

CASE NOTE

Case notes re identification of a competitor in Comparative advertising

Note that all case law is reported essentially verbatim; in some instances, commentary has been taken from online contributions. None of the text or related text represents a view, opinion or guidance from GRS, but is there simply for information to be interpreted as marketers or their legal advisors see fit

Clause concerned: Section 6 UWG (1) Comparative advertising shall mean any advertising which explicitly or by implication identifies a competitor, or goods or services offered by a competitor;

- The competitor does not actually have to be identified by name e.g. a statement such as "We wouldn't expect you to put up with cheap composite rackets (graphite/fibreglass)" ("*Billige Composite Rackets (Graphite-Fiberglas) muten wir Ihnen nicht zu*") is also comparative advertising within the meaning of the Directive. See FCJ judgment dated 5.2.1998 - I ZR 211/95, MDR 1998, 1238 = GRUR 1998, 824 (828) - *Testpreis-Angebot*
- Where it is not actually the supplier, but a third party, that makes the comparison for competitive purposes - like the tradesman in the FCJ case "Price Comparison List II" who had compiled a list of offer prices from various different suppliers and was offering to deliver the articles listed at the specified prices plus a percentage surcharge; this may also be considered comparative advertising e.g. FCJ judgment dated 23.4.1998 - I ZR 2/96, GRUR 1999, 69 et seq
- Merely requesting customers to make a comparison should not be classified as comparative advertising (case: FCJ, judgment dated 22.5.1986 - I ZR 11/85, MDR 1987, 206 = GRUR 1987, 49 - *Cola-Test*; differently now, however: FCJ, judgment dated 15.10.1998 - I ZR 69/96, MDR 1999, 820 = GRUR Int. 1999, 453 (454) regarding the price-related request to "compare with XY's catalogue" - criticized by *Völker*, WuB IV B. § 1 UWG 3.99)
- Where an advertisement is worded in terms that are so general that the targeted sections of the public do not even recognise straight away that it refers to competitors, but gradually realise over time that not all competitors can offer the same advantages, this is not comparative advertising (FCJ, judgment dated 15.7.1999 - I ZR 14/97, GRUR 1999, 1111/2, with affirmative commentary by *Helm*, WuB V B. § 1 UWG 1.00)
- So-called system comparisons or superlative-type advertising (*Alleinstellungswerbung*) are not regarded as comparative advertising because these do not actually refer to competitors or their products (source: the Government's memorandum of legislative intent concerning the draft law - p.10, at: *Bundestags-Drucksache* 14/2959 dated 20.3.2000 (*Bundesrat's* comments and Government's response at *Bundestags-Drucksache* 14/3433))

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