

Regulation of comparative advertising: which framework?

Extract of the Swiss Report presented at the 2004 LIDC Congress in Budapest

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I. Introduction

The Question A raised by the LIDC is motivated by an observation: comparative advertising has remained very discreet in Europe in comparison with the use of that technique in the United States. Is such a situation due to the legal framework or to the timorous conduct of the undertakings?

At the Antwerp Congress, 24 years ago, the LIDC adopted a resolution which set out the requirements that comparative advertising ought to meet in order to ensure fair competition. As it was acknowledged that the Antwerp Resolution had withstood the passage of time, the question arose as to the need for a new resolution. The participants at the working group felt that it was necessary to reiterate the general opinion that comparative advertising ought to be encouraged. They seized this opportunity to deal with specific issues such as the use of intellectual property rights in comparative advertising, comparison with products bearing a designation of origin, and self-regulation.

II. Summary of the Swiss Report

1. General Principles

The Swiss rules on comparative advertising belong to the general law against unfair competition, which aims to ensure fairness in trade and to prevent distortion of competition to the detriment of competitors and consumers. Art. 3 lit. e of the Federal Law Against Unfair Competition («LAUC») of December 19, 1986 reads as follows: «Acting unfairly

is, in particular, whoever compares himself, his products, works, performance or the prices therefor in a false, misleading, unnecessarily disparaging or imitating manner with others, their products, works, performance or with the prices therefore, or who benefits third parties in the market place by like conduct.»

By means of comparative advertising, the advertiser seeks to influence the decision-making process of the customer by contrasting or connecting his own products or services with those of the competitor regarding their quality, price, quantity or reputation.

The notion of comparative advertising is construed broadly to include personal comparative advertising (relating to the person or the business of the competitor), objective comparative advertising (relating to goods and services and prices of the competitor), positive or parasitic comparative advertising (the advertiser asserts that his product or he himself, as the case may be, is as good as his competitor's), negative or critical comparative advertising (the advertiser makes the public think that his product or he himself, as the case may be, is better than his competitor's). It is not necessary for the express or tacit, direct or indirect, reference to the competitor to be individualized or identifiable. Comparative advertising may refer to an indeterminate number of competitors. Thus, advertising claiming the superiority or uniqueness of a product (superlative advertising) constitutes a form of comparative advertising.

As a general rule, comparative advertising is permitted. It is considered as enhancing the transparency of the market. Only abuses, i.e. conduct contrary to good faith dealing, are prohibited. Art. 3 lit. e LAUC sets out the circumstances under which comparative advertising is prohibited.

2. False or misleading comparative advertising

One may compare only what is comparable. Thus, the goods or services compared must be similar, i.e. be of approximately the same quality and fulfill the same need or serve the same purpose from the

standpoint of the customers¹ ATF 104 II 124, JdT 1978 I 279, «Weltcup-Markenklassement»; OGer ZH, sic! 1997, 588, «Denner-Preisvergleich»..

Comparisons must be objective and based on accurate data. In addition, the data must be relevant: accurate indications may be deemed misleading where they compare secondary, irrelevant or equivocal facts². When a comparison does not take all conceivable criteria into account, the advertisement must clearly show the limits of the comparison, so that the public can correctly assess its scope and understand its relative value³.

A distinction is made between advertising containing factual indications, on the one hand, and advertising resorting to value judgments (e.g. allegation of taste) or to obtrusive exaggeration⁴, on the other hand. Whereas factual information must be accurate, value judgment cannot be assessed or verified. Regarding advertising exaggeration, obtrusive praise that does not make sense and that is recognizable as such and therefore not taken seriously by the public, cannot be considered deceptive. Thus, obtrusive exaggeration or value judgments cannot be considered as misleading consumers. They may however be unlawful if they amount to unnecessary disparagement.

Pursuant to the wording of art. 3 lit. e LAUC («compares himself [...] with others [...]»), personal comparative advertising is admissible and is subject to the same rules as those applicable to objective comparative advertising. Legal commentators recommend that the requirements should apply more strictly on the basis that subjective comparative advertisement is mostly unfair, since it refers to elements which are not related to the quality of the offered goods or services. However, we agree with the view expressed by Baudenbacher⁵ that the person of the seller plays a role in the buyer's decision especially when it concerns services and is therefore not always extraneous to competition.

To determine whether the comparison is misleading, the judge must place himself in the addressee's position. Pursuant to Swiss case law, the addressee is an average, normally gifted, Swiss non-professional buyer. What is determinant is the meaning that this average addressee could understand in good faith, using the diligence and the attention that is necessary in the instant line of business. When the advertisement is intended for a particular circle of persons, the judge will take into consideration their knowledge. The meaning that the advertiser intended to give to his information is irrelevant.

The overall effect of the advertisement is decisive, because advertising is in general glimpsed furtively, read superficially. So discreet correction or references to other texts are irrelevant.

3. Price comparison

It is permitted to compare exclusively the prices of competing products or services, subject to the rules applicable to any other comparison: one may only compare what is comparable. Hence, price comparison should refer to identical or equivalent products having identical qualities, and to identical quantities⁶. It is prohibited to compare the price of a special offer (launching price, sale price, wholesale price, etc.) with a retail price without clearly stating the specificity of the offer⁷.

Price comparison must moreover comply with the Ordinance on the Information on Price of December 11, 1978 (RS 942.211; see art. 17 LAUC). The seller may indicate the average competing price to contrast it with his own price (Art. 16 al. 1 lit. c of the Ordinance)⁸.

The legislator has decided that price disclosure is part of administrative law. Consequently, the consumer or the competitor who feels prejudiced is not empowered to lodge a civil or criminal action

¹ ATF 104 II 124, JdT 1978 I 279, «Weltcup-Markenklassement»; OGer ZH, sic! 1997, 588, «Denner-Preisvergleich».

² RSPI 1992, 121, «Frischerster Frischkäse»; ATF 104 II 124, JdT 1978 I 279, «Weltcup-Markenklassement», ATF 125 III 286, JdT 1999 I 454, «Physikzeitschriften II»; TC VS, RVJ 1995 157, «Rettungskarte».

³ ATF 104 II 124, JdT 1978 I 279, «Weltcup-Markenklassement»; ATF 125 III 286, JdT 1999 I 454, «Physikzeitschriften II».

⁴ HGer ZH, sic! 2001, 41, «70000 mal günstiger»; ATF 129 III 426, «Optique: les résultats d'une étude comparative de prix».

⁵ C. Baudenbacher, Lauterkeitsrecht, Basel 2001, art. 3 lit. e n. 66.

⁶ ATF 125 III 286, JdT 1999 I 454, «Physikzeitschriften II»; ATF 129 III 426, «Optique: les résultats d'une étude comparative de prix»; OGer ZH, sic! 1997, 588, «Denner-Preisvergleich».

⁷ ATF 116 IV 371, JdT 1993 IV 31, «Steigerungsanzeige»; ATF 129 III 426, «Optique: les résultats d'une étude comparative de prix».

⁸ The average competing price must actually be charged by the sellers of the relevant geographical segment of the market for at least half of the goods or services of identical quality and with similar features; ATF 118 IV 184, JdT 1993 I 366, «50% günstiger».

against the seller that has infringed the provisions. They may only report those facts to the competent cantonal authority (art. 20 LAUC).

As an exception to the general admissibility of price comparison, prices of alcohol cannot be compared with each other (art. 42b [2] of the Federal Law on Alcohol of June 21, 1932).

4. Disparagement

Comparative advertising should not unnecessarily denigrate a competitor. Not only inaccurate assertions of facts, but also accurate assertions of fact, value judgments and diffusion of irrelevant information may cause unnecessary disparagement⁹. A statement that praises one's own products and brings the public to believe that the competing products are defective or dangerous is also considered disparagement¹⁰.

The negative statement must be of sufficient seriousness in order to amount to disparagement within the meaning of art. 3 lit. e LAUC¹¹. The critical assertion must exceed the acknowledged function of comparative advertising (i.e. information of the customer). It is then deemed unjustified and disproportionate.

Personal comparison may be more easily deemed to unnecessarily disparage the competitor because the facts are extraneous to competition¹², whereas criticism of a product is less prone to offend.

5. Parasite advertising

Parasitic advertising takes advantage of the good reputation of a competing (or even non competing) product. The advertiser refers to a famous product to take advantage of its renown and to favor his own product which he describes as being as good.

Parasitic advertising must be distinguished from advertising by reference. In the latter, the reference to a third party's product is necessary and confined to the description of the advertiser's own product or service¹³. In the former, the advertiser attaches to his products the qualities of the product of the third party without adding any information about his own product¹⁴. The comparison is diverted from its informative function to serve exclusively the commercial interest of the advertiser. The answer to the question whether comparison was necessary to promote the sale of the products concerned, will be determinant in establishing parasitism. The exploitation of the reputation of a competitor is admissible when it enhances the transparency of the market and is limited in form and content to what is necessary for this purpose (principle of proportionality). Hence, a company should refrain from referring to its competitors and use their trademarks, except in case of absolute necessity¹⁵.

6. Confusion

Art. 3 lit. d LAUC contains a prohibition of confusion between products or services. By presenting his product in materially the same way as a famous product or by imitating the latter's well-known distinctive sign, the advertiser may create a risk that the public confuses the two products. For instance, when the reference to another trademark is combined with words such as «type», «kind», «in the style of...», a risk of confusion may occur, since the public does not take such words into account.

7. Use of competitor's trademarks or trade names

Comparative advertising often implies the use of competitors' trademarks or trade names. If the trademark is registered, the advertiser should be careful not to infringe the Federal Law on Protection of Trademarks and Indications of Source of August 28, 1992 (LPT; RS 232.11) which confers upon the holder of a trademark the exclusive right to use it to identify the products or services for which the trademark is registered, and to enjoy it (art. 13 [1] LPT).

⁹ ATF 125 III 286, JdT 1999 I 454, «Physikzeitschriften II»; RSPI 1992, 121, «Frischester Frischkäse».

¹⁰ CJ GE, sic! 1999, 297, «Pirates».

¹¹ ATF 122 IV 33, JdT 1998 IV 27, «Anlagestrategie».

¹² ATF 125 III 286, JdT 1999 I 454, «Physikzeitschriften II»; RSPI 1992, 121, «Frischester Frischkäse».

¹³ ATF 126 III 322, JdT 2000 I 527, «WIR»; ATF 128 III 146, JdT 2002 I 495, «VW/Audi».

¹⁴ CJ GE, RSPI 1990, 360, «Tableaux de référence aux parfums d'autrui II»; CJ GE, sic! 1999, 297, «Pirates».

¹⁵ CJ GE, RSPI 1990, 360, «Tableaux de référence aux parfums d'autrui II».

Before the revision of the LPT in 1993, the Swiss Supreme Court admitted that the LPT protected only against the use, by an unauthorized person, of the distinctive sign as a trademark, by which was meant use on the goods themselves¹⁶. The revised LPT has extended the range of the exclusive rights to include notably the right to use the trademark for advertising purposes (art. 13 [2] lit. e LPT). The legislator's intent was to abandon the above mentioned case-law and extend the protection against any use as a distinctive sign¹⁷.

The consequence of this enlarged protection on comparative advertising is not clear. The two cantonal judgments applying the revised LPT to comparative advertising are subject to different interpretation¹⁸. We are of the opinion that the use of a third party's trademark in comparative advertising is admissible when it does not aim at identifying the advertiser's product, but at setting a basis for comparison, and does not create a risk of confusion.

However, renowned trademarks enjoy a reinforced protection (art. 15 LPT). Not only the distinctive nature of the renown trademark is protected, but also its wider reputation which constitutes real goodwill. Art. 15 LPT is an acknowledgement in intellectual property law of the prohibition of parasitic advertising enshrined in the LAUC.

8. Designation of origin

The designation of origin attests that the products have their origin in a designated geographical region (Art. 47 [1] LPT). The geographical name usually evokes a particular quality. The rights relating to designation of origin are the same as for trademarks. However the nature of the right is not exclusive.

The reference to a designation of origin is also subject to the rules of the Federal Law Against Unfair Competition. In particular, it is prohibited to use a designation of origin to which is added «delocalizing» information for products that have more or less the typical characteristics of the products originating from the designated place but that do not originate from this place (such as Californian Champagne, Swedish Emmental). This use amounts to the exploitation of a well-known designation. In addition, the adjunction of such words as «kind», «type», «way», to a designation of origin is also unlawful because of a risk of confusion¹⁹.

We consider that a general limitation of comparison with goods bearing the same designation of origin would be excessive. However, if a quality is strongly related to an origin, then the rule that only identical goods should be compared with each other is applicable and entails such a limitation.

9. Special legal provisions and self-regulation applicable to certain fields of industry/business

All the big Swiss associations in the field of communication are members of the Foundation of Swiss Publicity for Loyalty in Commercial Communication. Its executive body, the Swiss Commission for Loyalty, has decreed rules²⁰ which have their origin in Swiss law and case-law. Pursuant to Rule 3.5, comparative advertising is deemed unfair if it is contrary to the truth or is misleading, if it has recourse to statements which are unnecessarily offensive or if it refers needlessly to others' goods, services or prices. Anyone has the right to report an advertisement that they consider as being unfair. The procedure is free of charge. The Commission, which is bound by Swiss law and complies with the ICC International Code of Advertising Practice (1997)²¹ as well, publishes a summary of its judgments.

In the health sector, advertising is widely regulated. The Federal Ordinance on Advertising for Medicine of October 17, 2001 (RS 812.212.5), distinguishes between advertising targeted at professionals and advertising targeted at the general public. For the former, art. 7 provides that comparison with other medicine is admissible only if the comparison is scientifically correct and proved by studies complying with certain strict requirements (clinical tests undertaken in compliance with good practice, publication of the results, faithful and thorough quotes...). On the other hand, comparative advertising addressed to the public is prohibited by art. 22 lit. c. The Federal Ordinance on Medical Devices en-

¹⁶ ATF 113 II 73, JdT 1987 I 230.

¹⁷ ATF 120 II 145, «Yeni Raki»; sic! 2000, 310, «Chanel IV».

¹⁸ KGer SZ and JzK LU, RSPI 1995, 291, «Richtpreis Bodum».

¹⁹ RSPI 1974, 142; RSPI 1976, 81; see also art. 23 (1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) on wines and spirits.

²⁰ www.lauterkeit.ch/pdfF/grundsaeetzeF.pdf (French version).

²¹ www.iccwbo.org/home/statements_rules/rles/1997/advercod.asp.

tails in effect a prohibition of comparative advertising directed towards consumers (art. 21; RS 812.231). In Geneva, the legislator has promulgated a regulation on health professions and the medical establishment which prohibits comparative advertising (art. 18). In the Swiss pharmaceutical industry, a code of conduct («Pharma Code» dated December 4, 2003²²) is binding on its members and contains provisions on comparative advertising that supplements the legal rules on therapeutic products and adds some details originating from international codes in the pharmaceutical industry.

The laws on several liberal professions, such as that for architects, engineers or notaries, often contain a general prohibition on advertising. In the law on the free movement of lawyers, the federal legislator has introduced some ethical provisions which replace the corresponding cantonal provisions. There is a very general rule on advertising: «the lawyer may advertise as long as the advertising limits itself to objective facts and meets the general interest» (art. 12 lit. d). In the practice of the Geneva Bar Commission under the former cantonal law, indications relating to a third person's activity are prohibited. This interpretation is not expected to be modified by the enactment of the federal law since comparative law is considered as not complying with the concept of dignity. The Code of Ethics of the Swiss Medical Association (FMH) contains detailed rules on advertising and prohibits non objective advertising, misleading advertising or advertising that harms the good repute of the medical profession²³. Annex 2 of the Code provides that information that establishes comparisons discrediting colleagues, belittling e.g. their activities or medical methods, is an example of prohibited advertising. Another such example consists in praising oneself or presenting one's medical activity in an overtly obtrusive and accentuated way.

10. Comparisons made by third parties

The rules on comparative advertising are applicable whoever the author of the comparison is²⁴. Comparative advertising may emanate from a competitor or from a third party. Hence, test comparisons are allowed to the same extent as comparative advertising is admissible. Comparative tests must in particular not be misleading. Some authors consider that the requirements should be stricter for comparative tests than for comparative advertising since the consumer expects the results to be the outcome of a neutral and objective examination and take them very seriously.

The Swiss case-law on test comparisons is sometimes difficult to reconcile with the principle of free speech. A Swiss judgment on the matter was annulled by the European Court of Human Rights because it did not meet the proportionality requirement²⁵.

The Swiss government encourages the provision of objective information to the consumer and may give financial aid to consumers' associations that undertake comparative tests on the essential and clearly understandable features of goods or services (art. 5 of the Federal Act on the Information of the Consumer, October 5, 1990; RS 944.0). The association must choose a theme for the tests that fulfils the public's need for information; the test must be undertaken in compliance with scientific principles; the sellers of the goods or the providers of the services must have the opportunity to exercise their right to be heard (art. 6). Moreover, the organisation should not be in a dependency relationship that would hinder the undertaking of objective tests (art. 7). These requirements may form a departing basis of an assessment conducted under the unfair law²⁶.

11. The use of comparative test in comparative advertising

As with comparative advertising, an advertisement that mentions the outcome of comparative tests is admissible under certain conditions. The testing used in the advertisement must be reliable, i.e. conducted neutrally and objectively by capable people²⁷. The results of the test must not be distorted in the advertisement. The advertiser cannot only point to the elements in favor of his product. He will also have to mention the elements that are less favorable and is not allowed to conceal important elements. The public must have an accurate and thorough understanding of the test.

²² www.sgci.ch/plugin/template/sgci*/11927.

²³ www.fmh.ch/fr/data/pdf/stao_2003_frz.pdf (French version).

²⁴ CJ GE, RSPI 1993, 148, «Kristall»; CJ GE, RSPI 1993, 316, «Filets de perche».

²⁵ ECHR, sic! 1998, 491, «Mikrowellenherd»; ATF 125, III 185, «Mikrowellenherd II».

²⁶ Th. Hügi, Die Veröffentlichung vergleichender Warentests unter lauterkeitsrechtlichen Aspekten, Bern 1997, 21. Rule 3.3 enacted by the Swiss Commission for Loyalty states that «the performing of tests and the publication of their results must respect the following principles: neutrality, objectivity, pertinence and transparency».

²⁷ ATF 129 III 426, «Optique: les résultats d'une étude comparative de prix».

The advertiser must seek the express authorization of the author of the test when he intends to cite his name²⁸. He may be held responsible for their accuracy and exhaustiveness.

The testing organizations (such as the Swiss Foundation for the Protection of the Consumer or the Swiss Federal Laboratories for Materials Testing and Research [EMPA]) authorize the use of their testing reports only by prior written permission and provided the draft advertisement, which must contain a reference to the publication of the test report, is also approved. The authorization is limited in time.

III. Discussions and LIDC Resolution

The discussions were heavily focused on the need or the lack of need for a new resolution. The LIDC felt the need to reaffirm that comparative advertising ought to be generally permitted as a legitimate method of advertising. The Resolution starts by referring to the safeguards and constraints applicable to unfair market practices set forth in the Paris Convention (misleading, confusion, discrediting). «In addition, with respect to its special nature comparative advertising should (i) only compare goods or services meeting the same needs or intended for the same purpose; (ii) objectively compare one or more material and relevant features of those goods and services» (n. 2 of the Resolution).

This statement raises a question in relation with Swiss law as to the legal situation of value judgment in comparative advertising. The Resolution appears to prohibit absolutely such a method of advertising by stating that comparison must be objective. By contrast, Swiss case-law appears to be more liberal, since value judgment or obstructive exaggeration do not fall within the prohibited abuses.

The Resolution continues as follows:

«3. In comparative advertising, in compliance with the principle of proportionality, the advertiser may use the competitor's trade mark or trade name in order to identify such competitor or its goods or services, only to the extent that such reference: (a) is necessary for clear identification; (b) does not take unfair advantage of; and (c) is not unduly detrimental to the distinctive character or the good reputation of the trade mark or name.

4. The same considerations shall apply relating to the use of competitor's other intellectual property rights (i.e. copyright, design).

5. It is necessary that express legal provisions grant an exemption from infringement to the user of a third party's intellectual property (e.g., trademark, copyright, design) if all criteria for comparative advertising are complied with. This requires further harmonization of the laws constituting such proprietary rights relating to the scope of non-infringing use.

6. With respect to goods with a designation of origin or geographical indication, it is unjustified to limit the comparative advertisement to goods with the same designation. The general requirements for the admissibility of comparative advertisements shall be applied to protect goods with a designation of origin against the taking of unfair advantage of their reputation and misleading use.»

Whereas the elements of the resolution on intellectual property rights were not an issue, much discussion revolved around the comparison of products with designation of origin and led the Spanish and French groups to vote partially against the resolution. Their sensitivity to this subject was influenced by their national legal background and the wide use of designation of origin in their country.

The Resolution ends with the limitations on self-regulation:

«7. With respect to certain goods or services, special rules on comparative advertising may be adopted by the organization responsible for regulating the relevant professional activity. Such rules must be justified by the specific nature of the goods (e.g. pharmaceutical products) or that of the service (e.g., lawyers, physicians) and in compliance with a proportionate and reasonable restriction of competition. In case of certain so-called professions liberals, comparison of services or prices may be incompatible with the ethical rules of fairness, dignity and professional demeanour.»

²⁸ ATF 129 III 426.

The new resolution is aimed at encouraging a more widespread use of comparative advertising. As it deals with very specific issues, it gives practical guidance to the enforcing authorities and, as such, may well achieve its goal.

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