

Court of Justice EU, 13 March 2014, Posteshop



ADVERTISING LAW

Misleading advertising and unlawful comparative advertising are two independent infringements: in order to prohibit and penalize misleading advertising, it is not necessary that that latter at the same time constitutes unlawful comparative advertising.

• With regard to the protection afforded to traders, Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising is to be interpreted as referring to misleading advertising and unlawful comparative advertising as two independent infringements and to the effect that, in order to prohibit and penalise misleading advertising, it is not necessary that that latter at the same time should constitute unlawful comparative advertising.

Where there is a divergence between various language versions of a European Union text, the provisions in question must be interpreted by reference to the general scheme and the purpose of the rules of which they form part.

• However, it is settled case-law that the wording used in one language version of European Union law provisions cannot serve as the sole basis for the interpretation of those provisions. Where there is a divergence between the various language versions of a European Union text, the provisions in question must thus be interpreted by reference to the general scheme and the purpose of the rules of which they form part.

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Court of Justice EU, 13 March 2014

(composed of C.G. Fernlund, President of the Chamber, A. Ó Caoimh and E. Jarašiūnas (Rapporteur), Judges)

JUDGMENT OF THE COURT (Eighth Chamber)

13 March 2014 (*)

(Request for a preliminary ruling – Directive 2006/114/EC – Concepts of ‘misleading advertising’ and ‘comparative advertising’ – National legislation providing that misleading advertising and unlawful comparative advertising are two separate unlawful acts) In Case C-52/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Italy), made by decision of 16 November 2012, received at the Court on 31 January 2013, in the proceedings

Posteshop SpA – Divisione Franchising Kipoint
v

Autorità Garante della Concorrenza e del Mercato,
Presidenza del Consiglio dei Ministri,
interveners:

Cg srl,

Tacoma srl,

THE COURT (Eighth Chamber),

composed of C.G. Fernlund, President of the Chamber,
A. Ó Caoimh and E. Jarašiūnas (Rapporteur), Judges,
Advocate General: E. Sharpston,
Registrar: A. Calot Escobar,
having regard to the written procedure,
after considering the observations submitted on behalf of:

– Posteshop SpA – Divisione Franchising Kipoint, by A. Vallefuooco and V. Vallefuooco, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by S. Fiorentino, avvocato dello Stato,

– the Austrian Government, by A. Posch, acting as Agent,

– the European Commission, by C. Zadra and M. van Beek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version) (OJ 2006 L 376, p. 21) (‘the Directive’).

2 The request has been made in proceedings between Posteshop SpA – Divisione Franchising Kipoint (‘Posteshop’), on the one hand, and the Autorità Garante della Concorrenza e del Mercato (Authority safeguarding Competition and the Market, ‘the Autorità’) and the Presidenza del Consiglio dei Ministri (Presidency of the Council of Ministers) on the other, concerning a decision finding that Posteshop had engaged in misleading advertising.

Legal context**European Union Law**

3 Recitals 1, 3, 8 and 16 to 18 in the preamble to Directive 2006/114 state as follows:

‘(1) Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising [(OJ 1984 L 250, p. 17)] has been substantially amended several times In the interests of clarity and rationality the said Directive should be codified.

...

(3) Misleading and unlawful comparative advertising can lead to distortion of competition within the internal market.

...

(8) Comparative advertising, when it compares material, relevant, verifiable and representative features and is not misleading, may be a legitimate means of informing consumers of their advantage. ...

...

(16) Persons or organisations regarded under national law as having a legitimate interest in the matter should have facilities for initiating proceedings against misleading and unlawful comparative advertising, either before a court or before an administrative authority which is competent to decide upon complaints or to initiate appropriate legal proceedings.

(17) The courts or administrative authorities should have powers enabling them to order or obtain the cessation of misleading and unlawful comparative advertising. ...

(18) The voluntary control exercised by self-regulatory bodies to eliminate misleading or unlawful comparative advertising may avoid recourse to administrative or judicial action and ought therefore to be encouraged.’

4 Under Article 1 of Directive 2006/114:

‘The purpose of this Directive is to protect traders against misleading advertising and the unfair consequences thereof and to lay down the conditions under which comparative advertising is permitted.’

5 Article 2 of that directive provides as follows:

‘For the purposes of this Directive:

(a) “advertising” means the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations;

(b) “misleading advertising” means any advertising which in any way, including its presentation, deceives or is likely to deceive the 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 or which, for those reasons, injures or is likely to injure a competitor;

(c) “comparative advertising” means any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor;

...

6 Article 3 of that directive states that, in determining whether advertising is misleading, account shall be taken of all its features and it lists certain information relevant in that regard.

7 Article 4 of that directive sets out the conditions under which comparative advertising is permitted.

8 Under Article 5 of Directive 2006/114:

‘1. Member States shall ensure that adequate and effective means exist to combat misleading advertising and enforce compliance with the provisions on comparative advertising in the interests of traders and competitors.

...

3. Under the provisions referred to in paragraphs 1 and 2, Member States shall confer upon the courts or administrative authorities powers enabling them, in cases where they deem such measures to be necessary taking into account all the interests involved and in particular the public interest:

(a) to order the cessation of, or to institute appropriate legal proceedings for an order for the cessation of,

misleading advertising or unlawful comparative advertising;

or

(b) if the misleading advertising or unlawful comparative advertising has not yet been published but publication is imminent, to order the prohibition of, or to institute appropriate legal proceedings for an order for the prohibition of, such publication.

...

4. Member States may confer upon the courts or administrative authorities powers enabling them, with a view to eliminating the continuing effects of misleading advertising or unlawful comparative advertising, the cessation of which has been ordered by a final decision:

(a) to require publication of that decision in full or in part and in such form as they deem adequate;

(b) to require in addition the publication of a corrective statement.

...

9 Article 6 of the Directive provides:

‘This Directive does not exclude the voluntary control, which Member States may encourage, of misleading or comparative advertising by self-regulatory bodies ...’

10 Pursuant to Article 8(1) of the Directive:

‘This Directive shall not preclude Member States from retaining or adopting provisions with a view to ensuring more extensive protection, with regard to misleading advertising, for traders and competitors.

The first subparagraph shall not apply to comparative advertising as far as the comparison is concerned.’

Italian law

11 Legislative Decree No 145, of 2 August 2007, on the implementation of Article 14 of Directive 2005/29/EC amending Directive 84/450/EEC on misleading advertising (GURI No 207, of 6 September 2007) (‘Legislative Decree No 145/2007’), provides, in Article 1(1) thereof, as follows:

‘The purpose of this Decree is to protect traders against misleading advertising and the unfair consequences thereof and to lay down the conditions under which comparative advertising is permitted.’

12 Article 3 of that decree sets out the matters that make it possible to assess whether or not advertising is misleading. Article 4 thereof lists the conditions under which comparative advertising is permitted.

13 Under Article 8(8) and (9) of that legislative decree:

‘8. If it considers that advertising is misleading or that the message of comparative advertising is unlawful, the [Autorità] shall prohibit its publication, if it has not yet been published, or, if it has, the future publication thereof. That decision may also provide that the trader is to be responsible and liable for the expense of publishing the decision, in extract form also, and, if necessary, of publishing a specific corrective statement preventing the misleading advertising or unlawful comparative advertising from continuing to have any effect.

9. In addition to the measure prohibiting the publication of the advertising, the [Autorità] shall decide upon the imposition of an administrative fine of

[EUR] 5 000 to [EUR] 500 000, having regard to the seriousness and duration of the infringement. In the case of advertising liable to entail a risk to health or safety or to affect, directly or indirectly, minors and adolescents, the fine may not be less than [EUR] 50 000.'

The dispute in the main proceedings and the question referred for a preliminary ruling

14 It is apparent from the order for reference that the Autorità, by decision of 30 March 2010, found that the publication by Posteshop of advertising material seeking to promote its franchise network Kipoint constituted misleading advertising within the meaning of Articles 1 and 3 of Legislative Decree No 145/2007. It consequently, by the same decision, prohibited any future publication and imposed a fine of EUR 100 000 on Posteshop.

15 Posteshop brought an action against that decision before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio). That court dismissed that action as unfounded, holding, inter alia, that it is clear from Article 1, Article 5(3)(a) and (b) and Article 5(4) of Directive 2006/114 that the system of protection implemented by that directive does not concern only cases in which the advertising material includes both features of misleading advertising and features of unlawful comparative advertising.

16 Posteshop brought an appeal against that decision before the referring court. Posteshop claims, in particular, before that court that it follows from recital 3 in the preamble to Directive 2006/114 and Article 5 thereof that the purpose of that directive is to impose penalties only in respect of acts constituting both misleading advertising and unlawful comparative advertising and that Legislative Decree No 145/2007 must be interpreted to that effect. Posteshop therefore cannot be alleged to have infringed those rules.

17 The referring court takes the view that the interpretation adopted by the Tribunale amministrativo regionale per il Lazio is the more persuasive. However, it is of the opinion that the view taken by Posteshop, which, so far as the protection of traders is concerned, claims that the misleading nature of an advertisement is simply one of the conditions for comparative advertising to be held unlawful, is not unfounded, since it is based on recitals 3, 8 and 16 to 18 of Directive 2006/114, which refer to 'misleading and unlawful comparative advertising'.

18 It was in those circumstances that the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'With regard to the protection to be afforded to traders, is Directive [2006/114] to be interpreted as referring to advertising that is misleading and at the same time based on unlawful comparison, or to two separate offences, each of which may be relevant in its own right, namely, misleading advertising and unlawful comparative advertising?'

Consideration of the question referred

19 By its question, the national court asks, in essence, whether, with regard to the protection afforded to traders, Directive 2006/114 is to be interpreted as referring to misleading advertising and unlawful comparative advertising as two independent infringements and whether or not it is necessary, in order to prohibit and penalise misleading advertising, for that latter to also constitute unlawful comparative advertising.

20 It must be observed in this connection that, on the one hand, as stated by the referring court, recitals 3 and 16 to 18 in the preamble to Directive 2006/114 use, in the Italian version, the wording '*pubblicità ingannevole ed illegittimamente comparativa*' (misleading and unlawful comparative advertising), which could imply that they refer to advertising which is both misleading and based on an unlawful comparison. On the other hand, recital 3, inter alia in the French version, uses the wording '*publicité trompeuse et ... publicité comparative illicite*' (misleading advertising and unlawful comparative advertising) and recitals 16 to 18, in that latter version, use the wording '*publicité trompeuse ou ... publicité comparative illicite*' (misleading advertising or unlawful comparative advertising), which implies, on the contrary, that those provisions concern two different types of advertising.

21 However, it is settled case-law that the wording used in one language version of European Union law provisions cannot serve as the sole basis for the interpretation of those provisions. Where there is a divergence between the various language versions of a European Union text, the provisions in question must thus be interpreted by reference to the general scheme and the purpose of the rules of which they form part (see Case C-149/97 *Institute of the Motor Industry* [1998] ECR I-7053, paragraph 16 and the case-law cited, and Case C-277/12 *Drozdovs* [2013] ECR, paragraph 39 and the case-law cited).

22 In the present case, it must first be observed that, pursuant to Article 1 of Directive 2006/114, that directive has a dual objective which consists in protecting traders against misleading advertising and the unfair consequences thereof, on the one hand, and in laying down the conditions under which comparative advertising is permitted, on the other.

23 Secondly, it must be noted that the terms 'misleading advertising' and 'comparative advertising' are the subject of two separate definitions, set out in points (b) and (c) of Article 2 of Directive 2006/114 respectively.

24 Thirdly, it is apparent from Article 5(3)(a) and (b) and from Article 6 of that directive that there must be the possibility of challenging misleading advertising or unlawful comparative advertising before the competent courts or administrative authorities of the Member States, that those courts or authorities must have the powers enabling them to take measures for the purposes of ordering the cessation of misleading advertising or unlawful comparative advertising or to order the prohibition of its publication and that the Member States can encourage voluntary control to

eliminate misleading advertising or unlawful comparative advertising. Unlike recitals 16 to 18 in the preamble to the Italian version of Directive 2006/114, the use, in those articles, of the conjunction ‘or’, in all the language versions, thereby implies the possibility of adopting such measures either against misleading advertising or against unlawful comparative advertising, without requiring, in order for there to be an infringement, those two circumstances to exist cumulatively.

25 Fourthly, it is evident from Directive 2006/114 that the provisions concerning misleading advertising and those concerning comparative advertising pursue different aims. Article 3 of that directive provides minimum criteria and objectives for determining whether advertising is misleading and therefore unlawful, while Article 4 of that directive lists various cumulative conditions which comparative advertising must meet in order to be permitted (see, by analogy, [Case C-487/07 L’Oréal and Others \[2009\] ECR I-5185, paragraph 67](#), and [Case C-159/09 Lidl \[2010\] ECR I-11761, paragraph 16](#)), recital 8 in the preamble to Directive 2006/114 also observing that comparative advertising may be a legitimate means of informing consumers of their advantage.

26 It is apparent from those factors that, in that directive, misleading advertising and unlawful comparative advertising each constitutes a separate infringement.

27 That interpretation is borne out by analysis of the development of the European Union legislation in the field of misleading advertising and comparative advertising. Directive 84/450, in its original version, concerned only misleading advertising. Regulation of comparative advertising was inserted into that latter directive by Directive 97/55/EC of European Parliament and of the Council of 6 October 1997 amending Directive 84/450 concerning misleading advertising so as to include comparative advertising (OJ 1997 L 290, p. 18). The objective of Directive 97/55, pursuant to recital 18 in the preamble thereto, was to establish the conditions under which comparative advertising is permitted. On the other hand, that directive did not in any way amend the provisions of Directive 84/450 on misleading advertising. Next, Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’) (OJ 2005 L 149, p. 22) limited the scope of Directive 84/450 to the protection of traders. Lastly, Directive 2006/114 codified that latter directive. It follows that the European Union legislature did not intend, in adopting Directives 97/55 and 2006/114, to amend the rules relating to misleading advertising as provided for in Directive 84/450, except by restricting their scope.

28 In the light of the foregoing considerations, the answer to the question referred is that, with regard to the protection afforded to traders, Directive 2006/114 is to be interpreted as referring to misleading advertising and unlawful comparative advertising as two independent infringements and to the effect that, in order to prohibit and penalise misleading advertising, it is not necessary that that latter at the same time should constitute unlawful comparative advertising.

Costs

29 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

With regard to the protection afforded to traders, Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising is to be interpreted as referring to misleading advertising and unlawful comparative advertising as two independent infringements and to the effect that, in order to prohibit and penalise misleading advertising, it is not necessary that that latter at the same time should constitute unlawful comparative advertising.