

THE MISLEADING AND COMPARATIVE ADVERTISING: EFFECTS AND PERSPECTIVES

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Abstract: *Advertising constitutes a phenomenon that is spreading more and more in our society.. Most of the times, the ad is the one that sells the product and has an impact on consumers' behaviour. Under these circumstances, one cannot ignore the impact that advertising has on competition and competitive nature. The evolution of the communication means has an important impact on advertising, especially through the development of internet, social networks, forums and blogs. The development of new advertising practices generates a series of issues that needs to be settled so that a high level of protection for users can be guaranteed.*

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INTRODUCTION

The International Chamber of Commerce of France drew up in 1937 The International Code of loyal practices in terms of advertising that was justified by the globalization of economy and a more intense competition. The code is conceived as a self-discipline tool. Within the meaning of the Code, advertising is defined in broad terms, as 'any manner to promote products or services, no matter the media means used'.

Commercial advertising constitutes a special type of advertising, which is characterized by its purpose of economic nature and constitutes all the specific ways and tools that are used in order to facilitate the familiarity with and the appreciation by consumers of certain products or services that are subject to supply and to sale respectively. The commercial advertising constitutes a way to provide consumers with a message with respect to a certain product or service or to the company itself.

The purpose of advertising refers to the formation of a favourable opinion of consumers with respect to a certain product or service or to its manufacturers. The role of advertising needs to be analysed on two coordinates: the issuer and the consumer. The issuer of advertising seeks to make the name of his/her company famous, to launch a new product, to increase the sales of an existing product, to differentiate his/her products from those of his/her competitors or to build an image of his/her company (Arn, 2001). A good

ad induces to consumer non-existing needs or awakes into this one hidden desires and, implicitly, makes him purchase things.

For consumer, advertising constitutes, above all, a source of information with respect to the qualities and use of a certain product, that shall allow this one to make the best decision with respect to the buying action. The consumer of advertising becomes one that is informed in a correct and complete way, so that he/she may choose those products or services matching his/her needs and making him/her feel safe (Maxim, 2007).

The expansion of advertising methods leads to an interesting phenomenon as far as advertising is concerned. In order to capture consumer's attention, issuers feel tempted to use more and more aggressive methods. These are an inevitable consequence of a market that is based on increased consumption and free competition. By commercial advertising the consumers of a good custom may be misappropriated, causing the economic decline of competitors and even their removal from the relevant market.

THE ASSESSMENT OF THE LEGISLATIVE FRAMEWORK

Directive 84/450/EEC has constituted, for a long time, the main community regulation in the unfair competition field. If we were to report upon the evolution of the unfair competition law, we would realize that, as a matter of fact, Directive 84/450/EEC would set minimum and objective requirements thanks to which one could establish that advertising is misleading. Directive would impose a minimum level for the protection of the public interest, in general, of consumers and of the persons that are in a competition relationship. The member states were free to adopt rules ensuring a stricter protection.

Directive 84/450/EEC was replaced by Directive 2006/114/CE that sees to ensure competitors' protection against misleading advertising and its unfavorable consequences, as well as the fixing of those circumstances under which comparative advertising is allowed. Unlike the former regulation, the protection of consumers and population no longer constitutes a goal in itself. The European Council Directive no. 2006/114 highlights in a special way the fact that the distortion of competition constitutes a consequence of illicit misleading and comparative advertising. The Directive has been transposed into the national laws by all the European Union member states.

In the Romanian law, The European Council Directive no. 2006/114 was taken over through Act no. 158 of July 18, 2008 with respect to misleading advertising and comparative advertising.

The European Parliament and European Council Directive no. 2005/29 of May 11, 2005 with respect to the companies' unfair commercial practices on the internal market towards consumers was adopted in order to harmonize the provisions related to the protection of consumers, both natural persons and legal entities, inside the joint market, so that they can make the best of the possibility to purchase things from other countries than the residence one. At the same time, the legislative framework with respect to misleading advertising is completed through the introduction of some clauses meant to fight against aggressive commercial practices. Act no. 363/2007 transposes into the Romanian law the provisions of Directive 29/2005.

MISLEADING AND COMPARATIVE ADVERTISING: GENERAL PRESENTATION

With a view to establishing the misleading character of advertising, we have to analyze all the elements that make it up (Goicovici, 2009). The provisions of art.5 of Act no. 158/2008 show that one may establish the misleading nature of advertising only if one takes into account all its issues, especially the information regarding:

- the features of goods and services, such as: availability, nature, execution and packing manner, composition, manufacturing or supply method and date, extent to which these ones match the intended purpose, destination, amount, technical-functional parameters, manufacturer, geographic or commercial origin or the outcomes of tests and trials on the goods or services, as well as the outcomes that are expected from these ones;
- the price and manner of calculating the price, as well as the circumstances under which the products are distributed or the services are supplied;
- the nature, attributions and rights of the trader that advertises, such as: his/her identity and goods, the qualifications and possession of industrial, commercial or intellectual ownership rights or his/her prizes and awards.

The comparative advertising is licit if it complies, in a cumulative way, with the requirements stipulated in art. 6 of act no. 158/2008:

- is not misleading, according to the provisions of art. 3 let. b) and art.5 of the present law, as well as of art.5-7 of Act no. 363/2007;
- compares goods or services that comply with the same needs or are intended for the same purposes;
- compares, in an objective manner, one or several basic, relevant, verifiable and representative features of the respective goods or services, that may include the price as well;
- does not undermine or denigrate the marks, trade names, other distinctive signs, goods, services, activities or status of a competitor;
- as far as products with origin name are concerned, it makes reference, in every case, to products with the same name;
- does not take advantage in an unfair way of the reputation of a trade mark, of a trade name or other distinctive signs of a competitor or of the origin name of the competitive products;
- does not present goods or services as imitations or reproductions of those goods or services wearing a trade mark or protected trade name;
- does not create any confusion between traders, between the one that advertises and a competitor or between trademarks, trade names, other distinctive signs, goods or services of the one that advertises and those of a competitor.

MISLEADING AND COMPARATIVE ADVERTISING IN ROMANIA. CASE STUDIES

Due to the legislative severity, the cases in which the economic operators soar to use unfair advertising forms are low. To illustrate this situation, we shall analyse some advertising spots for which the National Council of Audio-Video Material drew the

conclusion that these ones contain statements that may mislead the audience, in its capacity as consumer.

Therefore, for the spot promoting the mineral water Aqua Carpatica, which promotes itself as “The only non-nitrate mineral water in the world” the provisions of art. 3 letter b) and of art. 5 of Act no. 158/2008 are breached, as they contain statements that may mislead the audience with respect to the accuracy of presented information and features of mineral waters sold on the market, in general, and of the mineral water promoted, in particular. The statement promoting the mineral water Carpatica creates confusion with respect the actual features of the composition of the soda mineral water “Aqua Carpatica”, as nitrates may be naturally found in mineral waters and may only constitute a risk factor for consumers, when the maximum admitted limits are exceeded.

The advertising spot “Viziunea PCC pentru viitorul Oltchim” (The PCC vision for the future of Oltchim) breaches the rules of correct advertising and of objective information of the audience, as its contents conveys a doubtful message, from where it does not come out very clearly whether one wishes to promote or to denigrate the company Oltchim.

As as far ING advertising spot for refinancing loan, the members of the National Council of Audio-Video Material stated that the rules for correct information and loyal competition were breached. The promotion of the services offered by ING by statements such as “somebody told me that ING has loans with the best interest”, that can be neither checked or proved may directly harm consumers’ financial interests and affect, at the same time, a correct competition on the market of bank loan services.

We may find a similar situation in the case of the advertising spot for Duck Perfumed Bands, promoting the deodorants for toilet bowls. “Have you ever noticed that the toilet cleaning devices are bigger and more full of germs? Let us introduce to you the new perfumed bands offered by Duck...” These statements come with images where a plastic device used for cleaning the toilet where germs live is extracted with a crane from the toilet bowl. The comparison leads to the idea according to which the product promoted in the spot totally removes the germs from the toilet bowls, unlike the plastic devices that only keep them.

CONCLUSIONS

Advertising constitutes a key factor in a company’s business strategy, an element that really matters for the commercial success, as it allows traders to present their goods and services. The legislative framework ensures a protection for companies against unfair practices. Misleading and comparative advertising generates lack of functionalities on the market, distorts competition and harms the consumer’s decision-making process. Within this context, there is a need for a close monitoring of the advertising means. Within the same line of thoughts, The European Commission drew out a deep analysis of all the issues in relation with the trading practices and came to the following conclusions: the Directive regarding the misleading and comparative advertising offers a regulation framework that is sold enough for an important part of the advertising market between companies. Nevertheless, the persistence of certain fraud methods on a large scale shows that the overall existing norms at the EU level and self-regulation norms need to be

consolidated in order to fight against certain types of clearly identifiable frauds. Small companies are most affected by such practices, as their vulnerability degree is not very different from the consumers' one.

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