
A Practical Analysis of Comparative Advertising

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Abstract:

Purpose: The aim of this study is to present the subject matter of comparative advertising by trying to specify its legal boundaries.

Design/Methodology/Approach: The purpose is achieved by an analysis of legal regulations as well as views of legal scholars and commentators and the established line of judicial decisions. Additionally, the article presents numerous examples of comparative advertising and investigates them in the context of compliance with regulations in force and their impact on a broadly understood competition law. Moreover, to complete the investigation, a research problem is formulated in the form of facts gathered by the author, which are then examined in the light of regulations pertaining to comparative advertising.

Findings: Lawful comparative advertising may unquestionably contribute to the development of competition and at the same time it may have a positive effect on consumers by making on their behalf comparisons of goods/services offered on the market. It needs to be remembered that unlawful comparative advertising may lead to a serious distortion in competition at the level of a given country or the entire EU market.

Practical solutions: An analysis of regulations on comparative advertising, combined with the discussion of the example presented in the study may contribute to increasing social awareness of the positive and adverse effects of comparative advertising's impact on consumers and competition.

Originality/Value: The research has helped to narrow the scientific lacuna in the field of consumers' perception of comparative advertising combined with regulations in force.

Keywords: Comparative advertising, competition, consumer.

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1. Introduction

Comparative advertising in the European Union is addressed in the Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (OJ L. 2006, items 376, 21) (hereinafter Directive 2006/114/EC), which stipulates that the harmonization and unification of regulations on comparative advertising promotes fair competition, and as such, has a positive impact on both consumers and the economic development of the entire Community.

In Poland, the aspects relating to comparative advertising have been regulated in the Act of 16 April 1993 on Combating Unfair Competition (Dz.U. (Journal of Laws) 2020, item 1913, consolidated text) (hereinafter the Act).

Before proceeding any further, one should perhaps answer the question of what exactly comparative advertising is and how to characterise it. Pursuant to the Act and Directive 2006/114/EC, comparative advertising should be understood as any advertisement which, whether explicitly or implicitly, makes reference to a competitor brand or any of their products or services.

Prior to addressing the legal aspects of comparative advertising, let us note that violating the comparative-advertising regulations is considered an act of unfair competition referred to in art. 3 of the Act. In line with the regulation just mentioned, unfair-competition torts should be perceived as acts breaching the principles of law and good practice whenever they jeopardise or violate another business's or customer's interests, as is best exemplified by blacklisted or unfair advertisements. It is therefore difficult to disagree with the position expressed by the Polish Supreme Court in one of its rulings that the regulation falling under art. 3 of the Act allows for the recognition of certain commercial practices as an act of unfair competition even if they are not indicated therein and either derive from other acts or are contrary to established custom, thus violating competitors' trade interests (Judgment of the Polish Supreme Court of 9 October 2019, I NSK 61/18, Lex, No. 2727446).

In what concerns the criteria and legal framework for comparative advertising, the Act indicates in the first place that any such advertising must comply with good practice. In the doctrine and jurisprudence, the concept of good practice is interpreted very broadly, and by extension the same holds true for comparative advertising. It is beyond the government's capacity to come up with a definite catalogue of behaviors or proceedings that should be deemed contrary to good practice regardless of the context they occur in.

Because of that, when evaluating whether a comparative advertisement complies with good practice, this evaluation should be made on a case-to-case basis, given that good practice can never be fully isolated from the context of actual behaviour

(Judgment of the Court of Appeal in Krakow (1st Civil Division) of 10 October 2012, I ACa 856/12, Legalis, No. 719569).

Referring to advertising in particular, while good practice is indeed dictated by socio-moral norms, these very norms will vary markedly depending on the industry. Clearly, a comparative advertisement for tea is bound to be different from that for a laptop. Having said that, the most problematic aspect of any deliberations on good practice is its abstract nature which defies rigid definition.

However, with regard to comparative advertising, the Polish legislator has not per se imposed on comparative advertisers to comply with good practice, thus leaving that very concept open to broad interpretation. In art. 16 sec. 3 points 1-8 of the Act, good practice is given a somewhat loose definition consisting of a list of conditions, or premises, to be met by comparative advertising to successfully circumvent infringement of good practice.

First, good practice will not be violated if the advertisement is not misleading. This raises the question of when exactly a comparative advertisement can be viewed as misleading. Certainly, an advertisement conveying false assumptions about both the advertised product and the competitor product ticks all the boxes (Skubisz, 2010). Let us emphasize, however, that advertising which is misleading and affects the consumer and their purchasing decisions in a certain way also leaves an imprint on the business whose service or product has been falsely presented.

Examples of misleading advertisements abound, e.g., that of nutrition bars stating that the rival brand's bars contain glucose-fructose syrup, while in fact they only contain cane sugar. If a consumer avoids products containing glucose-fructose syrup, this would obviously discourage them from buying the competitor's bars and would have a direct effect on the sales of the product which was incorrectly described in the advertisement. Another question that arises is whether misleading advertising should only be that which provides false information or perhaps also that which provides true but incomplete information. It seems justified that, even if a piece of information conveyed in the advertisement were true but incomplete, it should still be considered as misleading (Targosz, 2011). What comes to mind is the advertisement of a hyper market chain whose prices were compared with those in a competitor chain which was nonetheless a super market.

The European Court of Justice (ECJ) ruled in that case that failure to distinguish between these two formats, namely super and hyper, is both misleading to consumers and constitutes an act of unfair competition, since the consumer assumes that comparison is being made between two equal stores, whereas they are different in terms of size and form and that very fact means they have to operate against a different price model (ECJ judgment of 8 February 2017 in Case C-562/15 U, Lex, ECR No. 2017/2/I-95).

Another condition set for comparative advertising is the need to compare, in an accurate and verifiable manner based on objective criteria, products or services that meet the same needs or are intended for the same purpose. And so, an advertisement that juxtaposes two products in terms of price will not be lawful as long as these products are significantly different from one another, e.g. margarine and butter (ECJ judgment of 18 November 2010 in Case C 159/09, Lex, ECR No. 2010/11B/I-11761-1180).

The third criterion laid out in art. 16 sec. 3 of the Act refers to objective comparison of one or more product or service features which are significant, verifiable and specific (this may also include price). In one ruling, a court in Poland stated that comparing funeral services by advertising one business as having a more individual approach and the competitor as having a more mechanised approach to the customer does not constitute illegal comparative advertising (Judgment of the Court of Appeal in Poznan of 23 October 2007, I ACa 794/07 Lex, No. 521784). It would be difficult to challenge this view; if an advertisement refers to the same type of services and their performance while the information it contains is true, there are no grounds for considering that it violates the above premise.

Condition four concerns the failure to clearly distinguish the advertiser from their competitor, which is equivalent to misleading. This is, for example, when the consumer is led to believe that the advertised product has the same properties as, or is somehow connected to, the competitor product. The above regulation is aimed at protecting the established brand, trademark and reputation. In one ruling, the ECJ had to consider a case in which one brand produced perfumes fashioned after the perfumes of a famous global cosmetic brand. In that comparative advertisement, the advertiser used the proprietary names of the competitor's perfumes and had them compared with their own products (mainly in terms of fragrance). The ECJ, however, did not find that comparison to have had a bearing on the possibility of distinguishing between the two brands. As stressed in its judgment, the advertiser intended to compare their products to the competitor's and this could not have been done without using the names of the latter's products (ECJ judgment of 18 June 2009 in Case C-487/07, Lex, ECR No. 2009/6B/I-5185).

Disparaging of competitors in comparative advertising is another faux pas that amounts to unfair competition. Regarding this particular premise, one might ask whether this can be avoided at all in comparative advertising. Let us consider a scenario in which product price is being compared, with all the other criteria described above having been met. In that case, it seems safe to assume that the competitor brand (who offer their products at a higher price) will be somehow discredited in the eyes of consumers for whom the price is crucial. While this is true, let us also recall that the idea of comparative advertising is to present one product in a more favorable light than the other; otherwise, comparative advertising would not make sense (Okoń, 2007).

An example of disparaging competitors would be referring to them in the advertisement using pejorative terms, such as thief or scoundrel, only to show that they charge more for their products (Judgment of the Court of Appeal in Warsaw of 14 May 2009, I ACa 1231/09, Lex)

Currently, the so-called regionality of certain products is in vogue, where product quality is often associated with its geographical origin. Many businesses have tried as a result to label their products with protected geographical indication (PGI) or protected designation of origin (PDO). In response to that, the Polish legislator indicates in art. 16 sec. 3 point 6 of the Act that only goods bearing the same PGI or PDO can be compared.

An example of violating this regulation could be an attempt to compare oscypek (Polish smoked cheese entered in the Register of Protected Designations of Origin and Protected Geographical Indications - Commission Regulation (EC) No. 127/2008 of 13 February 2008 entering a designation in the register of protected designations of origin and protected geographical indications (Oscypek (PDO)) to another cheese that is not covered by one of these labels.

Pursuant to art. 16 sec. 3 point 7, comparative advertising complies with good practice if it does not unfairly use the repute of a competitor trademark, company name or other distinguishing sign, including PGI and PDO. Having said that, the Polish and European legislators explicitly allow the use of a competitor trademark in comparative advertising, as long as it does not mislead consumers as to the potential link between the advertiser and the competitor (ECJ judgment of 23 February 2006 in Case C-59/05, Lex, ECR No. 2009/6B/I-5185).

As pointed out by the ECJ, the inappropriate use a competitor brand's repute should be understood as the taking of unfair advantage (ECJ judgment of 18 June 2009 in case C 487/07, Lex, no. ZOTSiS 2009 / 6B / I-5185). Which is to say: if the advertiser refers to the competitor's repute, trademark, or designation with a view to objectively comparing the latter's product with their own (i.e. without violating the conditions discussed above), such advertising will then not violate the condition laid out in art. 16 sec. 3 point 7 of the Act.

Presenting a product or service as an imitation or replica of a product or service bearing a protected trademark, PGI, PDO, or other distinguishing sign, is against the law. This can be easily demonstrated using the example of a comparative advertisement for wafers in which the advertiser states that their wafers follow the same production method as Andruty Kaliskie (well-established Polish brand), the latter being entered in the EU's Register of Protected Names (Commission Regulation (EC) No. 326/2009 of 21 April 2009 entering a name in the register of protected designations of origin and protected geographical indications (Andruty kaliskie (PGI)).

2. Apparent Comparative Advertising - Factual Analysis

As can be seen, the legal framework imposed on comparative advertising is rather extensive, and meeting each of those regulations may sometimes be counterproductive to the idea of boosting demand. This, however, has not stopped businesses from opting for this form of advertising to win over customers, even if the comparativeness of such advertisements is not always immediately obvious. To better illustrate this, a factual analysis of the regulations discussed above has been carried out using a hypothetical case.

How exactly should the legal provisions laid out in art. 16 sec. 3 of the Act apply to a hypothetical comparative TV advertisement for a telecom brand, if we were to know that, at the time of its broadcasting, there are three leading telecom providers in Poland, each with a characteristic colour – let it be blue, green and purple, respectively. In that advertisement, we see a man entering a high-rise building, make his way to the lift, and then press the button that activates the lift. The lift stops on one of the floors. On that floor, the design is all blue and there are no other people. Without exiting the lift, the man looks around and presses another button. The lift then stops on a different floor where the design is all green and there is also nobody there.

Once again, the man looks around and presses another button without leaving the lift. Now the lift stops on the purple floor where there is a lot of people, a jovial atmosphere, and a large letter "N" on one of the walls (which is incidentally the name of the network that the advertisement relates to). The man enthusiastically gets off the lift, after which the advertisement proceeds to present the network's offer.

Referring to the above, we should start from asking whether that advertisement can be considered comparative at all? In the first sentence of art. 16 sec. 3 of the Act we read that comparative advertising is that in which a competitor product or service can be identified, even if implicitly. In the case at hand, we noted that at the time of broadcasting the advertisement there were three leading telecom providers in Poland, each with a distinct brand colour. Knowing this, if the advertisement fails to refer to these networks by name, does the display of colour alone allow the conclusion that the other two colours are the advertiser's competitors?

In our opinion, it does, especially if we consider that colours are a strong psychological stimulant and are often a decisive factor when choosing a product or brand (Kilińska and Dmowski, 2017; Śmiechowska, 2014). Which is why, ascribing a colour theme to a brand determines how it is perceived by consumers. In other words, the consumer remembers the colour and associates it with the brand (Panigyrakis, 2015). Going back to our hypothetical case, the colours used in the advertisement (in the design of each floor) conveniently correspond to the colours of each of the three main telecom providers, making it all the more reasonable to assume that this is in fact a comparative advertisement, as the vast majority of its

recipients will be able to associate the colours with the brands in question. This can be further justified by adding that the advertisement is for a telecom network, meaning the colours will connect in the recipient's subconscious with the other telecom networks, even though their names are not explicitly mentioned. It can hardly be argued that the audience would associate the colours with brands or businesses unrelated to the telecom industry.

Assuming that this is a comparative advertisement, we should consider whether it complies with good practice and therefore meets, in cumulative terms, the conditions set out in art. 16 sec. 3 of the Act. First, let us consider whether the advertisement in question is not misleading. Instead of citing any specific information about competitors, it uses colours to stimulate consumers' brand awareness. And so, if the information regarding the advertised brand and its services is true, the advertisement cannot be viewed as misleading.

Following on from that, we should consider if none of the conditions laid out in art. 16 sec. 3 point 2. (comparison in an accurate and verifiable manner on the basis of objective criteria) has been violated. The thing is, our advertisement does not contain any criteria that would warrant side-to-side comparison. There is no reference being made whatsoever to the offer of the competitor brands; only to that of the advertiser. It therefore cannot be indicated that the condition in question has been met. Being able to identify a competitor brand without revealing criteria such as services certainly contradicts the idea of a fair and verifiable comparison made on the basis of objective criteria. It seems safe to assume in this case that a comparison is indeed being made in the consumer's subconscious.

When the protagonist does not get off on the first two floors, but reacts enthusiastically when the lift stops on the third floor, this already implies (having identified the previous colours with the other two telecom brands) that the only right choice is the brand whose colour is purple. Just because the comparison is not obvious or explicit, it does not mean that it does not exist. In the interpreted legal regulation, at no point does the legislator indicate that an advertisement is comparative only when it complies with good practice and compares products or services explicitly.

The issue of meeting the condition contained in art. 16 sec. 3 point 3 should be perceived similarly. In our advertisement, there is no objectivity of comparison, since objectivity is when two identical services are juxtaposed and the evaluation criteria are, in this case for example, broadband speed, equipment package, or price. In this advertisement however, the advertiser focuses solely on their services, and in so doing, they deprive consumers of the possibility to truly learn about competitor services and thus disparage the latter – if only through the use of empty versus crowded space on each of the floors as a visual hint. This is otherwise known as a subliminal message, where the advertised brand attracts many customers who co-

exist is a friendly atmosphere while there are zero customers in the other two brands, which clearly is not the best recommendation one could give.

Equally noteworthy is the regulation outlawing the disparaging of products, services, activities, trademarks, company signs or other distinctive marks or competitor-specific circumstances. It should be considered whether a comparison made regardless of the failure to indicate any objective comparison criteria amounts to discrediting. If a comparison respects the principles of objectivity and accuracy, and is not in itself misleading, it may have a positive effect on competitors by serving as a motivational tool and improvement factor; this is the so-called win-win situation for the market.

However, if a comparison were to be based merely on highlighting one's brand superiority over the other without explaining the reasons why, this would be unjustified. Let us recall that many of the consumers do not actively verify the veracity of advertising claims and could therefore take such misleading information at face value (Mikołajczyk).

The remaining conditions set out in art. 16 sec. 3 points 4 and 6-8 of the Act do not apply to the discussed advertisement.

In summary, it is our view that the presented hypothetical advertisement can be considered comparative because, albeit implicitly, the competitor brands are identifiable. Furthermore, due to the failure to meet the conditions set out in art. 16 sec. 3 points 2, 3 and 5 of the Act, the advertisement should be deemed illegal, and as such, constitutes an act of unfair competition. Let us stress, once again, that comparative advertising is lawful provided that the conditions set out in art. 16 sec. 3 of the Act are met without mutual detriment.

3. Conclusion

Unlawful comparative advertising may adversely affect consumers and their economic interest and may distort correct competition in specific Member States and on the EU market. Due to its direct and at the same time significant impact on social and economic life in EU Member States, it became necessary to regulate it in legal structures. The trading between Member States is constantly developing and causing advertising not to be confined within the borders of a specific country by having a direct influence on the functioning of the common market. The above meant that it became necessary to create a legal framework for comparative advertising and to allow its effective implementation in EU Member States.

Looking from the perspective of the structural principles of the common market and also the axiology expressed in them, it is not possible to stay outside the area of standardising the issue whose implications concern fundamental questions such as: freedom of movement of goods and provision of services. Advertising in a basic

means of communication between entrepreneurs and consumers that allows business operators to open new market directions and to generate demand. It needs to be emphasized that it is mainly consumers and business operators that are intended to be beneficiaries of the introduction of uniform regulations on comparative advertising.

Advertising, as a very important aspect, cannot therefore remain indifferent towards the law, which is why the legislator has the responsibility to regulate relevant issues so that it allows the development of correct and fair competition, which will serve these very consumer interests.

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