

Bugnion SpA

A detailed look at Italy's regulatory regime on unfair advertising

Advertisers must take into consideration provisions of the Consumer Code and Legislative Decree 145/2007 when devising a marketing campaign. Any breach of the rules could lead to the advertisement being suspended and a fine

According to Article 18(d) of Legislative Decree 206/2005 (known as the Consumer Code), a 'commercial practice' is "an action, omission, behaviour, declaration, commercial communication (including advertising and product commercialization) initiated by a professional which relates to the promotion, sale or supply of a product or service to consumers". The code applies to practices occurring before, during and after such commercial operations. In addition to advertising, promotions, communications, contracts and offers are also subject to the code.

Article 20(3) of the code prohibits "all unfair commercial practices, particularly those that target large groups of consumers and are capable of distorting the economic behaviour of a group of consumers who are particularly vulnerable to the activity or product in question because of their mental or physical weakness, their age or their gullibility, in a way that... could reasonably have been foreseen. Such practices will be evaluated from the perspective of the average member of the group". However, the provision explicitly allows "common and legitimate advertising activities using excessive declarations that should not be taken literally".

Unfair commercial practices are typically viewed as being either deceitful or overly aggressive. Under Article 24 of the code, a commercial practice may be considered to be overly aggressive if it limits, or is liable to limit considerably, the freedom of choice and behaviour of consumers through coercion, in that it is likely to lead them to buy something that they would not have otherwise chosen.

In contrast, a commercial practice will be considered to be deceitful if it includes incorrect or false information (Article 21 of the code). In addition, the code provides that even if the information is correct, the

way in which it is presented may deceive consumers and lead them to make a decision that they would not have otherwise made, taking into account, among other things, the nature of the product and its main characteristics. Another deceitful practice consists of omitting relevant information that the average consumer would need to make a knowledgeable decision (Article 22 of the code).

Moreover, Article 23 states that the following practices, among others, will be considered deceitful:

- False statements made by a company which has signed a code of conduct; and
- Use of a quality or collective trademark or equivalent sign without authorization.

Consequently, the 'deceitful use of a trademark' – as defined by Article 14 of Legislative Decree 30/2005 (better known as the Industrial Property Code) – may be found to damage the rights of consumers and be prohibited under the Consumer Code. Similarly, the unauthorized use of a collective trademark that guarantees the origin or quality of a product constitutes a deceitful commercial practice which is detrimental to consumers' rights.

Laws on unfair and comparative advertising

While the Consumer Code protects the interests of consumers, Legislative Decree 145/2007 specifically regulates unfair and

comparative advertising. Article 1(3) of the decree states that "advertising must be transparent, truthful and accurate". Further, Article 5 provides that advertising must be clearly recognizable as such. Press advertising must be distinguishable from all other forms of communication with consumers and use graphical representations that are easily perceptible. Any form of subliminal advertising is forbidden.

'Misleading advertising' is defined as any advertising which "in any way, including its presentation, deceives or is likely to deceive the physical or juridical persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour and, for those reasons, damages or is likely to damage a competitor".

To assess whether an advertisement is misleading, the following elements should be taken into consideration:

- The characteristics of the goods and services, including their prices;
- The terms and conditions of supply; and
- The attributes and rights of the advertiser, such as its identity, assets, qualifications and intellectual and industrial property rights, as well as any awards and distinctions.

With regard to comparative advertising, Article 4 of Legislative Decree 145/2007 states that comparative advertising will be

“ While the Consumer Code protects the interests of consumers, Legislative Decree 145/2007 specifically regulates unfair and comparative advertising ”

permitted where:

- it compares goods or services that meet the same needs or are intended for the same purpose;
- it does not create confusion among traders, between the advertiser and a competitor, or between the advertiser's trademarks, trade names, other distinguishing marks, goods or services and those of a competitor; and
- it does not denigrate or discredit a competitor.

In addition, Article 4(g) provides that an advertisement must not "take unfair advantage of the reputation of a trademark, trade name or other distinguishing signs of a competitor or of the designation of origin of competing products".

All the illegal practices included in Legislative Decree 145/2007 have, in the majority of cases, an impact on consumers, as unfair and comparative advertising is likely to distort their economic behaviour.

The Market and Competition Authority is in charge of enforcing the Consumer Code and Legislative Decree 145/2007. The authority may prohibit illegal practices and impose monetary fines ranging from €2,000 to €500,000. The decisions of the authority may be appealed to the regional administrative court.

Both Article 27 of the Consumer Code (introduced by Legislative Decree 146/2007) and Article 9 of Legislative Decree 145/2007 state that interested parties seeking the suspension of unfair or comparative advertising may apply to the relevant self-regulatory body.

Self-regulation

The Code of Self-Regulation has been enacted by the main trade unions and applies to all major advertisers. The code is now in its 45th edition and has been in force since April 21 2008 (the first code was dated May 12 1966). The code is enforced and interpreted by the jury and Control Committee of the *Istituto per l'Autodisciplina Pubblicitaria* (advertising self-regulatory body), which may give preliminary opinions on the lawfulness of an advertising campaign. Interested parties may also apply to the Court of Honour, which issues decisions quickly.

The code includes general rules on acceptable practices and explicitly prohibits:

- misleading commercial communications (Article 2);
- disguised commercial advertising (Article 7);
- the exploitation of superstition, credulity and fear (Article 8);



Donatella Prandin
Partner, Bugnion SpA
prandin@bugnion.it

Donatella Prandin is a partner at Bugnion SpA and is the foreign department manager. She graduated in law from the University of Milan and joined the firm in 1991. She is a registered Italian trademark attorney and a Community trademark and design attorney. Ms Prandin has extensive IP experience. Her practice covers trademark, copyright, design and domain name issues.



Daniele Caneva
Partner, Caneva & Associati
daniele.caneva@canevaeassociati.it

Daniele Caneva graduated from the University of Milan with a thesis on antitrust law. He has been an expert in IP law for the University of Milan since 1996. Mr Caneva is co-founder of the Caneva & Associati law firm in Milan, where he deals exclusively with IP litigation before national and international courts. Mr Caneva is a regular contributor to trade and legal publications.

- commercial communications that violate decency standards, civil and religious principles or a person's dignity (Article 10);
- commercial communications that may cause detriment to children and adolescents (Article 11);
- the imitation and exploitation of the name, signs and reputation of third parties, especially if it creates confusion among consumers (Article 13); and
- the denigration of a competitor, its activities or its products (Article 14).

With regard to comparative advertising, Article 15 of the code states that such advertising is allowed if it is accurate and does not deceive consumers. Moreover, comparative advertising should not:

- create a risk of confusion;
- discredit or denigrate a competitor; and
- take unfair advantage of the reputation of a third party.

Under the code, comparative advertising must show both the economic and technical characteristics of the goods and/or services at issue. Moreover, it must compare:

- essential, relevant and verifiable characteristics of the goods and/or services; and
- goods and/or services that meet the same needs and are intended for the same purpose.

Court action

A company that has suffered damage due to a third party's commercial behaviour may – in addition to applying to the Market and Competition Authority or the Court of Honour – file an action for unfair competition before the ordinary courts. The company may ask that the court enjoin the unlawful behaviour and order the payment of compensation under Articles 2598, 2599 and 2600 of the Civil Code.

A notable recent example is the unfair comparative advertising case between L'Oréal Italia SpA and Johnson & Johnson (decided under Legislative Decree 145/2007 and Article 2598 of the Civil Code). On May 28 2008 the Court of Turin banned a television commercial in which Johnson & Johnson referred to pseudo-scientific studies and claimed that its anti-wrinkle product sold under the RoC Retin-OX brand was more effective than a cream from L'Oréal's Vichy line of cosmetics. The court concluded that the commercial constituted unfair competition and unauthorized use of a renowned, third-party trademark. [WTR](#)