less than inspiration sent down to him; he was taught by one Mighty in Power” (Q53:2). Because he was also a merchant, he was aware how sellers might impair justice in market transactions. The use of misleading advertising while marketing products is one such practices.³¹ In many places, he underlined that tradesmen had an obligation to be honest and fair when advertising their products.³² He claimed that these be religious actions and promised

²⁶ See the British OFT Report entitled: “Consumer Protection from Unfair Trading, Guidance on the UK Regulations (May 2008) Implementing Unfair Commercial Practice Directive”, p. 33.

²⁷ Holy Qur’ān (2:275).

²⁸ Holy Qur’ān (7:157).

²⁹ Holy Qur’ān (5:2).

³⁰ Holy Qur’ān (24:19).

³¹ For more details about the importance of advertisings in Islamic law and its economic aspect, see: F. Jafkins, *Modern Marketing Community* (London: Blackie Academic, 1997) 43; Al-‘Awādli, *supra* note 5.

³² Al-Ghazālī, *The Revival of Science of Religion* (in Arabic: *Iḥyā’ ‘ulūm al-dīn*), 2/69.

that honest traders would be with him in Paradise.³³ Islamic law pays reasonable attention to the way in which advertising is carried out³⁴ and gives the following characteristics:³⁵

- (A) Islamic ethics, based on Qur'ānic commandments, leaves no room for ambiguous interpretation, such as by marketing executives to suit their individual whims and desires. The Qur'ān frequently refers to the necessity of protecting individuals within Islamic society, saying that Islam has extremely high respect for the right of every member of society to protect himself against interference;³⁶
- (B) The main difference is the transcendental aspect of their absoluteness and non-malleable nature;
- (C) An Islamic approach emphasizes value-maximization in view of the greater good of society rather than the selfish pursuit of profit maximization.³⁷

2.2.2. General Rules for Revising Advertising under Islamic Law

Islamic jurisprudence (*fiqh*)³⁸ offers three main guidelines for revising the use of misleading advertisements.³⁹ First, there is the prohibition of

³³ M. Aḥmad, *Consumer Protection in Islamic Fiqh* (in Arabic: *Himāyat al-mustablak fi l-fiqh al-islāmī*), Ph.D. Dissertation (Cairo: Al-Azhar University, 1992) 297.

³⁴ See Abū al-Hassan, A. Shashī and S. Abdul Latiff, "Islamic Marketing Ethics and Its Impact on Customer Satisfaction in the Islamic Banking Industry", *Journal of King Abdulaziz University*, 21/1 (2008): 30.

³⁵ M. Saīd, Z.U. Ahmad and S.M. Mukhtar, "International Marketing Ethics from an Islamic Perspectives: A Value Maximization Approach", *Journal of Business Ethics*, 32 (2001): 127.

³⁶ S. Mancuso, "Consumer Protection in E-Commerce Transactions: A First Comparison Between European Law and Islamic Law", *Journal of International Commercial Law and Technology*, 2/16 (2007): 7.

³⁷ Ausaf Aḥmad, "Lectures on Islamic Economics", *Islamic Development Bank*, (1995): 3.

³⁸ *Fiqh* in Islamic jurisprudence is an expansion of Islamic Shari'ah law—based directly on the Holy Qur'ān and Sunnah—that complements the Shari'ah with evolving rulings/interpretations of Islamic jurists. Islamic jurisprudence (*fiqh*) deals with the observance of rituals and social legislation. There are four prominent Sunni *fiqh* schools (*madhhab*) as well as a Shi'ite and a Kharijite school. See F. 'Aql, *The Theory of Obligation in the Syrian Civil Law and Islamic Fiqh* (in Arabic: *Naẓariyah al-iltizāmāt fi l-qānūn al-madani al-sūri wa l-fiqh al-islāmī*), 4th edn. (Damascus: University Publications of Damascus, 1994) 13.

³⁹ See Qarṭabī, Whole of the Qur'ān, 9/352; R. al-Ṣālahīn, *Advertisements, its Provisions and Rules in Islamic Fiqh*, p. 35; *Ṣaḥīḥ al-Tirmidhī*, that which is found in the chapter (*bāb*)

advertisements that may distort competition in the local market. Normally, advertising is used to differentiate products between competitors. In this regard, consumers may become attached and loyally stick to a particular brand even though all similar products produced by various manufacturers are much the same.⁴⁰ In a competitive Islamic economic market, consumers and merchandisers are required to have access to all relevant economic and technological information. It is assumed that no manufacturer should have an advantage to differentiate its product from other like products.⁴¹ In addition, consumers must have access to information that may influence their decisions, while sellers must be aware of all the possible uses of their products. Complete information is required by all economic decision-making units. The seller's duty is not only to inform but also to advise the counter-party.⁴² The right to information emphasizes all aspects of the contractual relationship, in particular the nature of the goods offered. This includes not only information from the supplier but also all contract terms and conditions, with particular reference to ways to exercise the right of withdrawal.⁴³ Second, fraud and deception of any kind condemned in the Qur'an are prohibited in legal transactions. Muslims are required to make their transactions absolutely free from ambiguity.⁴⁴ They must be clear, honest and just in their transactions in order to protect the contracting parties from mutual injustice resulting in disputes.⁴⁵ Third, regarding the way in which advertising is carried out, when marketing their products, sellers must operate in ways that do not contradict Islamic ethics. In

"The Book of Buying and Selling" (*Kitāb Buyū'*), No. 1902, p. 288; Jacob Bahussein: *Jurisprudence*, pp. 58-67, quoting a reformer: marketing business incentives, p. 13.

⁴⁰ G.A. Saleh and N. Mulla, "Optimal Advertising and Market Structure: A Conceptual Framework", *Damascus University Journal*, 17/2 (2001): 43.

⁴¹ D. Pipes, "Islamic Economy, What does it mean?", *The Journal of Islamic Studies*, (2006): 16.

⁴² Al-Ghazali, *Supra* note 31.

⁴³ See the Law on Electronic Commerce, approved by the Iranian Parliament (*Majlis*) on 7/1/2004, published in the *Official Gazette* on 31/1/2004 (11 Bahman 1382), enforced on 16/2/2004, Articles (34) and (35).

⁴⁴ 'Abd al-Samī' Abd al-Wahāb Abū al-Khair, *The Guarantee of Defect in Selling Contracts, A Comparative Legal Study with Islamic Law* (in Arabic: *Ḍamān al-'ayb fī 'aql al-qānūn al-madani, darāsah muqāranah bi-l shari'ah al-islāmiyyah*), Ph.D. Dissertation (Cairo: Al-Azhar University, 1987).

⁴⁵ K. Khan and S. Aftab, "Consumer Protection in Islam: The Case of Pakistan"; available at: <http://ideas.repec.org/a/bla/ausecp/v39y2000i4p483-503.html>, visited on 6/11/2010.

other words, are their actions permissible (*ḥalāl*) or not permissible (*ḥarām*).⁴⁶ Therefore, advertising must not use sexual or emotional appeal, evoke fear, offer false testimonies or pseudo-research claims, i.e., methods forbidden in Islam that aim to tempt consumers to make decisions otherwise not taken. Such unethical methods are utilized purely to exploit consumers' basic impulses with an aim to increase profit and grab a larger share of the market. Furthermore, Islamic ethics strictly prohibits the stereotyping of women in advertising and the excessive use of fantasy.⁴⁷ It is also forbidden to use suggestive language or women as objects to entice customers to buy.⁴⁸

2.3. General Rules of Prohibition in Arab Law

2.3.1. Policy of Protection

Investigation of consumer protection laws in Arab legal systems gives an immediate impression of how legislators paid significant attention to protecting consumers from the use of misleading advertising. In addition, the bylaws provide some detail about the tools and instruments employed. The objectives of these regulations and the stipulated consumer rights support this conclusion. In most of these regulations, a special chapter is provided for rules concerning misleading advertising; clear sanctions are provided where consumers have been misled by the advertising in question. Generally these regulations specify that advertising must be congruent with the actual specifications of the product advertised and that it must entail neither mischief nor deception.

These regulations begin with providing a special definition to the advertiser as "each supplier who advertises his products using various means of advertisement". A seller or a supplier is defined as "the person who exercises in his name or to the credit of a third party an activity of distribution, trading, manufacturing, selling or leasing of goods or delivery of services". Misleading advertising is defined as advertising that intends, by any way or

⁴⁶ Al-Bukhārī, "The Book of Drinks" (*Kitāb al-Ashriba*), in: *Ṣaḥīḥ Bukhārī*, Vol. 7, Ch. 69, p. 146.

⁴⁷ Muslim, "The Book of Drinks" (*Kitāb al-Ashriba*), in: *Ṣaḥīḥ Muslim*, Ch. 23, No. 2021, p. 902.

⁴⁸ See: Abū al-Hassan *et al.*, *supra* note 33 at 35; A. Eissawi, "The Theory of the Abuse of Rights in Islamic Fiqh", *The Journal of Social and Legal Science*, 1 (1963): 120.

sort, to advertise the use of any good or service and includes a false offer or indication that directly or indirectly deceits or misleads the consumer.⁴⁹

2.3.2. *General Rules for Prohibiting Misleading Advertising*

One of the main objectives of Arab's consumer protection regulations is to provide a legal basis for protecting consumers from the use of misleading advertising⁵⁰ and to safeguard the rights of consumers in a manner which ensures that they suffer neither health hazards nor fraud inequity nor economic losses.⁵¹ Moreover, consumers have the right to fair treatment without discrimination by the supplier or manufacturer, to choose freely goods and services from among alternatives,⁵² to access fair transactions such as the assurance of quality and reasonable prices as well as to refuse coercive transactions⁵³ and access correct information about the purchased product; all this in order to exercise one's right to make a free and informed choice of goods and services offered in the market.⁵⁴ These rights and objectives will remain unattainable until misleading advertising is banned from market transactions. Therefore, these regulations obligate advertisers to advertise in Arabic to make certain that consumers understand the content;⁵⁵ an advertiser will be penalized when failing to meet this obligation.⁵⁶

These regulations provide many sanctions where the above conditions are not considered. In Jordan, Syria, Tunisia, the UAE and Iraq, advertising is prohibited where it violates conditions of impartiality.⁵⁷ In Palestine,

⁴⁹ Lebanese Consumer Protection Law, Article (11).

⁵⁰ *Ibid.*, Article (1).

⁵¹ Palestinian Consumer Protection Law, Article (2).

⁵² *Ibid.*, Article (3/2); Lebanese Consumer Protection Law, Article (3).

⁵³ Palestinian Consumer Protection Law, Article (3/5); Lebanese Consumer Protection Law, Article (3); Egyptian Consumer Protection Law, Article (2/B); Qatari Consumer Protection Law, Article (2); Iraqi Consumer Protection Law, Article (6).

⁵⁴ Palestinian Consumer Protection Law, Article (3/6); Egyptian Consumer Protection Law, Article (2/C); Qatari Consumer Protection Law, Article (2); Syrian Consumer Protection Law, Article (2/C).

⁵⁵ Palestinian Consumer Protection Law, Article (27); Lebanese Consumer Protection Law, Article (9); Qatari Consumer Protection Law, Article (17).

⁵⁶ Article (27/7) of the Palestinian Consumer Protection Law stipulates that: "each advertiser who did not use the Arabic language in the advertisement of the goods or services, or infringes upon the provisions of Articles (15 and 21) above, shall be penalized with a fine that does not exceed 500 Jordanian Dinars or its equivalent in the legally circulated currency".

⁵⁷ Draft of the Jordanian Consumer Protection Law, Article (12); Syrian Consumer Protection Law, Article (35); Tunisian Consumer Protection Law, Article (11); UAE Consumer Protection Law, Article (6); Iraqi Consumer Protection Law, Article (9).

an advertiser shall be penalized with either, or both, confinement for a period not exceeding more than 3 years or with a fine not in excess of 3,000 Jordanian Dinars. In Lebanon, the national party has the authority to ban the use of such local advertising or to obligate the advertiser to amend it in a manner that reflects its reality; if this advertiser fails to supply the consumer with the product he accurately promoted, then the consumer has the right to demand that the advertiser supply him with a product similar to the one advertised (specific performance) or demand damages.⁵⁸ In Syria, the advertiser shall be penalized with either, or both, confinement for a period between 3 and 6 months or with a fine between 50,000 and 100,000 Syrian pounds.⁵⁹

3. Misleading Actions

3.1. *European Insight on Misleading Actions*

According to Article (6) of the Directive, a misleading action occurs when misleading and false information and deceptive presentation will likely cause the average consumer to make an incorrect decision. Misleading actions can also involve failure to comply with any applicable code:⁶⁰ e.g., (a) when a salesman falsely claims that the consumer's television cannot be repaired and that he will need to buy a new one; or (b) when a trader claims that the price of a refrigerator for sale has been substantially discounted,⁶¹ while, in fact, only very small numbers have been on sale at the non-discounted price for a very short period of time in one of the trader's numerous shops. Whilst the trader's advertisement may be factually correct, it is likely nonetheless to be deceptive; (c) when a trader advertises a house as having three bedrooms, when, in fact, it only has two or when it does have three so-called bedrooms, one of which is actually too small to fit in a bed. In such cases, the trader will have committed a misleading action.

The Directive's Black List provides 21 misleading actions (1:4 and 7:23), which are in all circumstances considered unfair practices, that can be itemized as follows. (a) A trader might provide misleading information

⁵⁸ Lebanese Consumer Protection Law, Articles (13) and (16).

⁵⁹ Syrian Consumer Protection Law, Article (41).

⁶⁰ Sweet and Maxwell Ltd., *supra* note 21 at 73.

⁶¹ See the British OFT Report, *supra* note 26.

about the main characteristics,⁶² availability or origin of a product, the price or the way in which it was calculated,⁶³ or false information about the trader himself (e.g., qualifications or awards). For example, a trader falsely informs a consumer, who is interested in buying a satellite television, that the total package includes certain key channels, which, in fact, are only available after one has paid an additional fee for a subscription. The trader has provided false information about the 'main characteristics of the product'. As this practice is likely to cause the average consumer to make a different decision about the package deal (e.g., to buy it where he would otherwise have not done so).⁶⁴ (b) A trader might market a product, e.g., selling sunglasses under a brand name or logo closely resemble a competitor's product, trademark, trade name, or other distinguishing characteristics, that would cause confusion for a buyer. (c) A trader might falsely claim that he is bound by a certain code of practice that entails a firm commitment,⁶⁵ e.g., that he as a member of a particular interest group has agreed to promote the use of wood other than hardwood from sustainable resources and thus displays the code's logo in a commercial advertising campaign. However, the product which he is advertising contains hardwood from endangered rainforests. Thus, the trader is duping an average consumer who wants to buy eco-friendly products endorsed and bearing a logo pertaining to certain environmental groups.⁶⁶ Because the above-mentioned criteria are objective, and the possibility of deception alone can be considered misleading if the other elements are present as well, one need not prove that a consumer has actually been misled or suffered a financial loss.⁶⁷

⁶² For example, a trader advertises a house as having three bedrooms when, in fact, it only has two; or it does have three rooms called bedrooms although one is too small in which to fit a bed.

⁶³ For example, a trader advertises televisions for sale, saying that the price has been substantially discounted. In fact, the televisions have only been on sale at the non-discounted price in very small numbers for a very short period of time in one of the trader's numerous shops. Whilst the trader's advertisement may be factually correct, it is nonetheless likely to be deceptive. See the British OFT Report, *supra* note 26 at 35.

⁶⁴ *Ibid.*

⁶⁵ See http://europa.eu/legislation_summaries/consumers/protection_of_consumers/l32011_en.htm, visited on 8/3/2011.

⁶⁶ See the British OFT Report, *supra* note 26 at 37.

⁶⁷ I. Stansfield, D. Kelly and A. Spiers, The New Misleading Marketing Regime; available at: http://www.olswang.com/pdfs/mmr_may08.pdf, visited on 7/3/2011.

3.2. Misleading Actions in Islamic Law

Islamic law prohibits all actions that may mislead others; it urges each Muslim to maintain fairness and honesty in all transactions. According to numerous provisions in the Holy Qur'ān, a Muslim must be faithful: "O ye who believe, fear Allah and be with those who are true".⁶⁸ A seller must be accountable, honest and fair when making legal transactions, not only to his consumers but also to God who sees all.⁶⁹ An honest seller's reward is not exclusively financial prosperity but a livelihood blessed by God up to the Day of Judgment when he sits with prophets in Paradise.⁷⁰ For this reason, Prophet Mohamed (pbuh) often commanded sellers to be truthful when marketing their products⁷¹ and disclose goods that were defective.⁷² Islamic guidelines provide two prohibitions, i.e., against fraud and misleading actions, that aim to thwart the use of false advertising.⁷³ These two prohibitions will be further discussed below.

3.2.1. Prohibition of Fraudulent Actions

The prohibition of fraud requires that sellers not take false measures when marketing their products.⁷⁴ The principle of fraud was developed by analogy from a tradition which is attributed to the Prophet Muḥammad (pbuh) concerning the case of *tashrīḥ*. He prohibited the *tashrīḥ* of animals (i.e., refraining from milking an animal for some time so that it will produce a

⁶⁸ Holy Qur'ān (9:119).

⁶⁹ See S.E. Rayner, *The Theory of Contract in Islamic Law, A Comparative Analysis with Particular Reference to the Modern Legislation in Kuwait, Bahrain and the United Arab Emirates*, 1st edn. (London: Graham & Truman, 1991): 223; A. Ḥāzm, "The Theory of Fraud in Islamic Law", *Islamic Law Journal* (1986): 26; J. Sharqāwī, *The Theory of Voiding the Legal Behavior in the Egyptian Civil Code* (in Arabic: *Naḥḥyah abṭāl al-taṣraf al-qānūnī fī l-qānūn al-madānī al-miṣrī*) (Cairo: Dār al-Nahḍah al-'Arabiyah, 1999) 222.

⁷⁰ A. Mansūrī, *supra* note 32 at 297.

⁷¹ See O. 'Abd al-Bāqī, *The Contractual Protection for Consumer* (in Arabic: *Al-Ḥimāyah al-'aqdiyyah l-mustahlik*) (Alexandria: Dār al-Mu'ārif, 2004) pp. 137-138.

⁷² Ibn Ḥanbal, *Musnad al-Imām Ahmad ibn Ḥanbal*, "Ḥadīth al-Sayyidah 'Āishā" (may Allāh be pleased with her), 41/59, No. 2451; Al-Tirmidhī, *Sunan al-Imām al-Tirmidhī*, chapter (*bāb*) on the selling of a slave with defects discovered after the sale, *The Book of Buying and Selling (Kitāb al-buyū')*, No. 1285, p. 305.

⁷³ See A.H. Maboub, "Market Prices in Islam: Perfect Competition or Monopoly", *Journal of Social Science*, 19 (1992): 39.

⁷⁴ A. Riḍwān, "Justice and Fairness in Islamic Law, A Comparative Legal Study Between Law and Islamic Fiqh", *Colombia Law Review Journal* (1992): 261.

large amount of milk at the time of sale).⁷⁵ ‘Umar ibn al-Khaṭṭāb, the second Caliph (*khalīfah*), punished a man who was selling milk that was diluted with water, not because the milk was unfit to drink but rather because the potential buyer was kept in the dark about the relative amount of water in the milk.⁷⁶ Hence, Islam stresses that Muslim businessmen should be honest and not mislead buyers by using fraudulent actions.⁷⁷ The problem encountered is that the principle is contractual and thus can be invoked when masking the agreement.⁷⁸ Moreover, this sanction is meant to enable the defrauded party to rescind the agreement in all where he may need the product. Finally, application of this principle cannot be invoked on its own; it must be accompanied by misrepresentation (*ghabn*) in order to be applied.⁷⁹

3.2.2. Prohibition of Misleading Actions

The second prohibition relates directly to misleading behaviour. Sellers must be honest when marketing their products rather than describing and praising them in an excessive manner that fails to reflect their actual quality. Giving any kind of false impression to promote or sell a product is strictly prohibited under the rules of Islamic ethics. Islamic law leaves no room to justify a cover-up of deceptive promotional behaviour. The Holy Qur’ān provides that: “O ye who believe! Eat not up your property among yourselves in vanities”.⁸⁰ The Holy Qur’ān also condemns all false assertions, unfounded accusations, concoctions and false testimonies. Prophet

⁷⁵ He said: “do not tie up the udders of camels and sheep. If one among you buys a she-camel or sheep with its udders tied up, he has two options after milking it: either to retain it or to return it with a measure of dates”. See *Sunān al-Bukhārī*, 34:64. *Tasrīh* also means the binding up of the teats of the animal, but the majority of the jurists use the word in the sense described in the text.

⁷⁶ A. Hette, *Consumer Protection in Islamic Fiqh* (2004); available at: <http://www.pdfbooks.net/vb/showthread.php?t=14747>, visited on 17/1/2010.

⁷⁷ For example, while the historic arbitration between Alī, the fourth Muslim caliph, and Mu’āwiyah, the fifth Muslim caliph, consisted of a written agreement, under Islamic law, arbitration agreements generally can be made orally as well as in writing. The formalities observed in this particular arbitration were as a result of peculiar political significance, its unique national and constitutional character and its international nature rather than the principles of Islamic law.

⁷⁸ See: A. Mansūrī, “The Defect of Fraud in the United Arab Emirates”, *Islamic Studies Center Publications* (1997): 69; Ḥāzm, *supra* note 68.

⁷⁹ See Articles (356:360) of the Majalla Civil Code.

⁸⁰ Holy Qur’ān (4:29).

Muḥammad (pbuh) underlined these provisions in many cases when he said: “four characteristics are required for the honest trader for his livelihood to be blessed: not dispraising in case of buying; not commendation in case of marketing; not misleading in case of selling and not swearing in these cases”. An individual must treat others as he would wish to be treated himself. The Holy Qur’ān provides: “But give them preference over themselves”.⁸¹ Elsewhere he said: “the best profit is the profit of sellers who do not lie when talking, do not betray when being trusted, do not break in case of promise, do not dispraise when buying, do not commend when marketing, do not temporize when being debited, and are not hard when being creditor”.⁸² In this regard, the Muslim scholar Al-Ghazālī said: “[the] praise of products is allowable where its purpose is to inform the consumer about the reality of the product, it is exclusive to hidden advantage that the consumer is unaware of and is not excessive”.⁸³

The above means that it is unethical for sellers to shower praise on their products, thus attributing to them qualities that they do not possess.⁸⁴ Therefore, in the case of advertising, the following rules are relevant: (a) avoidance of false and misleading advertising; (b) rejection of high-pressure manipulations or misleading sales tactics; and (c) avoidance of advertising that employs deception or manipulation. One is only allowed to document and reveal accurate specifications in terms of quality, content, etc.

3.3. *Misleading Actions in Arab Law*

Arab legislators followed two approaches in the organization of the rules of misleading actions in consumer protection laws. Qatar, the United Arab Emirates, Tunisia, Iraq and Jordan decided not to classify the term ‘misleading’; they found it sufficient to define misleading advertising in general without making any distinction between actions and omissions (negative approach).⁸⁵ In contrast, Palestine, Egypt, Lebanon and Syria chose to define specifically the term ‘misleading action’ and provided several basic

⁸¹ *Ibid.*, (59:9).

⁸² See: Al-Tirmidhī, *Sunān al-Tirmidhī*, chapter (*bāb*) on trade (*Al-Tijārah*), *The Book on Selling and Buying* (in Arabic: *Kitāb al-Buyū*), No. 1210, p. 288.

⁸³ This statement is mentioned in: Al-Bāqī, *supra* note 71 at 138.

⁸⁴ Ḍiyā’ al-Dīn Muḥammad b. al-Akhwah, *Ma’alim al-qurbah fi ahkam al-hisbah*, Reuben Levy, tr. (London: LUZAK, 1983).

⁸⁵ Draft of the Jordanian Consumer Protection Law, Article (12); Qatari Consumer Protection Law, Article (7); Tunisian Consumer Protection Law, Article (11); UAE Consumer Protection Law, Article (6); Iraqi Consumer Protection Law, Article (9).

characteristics to evaluate any questionable action (positive approach). Both approaches fail to provide a Black List of misleading terms as given in the Directive. Because the first approach will offer no explanations, the positive approach will be the target of research below.

3.3.1. *Misleading Actions in the Positive Approach*

Using the positive approach, a misleading action occurs where advertising is untruthful, contains false information including overall presentation, deceives or is likely to deceive the consumer, and causes or is likely to cause a consumer to take a transactional decision that he would otherwise not have taken. This refers to one of the following matters: (a) the real status, nature, or substantial specifications of the products or the hazardous elements they contain and the ingredients composing them in general;⁸⁶ (b) the number, amount, measurement, gauging, weight, energy and scale of products;⁸⁷ (c) the type, origin or source in cases in which—these matters—are deemed to be in accordance with the agreement or custom an essential reason in the contracting (process);⁸⁸ (d) the extent of the trader's commitments and sponsorship or approval of the trader or the product;⁸⁹ (e) the need for a service, part, replacement or repair; false claim to be a signatory to a code of conduct which the trader is not; (f) displaying a mark of trust, quality or equivalent without having first obtained the necessary authorization;⁹⁰ (g) falsely claiming that a product is able to cure illnesses, dysfunction or malformations.⁹¹

3.3.2. *Evaluation of the Positive Approach*

According to the first (negative) approach, much can be said about the above organization. (a) It does not provide specific and reliable provisions

⁸⁶ Palestinian Consumer Protection Law, Article (28/1); Lebanese Consumer Protection Law, Article (11); Bylaw of the Egyptian Consumer Protection Law, Article (17); Syrian Consumer Protection Law, Article (12).

⁸⁷ Palestinian Consumer Protection Law, Article (28/2); Lebanese Consumer Protection Law, Article (11); Bylaw of the Egyptian Consumer Protection Law, Article (17); Syrian Consumer Protection Law, Article (14).

⁸⁸ Palestinian Consumer Protection Law, Article (28/3); Lebanese Consumer Protection Law, Article (11); Bylaw of the Egyptian Consumer Protection Law, Article (17); Syrian Consumer Protection Law, Article (14).

⁸⁹ Lebanese Consumer Protection Law, Article (11); Syrian Consumer Protection Law, Article (14).

⁹⁰ *Ibid.*

⁹¹ Bylaw of the Palestinian Consumer Protection Law, Article (45).

and prohibitions as source of information for both consumers and advertisers seeking to avoid the use of misleading actions. (b) Due to the lack of specific rules of practice, national judges will differ when ruling on the use of misleading advertising. (c) The general rules of contract law have been followed rather than providing specific guidelines for consumers. The second (positive) approach states the following. (a) The definition of misleading action is partial and limits its application to actions that only contain untruthful information. The European Directive extends this definition by applying it even when the information is factually correct but when a consumer has been misled by said action.⁹² (b) The definition of 'misleading action' does not refer to cases in which comparative advertising is used. (c) Because the above-mentioned characteristics are not unified in these legal systems, any of which include all such characteristics, application of each of these legal systems is partial and non-comprehensive. (d) In Egypt, Syria and Palestine, the above-mentioned characteristics are exhaustive and exclusive, so the national judge is not authorised to evaluate other characteristics or actions. The situation in Lebanon differs, resembling the European approach where these characteristics are non-exclusive. (e) The above-mentioned characteristics refer to the product itself and focus on the seller or advertiser; they do not deal with how advertising affects the consumer. This case is important when discussing how advertising influences the consumer's decision making (see Articles 10, 11, and 14 of the Directive's List).

4. Misleading Omission

4.1. *European Insight on Misleading Omission*

According to Article (7) of the Directive, a commercial practice shall be regarded as misleading in two cases: (a) if a trader fails to provide information that a consumer needs in order to make an informed choice in relation to a product (material information); (b) if a trader fails to identify the commercial intent of a practice if it is not already apparent from the context. The presence of a price or statement making it clear that the practice

⁹² Article (6/1) of the Directive stipulates that a commercial practice shall be regarded as misleading if it contains false information . . . , even if the information is factually correct, . . . and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise.

is commercial (e.g., this is advertising) are examples of how commercial intent could be clarified. Misleading omissions include omitting or hiding material information, or unclear and/or ambiguous use of such, or failure to identify commercial intent.⁹³ In the case of invitation to purchase, the Directive provides some information about what the consumer should be told.

4.1.1. *Material Information*

Material information is what the average consumer needs in order to make informed decisions. In this regard, an action is misleading when such information is withheld or provided in an unclear, unintelligible, ambiguous or untimely manner, causing the consumer to make a different choice. Evaluation depends on the circumstances surrounding decision making: e.g., what product is involved and where and how it is offered for sale is information that the average consumer needs to make an informed choice.⁹⁴ Limitation of time or space and whether the trader has taken other steps to convey information (e.g., stating “terms and conditions apply” and where they can be found”) will be taken into account as part of the context.⁹⁵ The following are clear examples regarding material information. (a) If a trader fails to mention that a contract is for a minimum period or that the consumer has to continue making purchases in future, this would probably be a omission.⁹⁶ (b) If a trader advertises the sale of a washing machine but fails to mention that it was second hand, this would clearly be material information that a consumer must have. (c) If a car park fails to display the parking price(s) clearly at a point before the consumer enters and incurs a charge, the owner would be failing to provide material information.⁹⁷ Because the price of a product in most circumstances is material information, failing to provide it in a timely fashion before a transactional decision is made is likely to amount to a misleading omission.

⁹³ Sweet & Maxwell Ltd., *supra* note 21 at 73.

⁹⁴ See: http://europa.eu/legislation_summaries/consumers/protection_of_consumers/l32011_en.htm, visited on 8/3/2011.

⁹⁵ The context of any omissions, such as limitations of time or space, will be taken into consideration, as will other steps the trader has taken to convey the information (such as stating that “terms and conditions apply”).

⁹⁶ See the British OFT Report, *supra* note 26 at 38.

⁹⁷ *Ibid.*

4.1.2. *Invitation to Purchase*

In cases of invitation to purchase, the Directive sets out a limited number of key items of information which a consumer needs in order to make an informed decision. They are material in general, unless they are apparent from the context. Consequently, hiding such information may therefore lead to a misleading omission. It is not the intention of the Directive to reduce consumer choice by prohibiting the promotion of products which resemble other products unless such similarity confuses consumers as to the commercial origin of the product and is therefore misleading.⁹⁸ According to Article (1/i) of the Directive, the invitation to purchase is commercial communication, indicative to the characteristics of the product concerned and the price in a way appropriate to the communication medium used and, enables the consumer to make a purchase.⁹⁹ It is key information for the consumer thus allowing him/her to make an appropriate decision.¹⁰⁰ The amount of information required depends on the conditions related to the decision making process and to the agreement; in contrast to simple products, complex ones may require that more information be provided. (a) The product's main characteristics must be made clear, to such an extent appropriate to the medium and product. (b) The price must include taxes, or the customer told where the nature of the product means that the price cannot reasonably be calculated in advance. Regarding extra charges, if they refer to services (e.g., booking fee or handling of luggage) or additional costs (e.g., fuel surcharge) in flight tickets, which in any event will have to be paid by the consumer, they will also have to be mentioned as additional to the price.¹⁰¹ (c) The geographical address and identity of the trader, such as his trading name, must be known or, where applicable, the address and identity of the trader on whose behalf he is acting. (d) The arrangements for payment, delivery, performance and policy for handling of complaints must be clearly stated, if they depart from the requirements of professional diligence. (e) If relevant, it must be stated clearly if there is a right to withdraw

⁹⁸ See the Preamble of the Directive.

⁹⁹ It is defined as: "invitation to purchase" which means a commercial communication indicating characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enabling the consumer to make a purchase.

¹⁰⁰ Bray, *supra* note 17.

¹⁰¹ *Ibid.*

or cancel products and transactions.¹⁰² The Directive's List provides two practices of misleading omission in case of invitation to purchase (practices 5 and 6).¹⁰³ The following example may clarify the use of that information.¹⁰⁴ A trader sells mobile phones via his Internet website. His homepage shows mobiles advertised for sale. Each picture is linked to a page that provides details about the relevant mobile as well as its price. These pages represent an invitation to purchase. Other pages (not the linked ones) of his website provide the main characteristics of the mobile (e.g., camera resolution, memory card, function), total price (including taxes and cost of delivery) if not given on the previous page, the trader's name and geographic address, the delivery and payment arrangements as well as procedures for filing complaints and after-sales procedures. Since the mobile is being sold over the Internet, information required by the E-Commerce Directives and Distance Selling Directives includes cancellation rights.

4.2. *Misleading Omission in Islamic Law*

4.2.1. *General Obligation to Disclose Information*

Islamic contract law requires harmony of consent between the contracting parties regarding the subject matter and terms of agreement. A contractor is obligated to disclose to the other party all important data and information that will provide insight before the other party makes his decision. Prophet Muḥammad (pbuh) provides this duty: "the contracting parties have the choice unless they decide not to make the agreement. If they are truthful in their disclosure, their sale will be blessed and if they lie and

¹⁰² I. Stansfield, D. Kelly and A. Spiers, "The New Misleading Marketing Regime"; available at: http://www.olswang.com/pdfs/mmr_may08.pdf, visited on 7/3/2011.

¹⁰³ According to the List, these practices are: (5) Making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered (bait advertising). (6) Making an invitation to purchase products at a specified price and then: (a) refusing to show the advertised item to consumers; or (b) refusing to take orders for it or deliver it within a reasonable time; or (c) demonstrating a defective sample of it, with the intention of promoting a different product (bait and switch).

¹⁰⁴ A similar example is provided by the British OFT Report, but using a computer. See the British OFT Report, *supra* note 26 at 44.

conceal, their sale will be desecrated".¹⁰⁵ This provision does not define which information may fulfil this duty; its evaluation depends on how to ensure the objective of this duty (to give insight before consent of the contracting party who must make an appropriate decision). In this regard, Muslim scholars distinguish four important categories of information when evaluating this duty.¹⁰⁶ The characteristics of the object of the agreement, the ways said object will be used and its proportionality, the hidden defects of the product on sale and the terms of agreement are such categories and will be discussed below.

4.2.2. Classification of Core Information in Islamic Law

The first category is deduced from the following Ḥadīth¹⁰⁷ of the Prophet Muḥammad (pbuh):

... the Prophet Muḥammad (pbuh) happened to pass by a heap of eatables (corn). He thrust his hand into that heap, and his fingers were moistened. He said to the seller of the heap of eatable (corn): "What is this? These have been drenched rainfall". He [the Prophet] remarked: "Why did not you place this drenched part of the heap over other eatables, so that people could see it? He who deceives is not my follower".¹⁰⁸

From this provision, all actions aiming at hiding any characteristic of a product on sale and which may affect the contracting party's decision are unlawful.¹⁰⁹ In the second classification, according to Muslim scholarly tradition, it is important to inform the counterparty how to use the product on sale and explain its adequately to the buyer. Ibn al-Asqa Wāthilah, a Muslim scholar, said:¹¹⁰

¹⁰⁵ Al-Bukhārī: *Ṣaḥīḥ al-Bukhārī, The Book of Selling and Buying*, chapter (*bāb*) on matters and lack of advice, 3/67; Muslim, *Ṣaḥīḥ Muslim, The Book of Selling and Buying*, chapter (*bāb*) on selling and the truthfulness of statements (*Bāb al-buyū' wa l-imānāt*), No. 1532, p. 647.

¹⁰⁶ See: Al-Bāqī, *supra* note 71 at 236; A. 'Abed, "Price in Islamic Economy", *Journal of Commercial and Islamic Studies* (1984): 72; A. Ausaf and K.R. Awan, "Lectures on Islamic Economics", *Islamic Development Bank Journal* (1995): 3.

¹⁰⁷ It is what the Prophet said, did, decided, or approved.

¹⁰⁸ Muslim, *Ṣaḥīḥ Muslim, Book of Faith* (in Arabic: *Kitāb al-Amānāt*), No. 102, p. 97; Al-Nawwī, *Exegesis on Ṣaḥīḥ Muslim*, 2/109.

¹⁰⁹ Al-Bukhārī, *Ṣaḥīḥ Bukhārī, Book of Faith* (in Arabic: *Kitāb ul-Amānāt*), "The Door of Faith that he loves for his brother what he loves for himself", 1/10; Muslim, *Ṣaḥīḥ Muslim, Book of Faith*, "The Door of the Directory that the qualities of faith that he loves for his Muslim brother what he loves for himself of good", No. 459, p. 80.

¹¹⁰ Aḥmad, *Musnad al-Imām Aḥmad*, Ḥadīth al-Ṣaḥābī Ibn al-Asqa' Wāthilah of Aḥamīn (may Allah be pleased with him), 25/394, No. 16013.

I bought a camel from a seller and when leaving the place of contract, Oqba ibn Nafi followed me and said: "The camel seems fat and healthy, did you buy it for meat or travel?" I said for travel (*hajj*). He said: "Its toe has a hall, and it is not appropriate for your travel". "Are you looking to rescind the agreement?" the seller asked Oqba. Oqba responded: "I heard Prophet Muḥammad (pbuh) say that the contracting parties have the choice".¹¹¹

According to the third classification of information, it is obligatory that sellers disclose all of their goods' defects whether obvious or hidden: i.e., those which the purchaser cannot see "on the surface" spot by a "cursory glance". It is dictated that, when there are no stipulations, it is necessary that the object being sold be free from defects.¹¹² Marketing disclosure is manifested either by an assurance given by word of mouth or in writing; in some cases silence will infer assurance. Finally, contract terms have to be presented the counterparty in a clear language, so that he can assess his position before concluding the agreement. Islamic law stresses that all agreements and contracts should be transparent and clear and that Muslims are required to make their transactions absolutely free from ambiguity.¹¹³ They are required to be clear, honest and just in their treatment in order to protect contracting parties from mutual injustice resulting dispute.¹¹⁴ Clarity is of utmost importance; one must employ plain and intelligible language when drafting the terms of the contract (*ṣiġh*) and guaranteeing both parties' mutual rights and obligations. Uncertainty (*gharar*) with regard to rights and obligations may create deception, which is definitely prohibited under Islamic law. *Gharar* transactions render agreements invalid.¹¹⁵

¹¹¹ Al-Bukhārī, *Ṣaḥīḥ al-Bukhārī, The Book of Buying and Selling*, "If the door between the matters which did not advice", 3/67; Muslim, *Ṣaḥīḥ Muslim, The Book of Buying and Selling*, "Door sales and the truthfulness of the statement", No. 1532, p. 647.

¹¹² C.R. Tyser, D.G. Demetriades and I.H. Efendi, *A Complete Code on Islamic Civil Law* (translation from Turkish of the *Majallah al-Aḥkām-i-Adliya, Majella*) (New York: Law Publishing Company, 1967) 74.

¹¹³ See: M.A. Maannan, *Islamic Economics, Theory and Practice, A Comparative Study* (Pakistan: Lahore Publications Institute, 1990) 115; A. Abd al-Halim, *Public Duties in Islam* (London: Islamic Foundation Center, 1982) 76; A. Yousef and K.A. Awan, "Lectures on Islamic Economics", *Islamic Development Bank Journal* (1995): 7.

¹¹⁴ M. Mrgnee, "Options in Islamic (Fiqh) and Law", *Islamic Law Journal* (1993): 229.

¹¹⁵ Y. Kaẓem, "The Consumer Right to be Informed", in: *Proceedings of the Conference on Consumer Information*, (Cairo: Faculty of Law, Cairo University, 1995); see also the Holy Qur'ān (4:29).

4.3. *Misleading Omission in Arab Law*

As stated above, consumer protection laws in Arab countries agree on the rights of consumers to access correct information about products to be purchased or used, in order to exercise his/her right to make a free and informed choice among different goods and services.¹¹⁶ Several of these legal systems, such as the Directive, specify important information which must be available to a consumer in the case of advertising.¹¹⁷ Which listed information, and how to evaluate it to guarantee the above-mentioned rights, will be examined below.

4.3.1. *Classification of Information Provided in Arab Regulations*

As mentioned above, most, and not all, Arab regulations provide some information that has to be presented to consumers. For instance, a supplier who intends to promote goods and/or services by advertising a special offer must define the period of time during which such goods or services will be available; where the time period has not been specified, the offer shall be deemed valid for a period of 1 month beginning on the first day the advertisement was placed.¹¹⁸ The price must be displayed in the circulated currency on the unit of sale supplied to the consumer in a direct manner thereupon. If untenable, it shall be posted in a visible manner on the place where it is displayed.¹¹⁹ Arabic language must be used in all advertisements.¹²⁰ The seller must supply the consumer with clear and correct information including the main characteristics of the product, its quality, its price, the terms of the agreement, and risks that might arise when using the product.¹²¹

4.3.2. *Evaluation of the Listed Information*

The classifications described above are challenging in that they specifically fall under the duties of the seller and not under the category of misleading advertising. Therefore, sanctions provided for the use of misleading actions cannot be invoked here. It appears that these regulations follow the general principles of contract law, which do not consider the failure to disclose as

¹¹⁶ See above for the legal basis of Arabic law.

¹¹⁷ Basically, the main characteristics of the product and its price.

¹¹⁸ Palestinian Consumer Protection Law, Article (16).

¹¹⁹ *Ibid.*, Article (17).

¹²⁰ *Ibid.*, Article (27); Syrian Consumer Protection Law, Article (34).

¹²¹ Lebanese Consumer Protection Law, Article (4); Qatari Consumer Protection Law, Articles (7) and (11); Syrian Consumer Protection Law, Article (14).

a type of fraud.¹²² It remains unclear, under the provisions of Arabic consumer law, which sanctions will be applied when sellers breach their duties. Scrutinizing the articles in these regulations may impart the sense that sanctions cannot be invoked in this case.¹²³ Moreover, important information made available by the European Directive is not provided in this organization.¹²⁴ While Arab lawmakers realized the importance of a consumer's right to information, they were unsuccessful in determining how to ensure this right. All regulations provide for consumers' rights, although none of them have determined comprehensively what information is important to provide insight to a consumer before he/she makes a transaction in the marketplace. Moreover, no clear Lists are provided, it is not easy to define a practical scenario for fulfilling this duty. Finally, this categorization does not include cases of invitation to purchase, although such cases are important when addressing the use of misleading omissions. These challenges justify and underline the importance of rethinking this organization to satisfy the needs of the modern market. It is recommended here to follow the European approach, in order to ensure the efficiency of these measures.

5. Conclusion

This article makes clear that it would be better for Arab lawmakers to benefit from the European practice when enacting consumer protection regulations. Evaluation of Arab practice, with regard to ending the use of misleading advertising in consumer transactions, reflects contradictory outcomes. On one hand, Arab lawmakers explicitly stress their objective to

¹²² See A. Sulṭān, *Explanation of Legal Contracts: A Comparative Legal Study Between Egyptian and Lebanese Law* (in Arabic: *Sharḥ al-qānūnī al-madani: darāsah qānūniyah maqārnah baina l-qānūn al-miṣri wa l-lubnānī*) (Beirut: Dār al-Nahḍah al-ʿArabiyah, 1980) 47; H. Jamīʿi, *Product Liability for Damages Caused by Defective Products: A Comparative Legal Study According to the Development of Judicial System in France* (in Arabic: *Maʿūliyah al-muntij ʿan al-adrār il-latī tusababuhā muntajātahi l-māʾibah: darāsah qānūniyah muqārnanah waḥḍan li-tuṭūr il-niṣām al-qadāʾi l-fransi*) (Cairo: Dār al-Nahḍah al-ʿArabiyah, 2000) 169.

¹²³ For the justification of this conclusion, see: M. Fayyad, *The Legislative Consumer Protection from the Use of Unfair Terms in Palestine: A Comparative Legal Study with the European Directive (93/13/EEC) of Unfair Terms in Consumer Contracts*, Ph.D. Dissertation, Free University of Brussels (VUB), Brussels, 2010, p. 439.

¹²⁴ See the material information in the European law, *supra*.

terminate the use of misleading advertising. On the other hand, they have not succeeded in providing appropriate measures to ensure this objective. European law divides misleading practices, making a distinction between misleading actions and omissions, and provides their elements and requirements. Information required to terminate the use of such actions is provided in detail in the European Directive. The Directive's List provides the common use of these practices and may facilitate their application. Islamic law employs the same classification and its guidelines constitute the legal base needed to be promoted to comply with the development of modern market transactions.

To achieve the above, it is recommended that Arab consumer protection regulations be amended, thus distinguishing between misleading actions and omission, that European information requirements be adopted and that the terms of the Directive's List be transposed into a new amendment.

