

THE CONCEPT OF COMPARATIVE ADVERTISING AND ITS CONDITIONS OF LEGALITY

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Abstract in original language

In today's world, advertising is increasingly felt in all areas and become a persuasive force on the collective mentally and, naturally, on human behavior. In general, advertising can be regarded as a mere public announcement that it intends to provide information, to awaken interest and a certain reaction. In other words, advertising seeks, first, to inform and, secondly, to persuade. These two functions although you can find distinct most often are present simultaneously. From a juridical point of view, advertising is important especially in competitive activity where must be made distinguish between misleading which may lead to adverse consequences for business, and the correct, fair and lawful able to lead, ultimately, economic growth in the service of authentic human development. In this area, practical work required the need to adopt legal regulations which would enable distinguishing the two forms of advertising. Thus, at European level was adopted the Directive 2006/114/EC, which, nationally, has been transposed into Law 158/2008. These regulations have established a number of constraints of fairness and objectivity comparative designed to make the distinction between the correctly advertisements and likely to mislead. According to the above regulations we will be in the presence of lawful comparative advertising when it compares goods or services answering to the same needs or intended for the same purposes, does not discredit or denigrate the trade marks trade names, other distinguishing marks of a competitor, trade names, other distinguishing marks of a competitor, goods or services do not have imitations or replicas of goods or services bearing a mark or trade name protected and does not create confusion between competitors.

Key words in original language

Advertising; Competitive activity; Misleading advertising.

1. PRELIMINARY

Romania's integration into the European Union since January 1, 2007 led to a need to create effective conditions for expression of the four freedoms of movement¹ which result in stimulating creativity and initiative in all fields.

¹ It is about the freedom of movement of persons, goods, services and capital.

Naturally, in this context, advertising initiatives to promote the sale of goods or services acquired new values.

However, this activity often occurred incorrect advertising.

Therefore, the European Union towards a properly advertised, on the one hand, to stimulate competition fair competition and, on the other, protecting consumers, has proceeded to regulate this activity by Directive 2006/114/EC.² In general, advertising can be regarded as a mere public announcement that it intends to provide information to awaken interest and a certain reaction. In other words, advertising seeks, first, inform, and, secondly, to persuade. These two functions, although it may find even distinct, often are present simultaneously. From a juridical point, advertising is important especially in competitive activity where must be distinguished from misleading which may lead to adverse consequences for business and the correct, fair and lawful, able to lead, ultimately, to economic growth in the service of authentic human development.

2. KINDS OF ADVERTISING AND THEIR DEFINITION

The law no. 158/2008 is speaking, since from the title, about two kinds of advertising namely misleading advertising and comparative advertising.

In case we consider that although the law does not show it, through an interpretation per a contrario we can distinguish beside the lawful comparative advertising the illegal (illicit) advertising.

It is misleading, that advertising which in any way, including the presentation induce or mislead the persons to whom it is addressed or who have contact with it and which because of misleading may affect their economic behavior or which, therefore, harm or may harm a competitor.

To determine whether advertising is misleading should be examined, according to art. 5 of Law no. 158/2008 all its aspects, in particular any information it contains concerning:

- Characteristics of goods or services, such as availability, nature, manner of execution, composition, method and date of manufacture of goods or service delivery, technical and functional parameters, geographical or commercial origin, the expected results due to their use or the results of tests or essential characteristics of the contracts made the goods or services;

² Directive 2006/114/EC of the European Parliament and EU Council of 12 December 2006 concerning misleading and comparative advertising was published in the Official Journal of the European Union no. L 376 of December 27, 2006

- price or its calculation method and conditions for distributing goods or services are provided;
- Nature, duties and rights of the dealer who advertises such as: identity and the assets, qualifications and ownership of industrial, commercial or intellectual property rights or his awards and distinctions.

Misleading advertising is prohibited.

In turn, accordingly to art.3, points c) from the Law no. 158/2008, comparative advertising is that advertising which identifies explicitly or implicitly a competitor or goods or services offered. In other words, we will be in the presence of comparative advertising only to the extent that the advertisement permits - directly or indirectly - a competitor aimed at identifying the person or goods or services they offer and not when the message that raises the overall superiority of a product.

Comparative advertising may be legal or illegal.

Under the law no. 158/2008 is considered the legal comparative advertising when cumulatively meets the essential requirements established by law.

Consequently, that advertising which does not meet the cumulative requirements established by law is unlawful comparative advertising.

3. BID CONDITIONS OF COMPARATIVE ADVERTISING

Conditions of lawfulness of comparative advertising are established by art. 6 of Law no. 158/2008 which faithfully reproduces the eight requirements of fairness and objectivity of the comparison contained in the art. 4 of Directive 2006/144/EC. Conditions of lawfulness of comparative advertising are established by art. 6 of Law no. 158/2008, which faithfully reproduces the eight requirements of fairness and objectivity of the comparison contained in art.4 of Directive 2006/144/EC.

Thus, comparative advertising is legal if:

- a) “Does not misleading, according to the provisions of art. 3 letter b) and Art.5 of this law (Law no. 158/2008 - Ed), and of art. 5-7 of Law no. 363/2007³ on combating unfair practices of traders in European relations joint protection countries;

³ Law no. 363/2007 was published in the Official Gazette of Romania no. 899 of 28.XII.2007 și entered into force on December 31, 2007. In Title I, entitled ‘Defining and prohibiting unfair trade practices’ the law transposes the provisions of Directive 2005/29 EC of the European Parliament and Council of May 11, 2005 on unfair trade practices by domestic firms to consumers And amending Council Directive 84/450/CEE, Directives 97/7/EC and 2002/65/EC of the European Parliament and Council (‘Unfair Commercial

- b) “Compares goods or services meeting the same needs and are designed for the same purpose.” We note that the legal text does not refer to the same kind, but the same needs or goals. This formulation translates assertion that can compare what is comparable;
- c) “Compare, objectively, one or more essential, relevant, verifiable and representative features of those goods or services which may include the price”. In this formulation is a need imposed by law as a comparison operation to be based on objective criteria, respectively one or more essential, relevant, verifiable and representative including price;
- d) “Does not discredit or denigrate the trademarks, trade names, other distinguishing marks, goods, services, activities or that of a competitor”. This condition imposes the requirement of impossibility of completion advertisement in a depreciator way.
- e) “For products with designation of origin relates, in each case to products with the same name”. This requirement also reiterates the need for comparability of comparable products;
- f) “Does not take unfair advantage of the reputation of a mark, a trade name or other distinguishing marks of a competitor or the designation of origin of competing products”. This condition releases the trader’s obligation to not invoke in its advertising message, a brand of well known products to demonstrate the superiority of their products;
- g) “Does not present goods or services as imitations or replicas of goods or services bearing a mark or trade name protected”. This rule focuses advertising that aims to compare two or more products in order to demonstrate the superiority of one of them, by seeking unfair advantage to a competitor’s product reputation and similarities between their own products and those of well-known brands.
- h) “Does not create confusion among traders, between one who advertised and a competitor or between the marks, trade names, other distinguishing marks, goods or services that their advertising and those of a competitor”. It is a requirement designed to protect particularly beneficial competition advertisement whose trademarks, trade names or distinctive signs may be so affected.

4. SANCTIONS FOR BREACH LEGAL LIMITS OF COMPARATIVE ADVERTISING

Comparative advertising carried in excess of the limits prescribed by art. 6 of Law 158/2008 is a contravention and is punishable by a fine of 3000 lei to 30 000 lei.

Establishment and enforcement is for the representatives of the Ministry of Economy and Finance.

Complement to this sanction a publication process may have - Report of Findings and sanctioning the contravention and thereafter the court decision (in whole or in extract) and the publication of corrective statements.

The measures have to eliminate the continuing effects of misleading advertising.

Non-compliance the measures, respectively the publication process - Report of Findings and sanctioning the contravention, publication of the court decision, publication of corrective statements, constitute on its turn an offence whose determination is made by representatives of the Ministry of Economy and Finance and shall be punished with fine from 6000 lei to 000 lei 60.

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