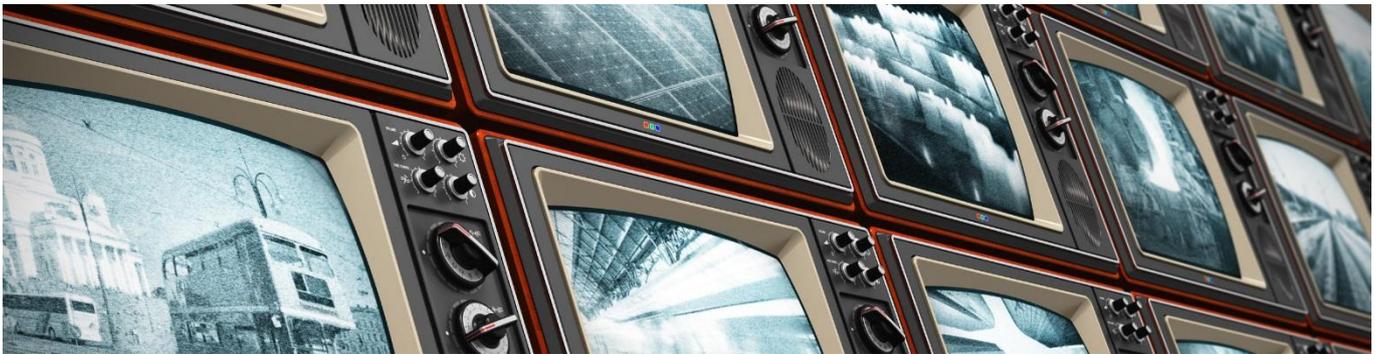


CONSIDERING COMPARATIVE ADVERTISING

A recent decision by the European Court of Justice has provided advertisers with guidance on "comparative advertising", a popular method of advertising in the UK.



The facts

When advertising products, many retailers – and in particular the big supermarkets – look to gain an advantage over their competitors by directly comparing the price of their products against the prices charged by their closest rivals. We have seen this form of advertising used by the traditional "Big 4" for many years, and more recently, we've seen retailers such as Aldi and Lidl make use of comparative advertising to good effect.

Popular and effective as it may be, a recent decision of the European Court of Justice should be given consideration by advertisers now looking to rely on comparative advertising. The ECJ was concerned with a comparative advertising campaign conducted by French retailers, Carrefour. Like in many British ads, Carrefour compared the price of its products against one of its rivals, in this case, Intermarché. However, when doing so, Carrefour opted to compare the prices charged in its own hypermarkets, against the prices charged in Intermarché's smaller supermarkets. The European Court of Justice was asked to consider the advertisement in line with the relevant EU Directives.

The Court noted that there was nothing in European law preventing Carrefour from comparing different sized stores, but they had a responsibility to be objective and to not mislead potential customers. In the present case, Carrefour only noted the difference in size between the stores being compared on their website and not on the TV advertisement itself. The Court

noted that an advertisement would be misleading "if it omits material information that the average customer requires, according to the context, in order to take an informed transactional decision."

What does this mean?

So, what does this mean for the future of comparative advertising? It is important to stress that this does not bode the end for this form of advertising, indeed the European Court of Justice noted in their judgement that comparative advertising has benefits - giving consumers the opportunity to compare the price of goods and services to their own advantage.

So as to avoid advertisements being deemed misleading to consumers, advertisers should ensure that all material information is contained within the advertisement itself and not in an "unclear, unintelligible, ambiguous or untimely manner." If advertisements fail to produce this material information (whether that be relating to the size and 'bulk-buy-ability' of the retailers' stores in question (as in this case), or the nature of the products themselves) or presents this information in such a way that would not be clear to the average consumer, the advertisement may be subject challenge and may be deemed misleading. In such circumstances, retailers could see fines levied against them, and their advertisements withdrawn from circulation by the courts.

Retailers will continue to use the popular method of comparative advertising, and in many instances, the consumer will benefit as well as the individual retailer. This case, however, acts as a reminder that advertisers – whilst free to invite members of the public to purchase their products – should be careful of the risk posed by this form of advertising and ensure always that the customer is always in full receipt of all relevant information so as to ensure they are able to make informed decisions.

Who to contact

REBECCA MOORE
Legal Director

+44 (0)161 934 6673
07912395558



DOMINIC GANE
Trainee

+44 (0)161 934 6704
07595036219



10-10503789-1

Doha, Dubai, Hong Kong, Leeds, London, Manchester, Muscat, Singapore and Tokyo*

*a formal alliance with Hashidate Law Office

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