

Garrigues

An approach to Portuguese advertising law

The legislation on unfair and comparative advertising has its roots in the rules on unfair competition. The introduction of changes to the Advertising Code in 1998 clarified the law by implementing the EU Comparative Advertising Directive

Historically, Portuguese regulations on unfair competition have not expressly referred to unfair and comparative advertising. They have tended to prohibit all advertising that seeks to discredit a competitor. Although the previous legislation on advertising specifically governs unfair and comparative advertising the concept of 'advertising' was not defined, and promotional activities were limited by the unfair competition rules, among others. In 1990 the authorities implemented the Advertising Code, in particular this legislation prohibited such advertising where:

- the comparison was not based on essential, associated and objectively verifiable characteristics of the goods and/or services; or
- the advertisement compared a product with dissimilar or unknown products.

However, the language used in this legislation was viewed as being too vague and, consequently, overly permissive.

New regime

The EU Comparative Advertising Directive (97/55/EC), amending Directive 84/450/EEC, set the European standard. The regulation of advertising in the European Union helps foster fair competition. Advertising practices that are likely to distort competition, cause detriment to competitors and have an adverse effect on consumer choice.

Under the directive, 'comparative advertising' means "any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor". The directive also determines that comparative advertising will be admissible if:

- it is not misleading;
- it compares goods or services meeting

the same needs or intended for the same purpose;

- it objectively compares one or more material, relevant, verifiable and representative features of the goods and services, which may include price;
- it does not create confusion in the marketplace 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;
- it does not discredit or denigrate the trademarks, trade names, other distinguishing marks, goods or services, and activities or circumstances of a competitor;
- for products with a designation of origin, it relates in each case to products with the same designation; and
- it does not take unfair advantage of the reputation of a trademark, trade name or other distinguishing marks of a competitor, or of the designation of origin of competing products.

Revised code

In 1998 Portugal implemented changes to the Advertising Code, transposing the directive into national law. It contains a specific provision on comparative advertising (Article 16). Contrary to the former legislation, which prohibited certain forms of comparative advertising, Article 16 establishes the situations in which comparative advertising is allowed. Specifically, Article 16(1) determines that comparative advertising must identify, explicitly or implicitly, a competitor or the goods and/or services offered by a competitor. This definition is very broad, as an advertisement may identify a competitor, or its goods and/or services, without providing a clear comparison of the goods and/or services.

Article 16(2) sets out the cumulative conditions that must be met for comparative advertising to be permissible. These conditions originate from the regulations on advertising, unfair competition and industrial property.

Specifically, Article 16(2) provides that to be

Contrary to former legislation, which prohibits certain forms of advertising, Article 16 of the Advertising Code establishes the situations in which comparative advertising is allowed

allowed, comparative advertising must not be misleading. Moreover, such advertising must compare objectively one or more essential, relevant, verifiable and representative features of the goods and/or services.

It must also compare goods and services meeting the same needs or intended for the same purpose. In short, comparative advertising must compare, explicitly or implicitly, goods and/or services that meet the same or similar needs.

The remaining conditions derive from the unfair competition provisions of the Industrial Property Code. Article 317 of the code prohibits acts that are liable to cause confusion with a competitor or its goods and/or services, as well as false statements made in the course of trade for the purpose of discrediting a competitor. In addition, the trademark legislation establishes strict rules on the unauthorized use of, or reference to, the trademarks of third parties.

In practice

The Portuguese supervisory authority has decided several cases on comparative advertising. One such case involved an advertising campaign by a famous international fast-food company in which the latter compared its hamburgers with those of competitors. Specifically, the company represented the hamburgers of competitors as being smaller in size, and claimed that there was a “big difference” between its hamburgers and those of its competitors. The company also stated that its hamburgers were “much bigger” and that “there are no arguments against facts”. In particular, the company argued that its hamburgers had increased in size and now consisted of over 50% meat.

The advertisement thus compared hamburgers with regard to height, size and weight, and the company provided evidence of the facts alleged.

The authority decided that this advertising campaign was lawful insofar as it compared the essential characteristics of the goods and those characteristics were scientifically verifiable. Moreover, the campaign compared goods that served the same purposes.

However, it is questionable whether size was an essential characteristic of the goods. The company stated that the size of its hamburgers resulted from the fact that they consisted of over 50% meat.

It is clear that the more meat there is in a hamburger, the more it will weigh and the bigger it will be. Therefore, commentators argued that size and weight represented essential and objectively verifiable



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characteristics of the goods, even though the specific legislation might provide otherwise.

Another case involved a campaign in which an advertising agency compared its services with those of several multinational advertising agencies. The competitors took offence at the following statements:

- “The abuse of advertising by multinational agencies can seriously damage the health of your products. Before choosing your advertising agency, think twice and contact [the company] by phone.”
- “If you prefer an advertising agency that is more agile, of a smaller size, with a more flexible structure and streamlined administration, contact [the company] by phone. You may then come to understand the reason for the extinction of dinosaurs.”

The authority ordered that the agency pay a fine on the grounds that the language used in the campaign was not based on essential, associated and objectively verifiable characteristics of the services.

Moreover, the campaign was held to denigrate the agency’s competitors, which would have a negative impact on their professional and commercial image.

Violations of the rules on comparative advertising are punishable by a fine ranging from €1,745.80 to €3,741 for natural persons, and from €3,491.60 to €44,891.90 for legal persons. [WTR](#)