

Patpol

# Protection but little practice

**In Poland, advertisers have shied away from comparing products, despite the existence of a comprehensive regulatory regime for comparative advertising**

Comparative advertising has always been controversial, involving as it does a collision between the interests of consumers – who have a right to be informed – and those of the competitors whose products or services are the subject of comparison. For many years in Poland comparative advertising was generally banned and considered to be a tort of unfair competition, unless it contained information which was accurate and useful to consumers. However, this approach changed in 2000 with the amendment of the Act on Combating Unfair Competition. The new regime also implemented EU Directive 97/55/EC. It introduced a long-awaited definition of ‘comparative advertising’, and set forth requirements that must be met in order for a comparative advertisement not to be considered a tort of unfair competition.

The current wording of Article 16, Section 3 of the act provides a legal definition of ‘comparative advertising’. According to this provision, an advertisement that allows for the direct or indirect recognition of a competitor, or products or services offered by a competitor, is comparative. Such an advertisement shall constitute a tort of unfair competition if it violates good practices. A comparative advertisement is not in breach of good practices if it satisfies the following criteria:

- It is not misleading.
- It compares goods or services that satisfy the same needs or purposes in an honest, verifiable and objective manner.
- It compares in an objective way one or more essential verifiable and typical features of those goods or services, including their price.
- It does not cause confusion between the advertiser and a competitor, their products or services, trademarks or

other distinguishing features, as well as circumstances referring to a competitor.

- It does not discredit the goods, services, activities, brand names, trademarks or any other features of a competitor.
- It always refers to goods from the same country of origin, where such information appears on the goods.
- It does not unfairly exploit the reputation of a brand name, trademark or other distinguishing feature of a competitor, or that of the country of origin marked on a competitor’s products.
- It does not portray a product or service as an imitation or copy of a product or service with a protected brand name or a trademark.

While the act defines ‘comparative advertising’, it does not define what an ‘advertisement’ is in general, unlike the EU directive. In the Polish legal system, there is no single, universal definition of an ‘advertisement’, although this notion has been defined for the purposes of specific legal acts. For example, Article 4, Section 17 of the Act on Radio and Television defines ‘advertising’ as a commercial communication, originating from a public or private entity in connection with its business or professional activity, aimed at promoting the sale or use of products or services; self-promotion is also considered as advertising. ‘Advertising’ is also defined under the Pharmaceutical Law, which sets forth strict standards and regulations specific to the advertising of pharmaceuticals. However, it is generally undisputed that any communication – irrespective of its form – that is intended to stimulate the sales of products or services should be regarded as a form of advertisement.

In Poland, comparative advertising is permitted on condition that it does not violate good practices. An advertisement does not violate good practices if it satisfies the eight criteria listed in Article 16, Section 3 of the Act on Combating Unfair Competition. If a comparative advertisement fails to fulfil even one of the criteria, it will be considered as a tort of unfair competition, with justified grounds for civil liability.

The admissibility of comparative advertisements allows for the use of a third party’s trademarks or brand names. Such use must comply with the guidelines set out in Article 16, Section 3 of the act, along with Article 156 of the Industrial Property Law. Nevertheless, the use of a third party’s trademark cannot suggest any affiliations with the competitor or other non-existent connections. Careful use of a third party’s trademark is essential, as any inaccuracies could cause confusion among consumers, which could lead to a claim of false advertising and trademark infringement.

In order to be honest, comparative advertising cannot convey any misleading implications that might create misrepresentations. It is also essential to include all important information about other parties’ products or services when advertising one’s own products, so that it is clear that the advertiser has no hidden intention of gaining an unlawful advantage or misleading consumers. In order to find that a comparative advertisement constitutes a tort of unfair competition, it is sufficient to indicate that there is a risk of misleading consumers – although it need not be proven whether this risk is high or low.

Comparisons must be objective and refer to material, relevant and verifiable features of a product or service. Comparisons must also be apposite and

refer to the relevant facts of the products or services.

As far as dispute resolution is concerned, the Advertising Council – which is a member of European Advertising Standards Alliance – is a recognised organisation in Poland for this purpose. The council's Code of Ethics is not binding law, but rather a guideline for the advertising industry. The council is competent to resolve disputes connected with unjust and unfair advertising practices, including comparative advertising.

Nevertheless, the council has no rights to execute its judgments, and compliance with those judgments is voluntary. According to the council, over 50% of companies whose campaigns were subject to review have complied with the council's guidelines and withdrawn or revised their advertising campaigns.

Comparative advertising is not very popular in Poland and competitors think carefully before deciding to launch a comparative campaign. As a result, the Advertising Council has resolved few disputes concerning comparative advertising. Similarly, there have been few relevant reported cases before the common courts.

In 2009 the council reviewed an interesting comparative advertising case (Case 58/09, October 22 2009), in which a manufacturer compared its fruit juice (Minerado) with a competitor's fruit juice (Caprio) in a television commercial. The commercial claimed that the phrase "no added sugar", which was included on the packaging for both juices, did not always mean the same thing. This statement, together with a close-up on the competitor's product, was accompanied by background music that is characteristic of horror movies. According to the advertiser, the competitor did not add sugar to its product, but did add artificial sweeteners. The commercial was ruled to violate – among other things – Article 16, Section 3 on the grounds that the comparison was inaccurate, since it involved different types of juice, and further that the communication discredited the competitor by suggesting that the statement "no added sugar" was untrue, when in fact it was true. The manufacturer thus revised its advertising campaign.

According to Article 18a of the act, in cases where claims are brought concerning the truthfulness of designations, or torts of unfair competition connected with misleading activities, the burden of proof is reversed. The party that made the



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misleading statement must prove the truth of that statement before the court.

Experience from the last few years shows that despite the existence of a comprehensive regulatory regime for comparative advertising under the Act on Combating Unfair Competition, few advertisers have chosen to compare their products or services with those of others. This would suggest that Polish entrepreneurs are cautious about saying "mine is better than yours" – although in some cases such a comparison might in fact be helpful for consumers. [WTR](#)