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Advertising

ITALIAN ANTITRUST AUTHORITY FIGHTS MISLEADING ADVERTISING AND UNFAIR COMMERCIAL COVID-19 RELATED PRACTICES

Following the outbreak of the sudden spread of COVID-19, Antitrust Authority, who is responsible for supervising traders' activities in the market, launched several investigations related to commercial practices that can affect negatively consumers through the spread of unfair, misleading and aggressive marketing and advertising.

In particular:

- on March 12 (PS11716 - PS11717), upon *Codacons* notice, the Authority started investigations against two e-commerce platforms (Amazon and eBay) for misleading claims and excessive price increases with reference to some resellers that marketed sanitizing products / hand sanitizers, respiratory protective masks and other medical products during the emergency;
- on 17 March (PS11723), upon notice of a consumer, the Authority started an investigation against the sale of medical products using claims such as “*the only drug against Coronavirus*”, “*the only remedy to fight Coronavirus*” through the website *farmacocoronavirus.it*. The claims were considered *prima facie* capable both of misleading consumers on some product features (its performance, its lawful origin, its healing properties), and of using aggressive methods, by means of exploiting the emotional status triggered by the epidemic on the community. The Authority ordered the shutdown of the website during the performance of its investigation activities.

Possible violations:

1. **Marketing products using claims that emphasise healing properties against COVID-19 constitutes a misleading commercial practice**, as defined by article 6 of Directive (EU) 2005/29, implemented by Section 20 Legislative Decree of September 6, 2005 n. 206 (“**Consumer Code**”) if:

- (i) the claim contains false information, or
- (ii) even if the information is factually correct, it deceives or is likely to deceive the average consumer in relation to one or more elements, e.g. the existence or nature of the product, its availability, its delivery, its purpose, its price.

It should also be considered that Section 23 of the Consumer Code lists some practices to be **considered in any case misleading**, such as, among others, those which:

- (i) generate the impression that the sale of a product is lawful;
- (ii) **claim, untruthfully, that a product has the ability to cure diseases.**

2. **Marketing products exploiting any misfortune or circumstance of such gravity as to impair the consumers’ judgement (such as COVID-19 epidemic) in order to influence purchase decisions constitutes an aggressive commercial practice**, as defined by article 8 of Directive (EU) 2005/29, implemented by Section 24 of the Consumer Code.

3. **The imposition of unfair high prices or other burdensome contractual conditions may constitute an abuse of a dominant position** pursuant to Section 3 paragraph 1 letter a) Law 287/1990.

The up listed unfair commercial practices, whether they are misleading or aggressive, can damage two categories of subjects:

- (i) **consumers:** who can submit notices to the Antitrust Authority through associations such as Codacons or National Consumer Union, and
- (ii) **professionals:** who can as well submit notices to the Authority to take action to inhibit and / or impose fines unfair commercial practices.

In addition, undue influence on consumers purchase decisions can damage competitors and may constitute an **act of unfair competition** within the meaning of Section 2598 no. 3 of the Civil Code, with the possibility for economic operators who had been damaged, to bring action to the ordinary judicial authority seeking for damages.

For the sake of completeness, please note that the **Advertising Self-Discipline Code** is also applicable.

The Institute of Advertising Self-Discipline (IAP) is entrusted with the enforcement of the Code and, *ex officio* or upon notification of companies or consumers, can take action to oppose the spread of aggressive, incorrect or deceptive claims. The Code sets forth some principles to ensure correct advertising (art. 1 “fair advertising”, art. 2 “misleading advertising”, art. 6 “proof of truth of advertising” art. 8 “superstition, credulity, fear”).

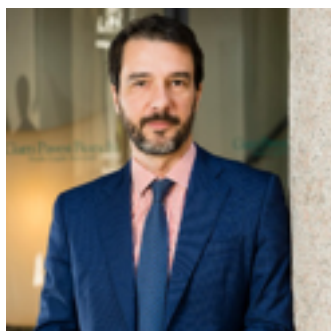
IAP may order to desist from spreading unfair advertising and, in case of violation of the order, may impose the publication by extract of the notice of the infringement with the names of the parties, at the expense of the infringer.

Our practical tips:

In order to avoid investigations and imposition of fines by the authorities, we suggest to pay particular attention to the following aspects:

- (i) do not use claims that do not reflect the actual qualities of the product, in particular that exaggerate healing or prevention properties of the product;
- (ii) as far as possible, do not accept orders of goods that exceed the stock, or at least adequately inform consumers of the difficulties in the performance of contractual obligations due to Covid-19 emergency;
- (iii) do not enhance the words “Coronavirus” “Covid-19” in advertising claims, nor identify products with these terms;
- (iv) do not adopt story-telling that causes emotional states of anguish, fear and concern about the ongoing epidemic;
- (v) even in apparently more neutral/institutional communications, comply with strict criteria of commercial fairness in order to avoid parasitic exploitation of the emergency situation to draw the consumers’ attention to the company.

TEAM



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