



# JONES DAY COMMENTARY

## UNFAIR COMMERCIAL PRACTICES AND MISLEADING ADVERTISING—NEW POWERS GRANTED TO THE ITALIAN ANTITRUST AUTHORITY

On September 21, 2007, the Italian Antitrust Authority (the “Authority” or “IAA”) was given additional powers to curb unfair commercial practices and misleading advertising. The Authority has now been empowered to act *ex officio* without the express request of consumers and/or public entities.<sup>1</sup>

### UNFAIR COMMERCIAL PRACTICES

**Scope of Application.** In general terms, a commercial practice is unfair if it is contrary to the requirements of

professional diligence and materially distorts, or is likely to materially distort, the economic behavior of consumers in their choice of a product offered for sale.<sup>2</sup>

There are two types of unfair commercial practices: “misleading practices,” which may consist of “misleading actions” or “misleading omissions,”<sup>3</sup> and “aggressive practices,” which encompass harassment, coercion, or other forms of unlawful influence that cause consumers to make commercial decisions that they would not otherwise have made.<sup>4</sup>

1. Legislative Decrees No. 145/2007 and No. 146/2007, transposing EC Directives 2006/114/EC and 2005/29/EC into Italian law, have entered into force. These new rules have slightly modified existing laws governing misleading and comparative advertising and have also granted to consumers new means of protection against unfair commercial practices. New rules concerning unfair commercial practices have been introduced in the new Code of Consumers (Legislative Decree No. 206/2005), while rules on misleading advertising are now contained in a different piece of legislation.
2. Section 20 of the Code of Consumers.
3. Section 21 of the Code of Consumers.
4. Section 24 of the Code of Consumers.

According to such provisions, the subject of protection from such practices is the consumer, defined as the “physical entity that, in the context of commercial practices . . . , operates for purposes not included in its commercial, industrial, craft or professional activity.”<sup>5</sup> This appears to exclude from protection “professionals,” expressly defined as “any physical or juridical entity that, in the context of commercial practices . . . , operates for purposes included in its commercial, industrial, craft or professional activity or acts in the name or on behalf of a professional.”<sup>6</sup>

**Blacklists.** The new rules specifically identify a series of misleading and aggressive practices that can be considered misleading and aggressive without the need for demonstrating whether or not they are likely to distort or falsify consumer choice.

Misleading practices that have been blacklisted include: (i) use of a trademark without the necessary authorization; (ii) falsely declaring to be the subscriber of an ethical code; (iii) falsely declaring that a certain product will be available for a limited period of time; and (iv) falsely asserting that the sale of a product is lawful.

Aggressive practices blacklisted by the Code of Consumers include: (i) giving the impression that the consumer may leave the commercial premises only after entering into an agreement; (ii) repeatedly visiting consumers at their homes in violation of their express wishes; and (iii) addressing advertising campaigns to children in an effort to sell products to their parents.

**Powers of the Authority.** Under the new rules, the IAA is entitled to investigate unfair commercial practices and misleading and comparative advertising on its own initiative, without having to wait for external complaints to be submitted. The Authority has investigative powers that enable it to: (i) access any relevant document; (ii) request information and documents from any party whatsoever; (iii) impose sanctions in the event of refusal or if false information and documents are submitted; (iv) conduct inspections; (v) make use of the

services of the Tax Police (*Guardia di Finanza*); and (vi) order expert testimony.

Interim measures immediately terminating unfair practices may be imposed by the Authority when the need is urgent and the claim appears to be grounded. Moreover, a system of undertakings has been instituted: except in cases of manifest unfairness and gross violation, the IAA may waive the need to prove that a violation has been committed if the trader undertakes to correct the unlawful activity.

**Sanctions.** Once a violation has been ascertained, the Authority may: (i) order the infringing party to stop its illegal activity; (ii) order rectifying statements to be published at the expense of the infringing party; and (iii) issue fines ranging between €5,000 and €500,000. If the activity relates to hazardous products that could threaten, even indirectly, the safety of children or adolescents, the minimum fine is €50,000. In case of noncompliance with the Authority’s measures, the penalty can range from €10,000 to €150,000.

## MISLEADING AND COMPARATIVE ADVERTISING: AN OVERVIEW

**Scope of Application and Basic Rules.** The rules on misleading and comparative advertising previously provided in the Code of Consumers are now included in a separate piece of legislation,<sup>7</sup> which focuses on the protection of traders in their commercial relations.

The new provisions ban any form of advertising that, because of its misleading nature, could distort the economic conduct of the parties to which it is addressed or that is likely to harm a competitor. Specific provisions and sanctions dealing with advertising addressed to children or concerning dangerous products remain unchanged.

Guidelines for the lawful use of comparative advertising also remain unchanged. Comparative advertising shall be “nonmisleading”; the IAA determines whether the message

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5. Section 18, letter a, of the Code of Consumers.

6. Section 18, letter b, of the Code of Consumers.

7. Legislative Decree No. 145/2007.

is misleading by taking into account the unfair commercial practices listed in the Code of Consumers as well as the definition of “misleading advertising” provided by the new provisions<sup>8</sup>—i.e., advertising that, because of its misleading nature, distorts the economic conduct of the parties to which it is addressed or is likely to harm a competitor.

**Powers of the Authority.** In addition to the above-mentioned power of the Authority to act *ex officio*, and with the support of the Tax Police, a “precontentious phase” has been introduced. In this phase, the Authority may negotiate with the advertiser to cease and/or modify the message. In this case, the Authority would have the power to render such undertaking mandatory for the advertiser without any declaration of infringement.

**Sanctions.** After ascertaining a violation of the rules on misleading and comparative advertising, the IAA imposes a fine. Under the new legislation, the fines have increased—in certain cases, by up to 500 percent—reaching a peak of €500,000.

## COMMON PROCEDURAL ASPECTS

Shortly after the new legislation went into force, the IAA issued enacting regulations detailing specific aspects of the procedures to be followed in cases of infringement.

According to these regulations, the maximum term for the duration of legal proceedings in cases of unfair commercial practices and misleading and comparative advertising has been set at 120 days. However, when an express opinion of the Italian Communications Authority is requested before issuance of a final decision, the term can be extended by up to 210 days if the infringer is domiciled or has its registered seat abroad.

It is worth noting that entities with public or private interests that may be harmed by the infringing practices discussed in the proceedings may intervene in the proceedings. They may do so by filing a brief mentioning the reasons for the intervention, and the intervening party may have access to the documents of the case.

Access to documents is governed in detail by enacting regulations for cases of unfair commercial practices and misleading and comparative advertising. In principle, the minutes of meetings between the IAA and other authorities, including the EU Commission, are not likely to be accessible, but parties to the proceedings may claim confidentiality on information they have provided.

The IAA's powers also include carrying out inspections at the premises of entities that may have documents and information referring to the infringement. In the course of the inspection, IAA officials may: (i) have access to the premises; (ii) review relevant documents and extract copies; and (iii) request verbal explanations.

## CONCLUSION

On the one hand, enactment of these new rules appears to entail a widening of IAA powers that, in principle, may allow consumers and professional operators to receive more effective protection. On the other hand, companies might take advantage of the new provisions by using the blacklists of specific prohibited practices as benchmark to self-assess their day-to-day commercial conduct.

However, practical application of such peculiar rules may be controversial, and their success will largely depend on how the IAA uses its discretionary powers (especially taking into account investigations that may be opened *ex officio* by the Authority). Thus, it will be necessary to evaluate the impact of this innovation in the next few years to come, in light of an increased awareness among business operators.

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8. Legislative Decree No. 145/2007.

## LAWYER CONTACTS

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