

CASE LAW AND IAP RULINGS

Full title of law or regulation	Various; see judgements and below
Title of relevant section	<p>Article 4 of Legislative Decree 145/2007 and Article 2598 of the Civil Code (unfair competition)</p> <p>http://www.g-regs.com/downloads/ITConsumerCodeN.pdf</p> <p>http://www.g-regs.com/downloads/ITGenCivilCodeArt2598.pdf</p> <p>The IAP Code of Marketing Communication Self-Regulation Italy 63rd edition effective March 8th, 2017</p> <p>http://www.iap.it/wp-content/uploads/2017/03/Code-of-Marketing-Communication-63rd-edition-8.3.17.pdf</p>
Case	<p>Barilla company and Plasmon (Heinz Group); advertising appearing 30/11/2011:</p> <p>http://www.gregsregs.com/downloads/ITCompAdExamplePlasmon-Barilla.jpg</p>
Background	<ul style="list-style-type: none">• The Plasmon advertising reproduced a Barilla product line (the 'Piccolini') and a Plasmon product line (Children's Pasta Pennelle) accompanied by the words 'What's the difference?' <i>Qual è la differenza?</i>• A comparative table highlighted the numerical values of pesticides and mycotoxins showing the conformity of Plasmon products to the quantities required by regulations and, conversely, certain values exceeding the limits for infants (under 3 years of age) in the case of the Barilla line.• The message ended with the statement: Plasmon always gives you the best for your child – "<i>Plasmon da sempre ti dà il meglio per il tuo bambino</i>".• Plasmon released a similar ad (01/12/2011, see link below), this time comparing their biscuits with Barilla's Mulino Bianco "Millstone – <i>Macina</i>". As in the case of pasta, the ad compares the presence of certain pesticides revealing that the <i>Macina</i> biscuit exceeded limits imposed by infant food laws (for under 3s) <p>http://www.gregsregs.com/downloads/ITCompAdExamplePlasmon-biscotti.jpg</p> <p>Which led to Barilla's own advertising</p> <p>http://www.gregsregs.com/downloads/ITCompAdBarilla-Reply.jpg</p> <p>This carried the headline 'Italian mothers know what they are doing' – "<i>le mamme italiane sanno quello che fanno</i>". Full ad reads: "<i>Plasmon has published a comparative advertisement which is confusing, because it relates products which are totally different. But Italian mothers know what they are doing and what they should buy. For 135 years Barilla carries out constant checks and tests to ensure the authenticity, quality and safety of each product. For Barilla, respect for transparency, ethics and consumer welfare has always been our top priority. We believe this makes a difference. And moms know it.</i>"</p>
Claim and counter claim	<p>Barilla's case:</p> <ul style="list-style-type: none">- Barilla products referenced by Plasmon are not intended for infants (children 0-3 years). In this sense the campaign would contravene Art. 15 IAP Code - <i>Comparative advertising is permitted when it helps to explain the technical or financial features and benefits of promoted products and services, objectively comparing the relevant basic, technically verifiable and representative features of competitive goods and services, that meet the same needs or are intended for the same purpose. Comparisons should be fair and not be misleading, nor generate the risk of confusion, or discredit or denigrate others. Comparisons should not draw unfair advantage from the notoriety of others.</i>- Plasmon advertising does not specify clearly that the values of the substances referenced were infinitesimal, since the value is "mg / kg", i.e. micrograms per kilogram. This would have a derogatory effect for Barilla, representing it as a company insensitive to the welfare of infants

-
- Plasmon would have thus enjoyed an unfair advantage; this is in violation of Article 13 of the Code of commercial communication, which prohibits *"the exploitation of the name, trademark, notoriety and corporate image of other marketers, if it is intended to generate an undue advantage"*

In defence, Plasmon claimed:

- Barilla would tend to devalue and demean speciality infant food trying to convey the message that the generic foods are substitutable with those specifically for children under 3. In Plasmon's view, the slogan used for Piccolini – *"Good eating starts with Piccolini - A mangiar bene si comincia da Piccolini"* – might lead to confusion between the product and target audience.
- The reported values would be true and as such would not be adequate to discredit Barilla
- The reference to the products and to the competitor's mark was purely functional to inform consumers of the differences between products aimed at children and generic products (advertised as products for children).

Ruling by IAP

The issue was brought before the IAP Jury (IAP BARILLA 148/2011 - 20/12/2011) and also the Court of Milan, which had issued an injunction in respect of the advertising on 03/12/2011. The IAP Jury deemed the comparison to be legitimate but nevertheless held the Plasmon campaign to be misleading and disparaging under Articles 2 (*Marketing communication must avoid statements or representations that could mislead consumers, including omissions, ambiguity or exaggeration that are not obviously hyperbolic, particularly regarding the characteristics and effects of the product, prices, free offers, conditions of sale, distribution, the identity of persons depicted, prizes or awards. In assessing whether or not a marketing communication is misleading, the benchmark is the reasonable consumer belonging to the relevant target group*) and 14 of the Code.

- Recognizing a partial substitutability between the Plasmon and Barilla products, the Jury concluded that there would be no difference between the products offered in the ad campaign and therefore the advertising does not transgress in that respect.
- Whilst the accuracy of the published values was not contested by Barilla, the Jury held that the dissemination of scientific findings even if true and correct could still be misleading if not accompanied by interpretative instruments that clearly convey their significance to consumers. So the ad should be assessed according to Article 3 of the Code, which requires that scientific evidence, and citations should be used appropriately: *Terminology, quotations, technical and scientific tests, statistical data. Terms, quotations and references to scientific and technical tests must be used appropriately. Technical and scientific tests and statistical data with limited validity must not be presented in such a way as to make them appear generally valid.*
- In conclusion, the Plasmon campaign was considered contrary to Articles 2 (misleading communication) and 14 (denigration) of the Code, in that it sought to communicate that Barilla products were potentially harmful to children's health by:
 - o Failing to clarify to which class of children the products are related
 - o Mentioning of values whose meaning if adequately defined would not infer any danger from the products concerned.

The IAP Jury ruled that Plasmon had not transgressed by exploiting the notoriety/ reputation of Barilla products.

Ruling by Court of Milan

- Later than the IAP Jury – on 17/01/2012 – the Court upheld the injunction issued in December 2011 prohibiting the Plasmon advertising campaign (both the pasta and biscuit advertising) as contrary to Article 4 of Legislative Decree 145/2007 and Article 2598 Civil Code (unfair competition)
 - The Judge took the view that the Plasmon advertising was misleading as it created a comparison of non-homogeneous products; it was also held to be unlawful because it was derogatory
 - The Court of Milan (contrary to the IAP Jury) held that the comparison would be made
-

between products for children (meaning by this expression, those covered by the Plasmon brand) and products for adults (those covered by the mark Barilla)

- Although it accepted the veracity of the data released by Plasmon, the court held it was a deceptive message as it could mislead consumers with respect to the suitability of the Barilla products for consumers older than 3 years, a category for which they were fully compliant. The ruling on this point stressed that the advert should have been qualified and clarified, stating something like: "*Many moms use cookies for adults also for children under 3 years. These cookies are fine for adults, but may contain levels of pesticides also much higher than the legal limits established for the children of this age ... "and, in the case of pasta, like: "This pasta is fine for adults, but it can contain levels of contaminants also much higher than the legal limits established for the children of this age ... ". The statement "these cookies are good for adults" or "this pasta is fine for adults"*"
- A further element deemed to be misleading was the absence of price, which according to the judge would have been a necessary element to provide a "*complete and objective picture of the situation, then allowing mothers to make an informed assessment of costs and benefits, assigning a monetary value to the benefits, even in the case of a higher price, on the basis that it was to preserve the health of their children under three*"
- The omission of the price is also considered very relevant under the standpoint of the judgment relating to the substitutability of products: to be able to say that two goods meet the same needs it is essential that the products are offered to consumers under the same conditions (i.e. on equal terms) and, primarily, on condition of price.

The absence of this information under the Plasmon comparative advertising campaign was therefore considered suitable to mislead the consumer and to affect their buying choices.
