

**PROCEDURES FOR INVESTIGATING MISLEADING AND UNLAWFUL
COMPARATIVE ADVERTISING**

Measure No. 17590

THE COMPETITION AUTHORITY

AT ITS MEETING on 15 November 2007;

HAVING REGARD to Legislative Decree No.145 of 2 August 2007, “Implementing article 14 of directive 2005/29/EC amending directive 84/450/EEC on misleading advertising”;

HAVING REGARD to article 8 (11) of Legislative Decree No. 145/07, authorising the Authority to issue a Regulation governing investigative procedures in a manner which guarantees the *audi alteram partem* principle, full disclosure of evidence, and the minuting of investigations;

HEREBY RESOLVES

To adopt the Regulation on “Procedures for investigating misleading and unlawful comparative advertising” in the annexed text which forms an integral part of this Resolution.

The Regulation shall be published in the Official Gazette of the Italian Republic and in the Bulletin of the Competition Authority.

SECRETARY-GENERAL
Luigi Fiorentino

CHAIRMAN
Antonio Catricalà

REGULATION ON PROCEDURES FOR INVESTIGATING MISLEADING AND UNLAWFUL COMPARATIVE ADVERTISING

Art. 1

Definitions

For the purposes of this Regulation the following words shall have the following meanings:

- a) The “Legislative Decree” is Legislative Decree No. 145 of 2 August 2007;
- b) The “Board” is the Chairman and the four Members;
- c) The “Offices” are the organisational units referred to in article 10 (6) of law No. 287 of 10 October 1990.

Art. 2

Scope

- 1. This regulation shall apply to proceedings relating to misleading and unlawful comparative advertising within the meaning of the Legislative Decree.

Art. 3

Case Officer

- 1. The Case Officer is the executive responsible for the organisational unit responsible by subject matter established pursuant to article 10 (6) of law No. 287 of 10 October 1990, or another official appointed to act in his/her stead.
- 2. The Case Officer referred to in paragraph (1) above shall initiate proceedings and the relevant formalities for proceeding with the investigations.

Art. 4

Pre-investigation activity

- 1. The Case Officer shall acquire all the information needed to appraise the case. To this end, the Case Officer may request information and documents from any party, whether private or public.
- 2. When the principal of the advertisement is unknown the Case Officer shall request the proprietor of the medium used to disseminate it and anyone else in possession of relevant information to provide such information to be able to identify the principal.
- 3. Except in particularly serious cases, whenever there are good reasons for considering that an advertisement is a case of misleading or unlawful comparative advertising, the Case Officer may, after having informed the Board, invite the professional in writing to remove the possible misleading or unlawful contents from the advertisement.

Art. 5

Request for action

1. Any individual or organisation having an interest in the matter may request the Authority to take action in respect of advertisement deemed to be misleading or unlawful pursuant to the Legislative Decree.
2. In the request referred to in paragraph (1) the applicant shall provide the Authority with:
 - a) the applicant's first name, surname, or company name, residence, domicile or registered office and the telephone and telefax numbers and e-mail address, if any;
 - b) information making it possible to clearly identify the advertisement forming the subject matter of the request as well as the professional deemed to be its author;
 - c) any other information useful for the Authority's appraisal.
3. In the event that the Board considers that, on the basis of the information and evidence provided with the request for action, or otherwise acquired by the Case Officer, pursuant to article 4 (1) and (3) that there are no grounds for proceeding with the investigation, the request shall be overturned and the applicant informed accordingly.

Art. 6

Commencement of proceedings

1. Having appraised the information and evidence in his/her possession from whatever source, and the information provided with the request for action pursuant to article 5, the Case Officer shall commence the investigation of the complaint in order to ascertain the existence of misleading and unlawful comparative advertising within the meaning provided by the Legislative Decree.
2. The Case Officer shall serve notice of commencement of proceedings on the professional concerned, pursuant to article 8 (3) of the Legislative Decree, and on the other parties that have submitted a request for action pursuant to article 5.
3. The notice referred to in paragraph (2) shall indicate the subject matter of the case, the deadline for its completion, the office and the officer responsible for the case, the office at which access may be had to the case papers, the possibility of submitting written statements or documents and exhibits and the deadline for the submission of any such statements and documents and exhibits.

Art. 7

Deadlines for completing the investigation

1. The investigation shall be concluded within one hundred and twenty days counted from the registration date stamp on the notice of commencement of proceedings, and one hundred and fifty days when, pursuant to article 8 (6) of the Legislative Decree, a request has to be made to the Communications Regulatory Authority.
2. In the event that the professional is resident, domiciled or headquartered abroad, the deadline for completing the investigation shall be one hundred and eighty days, counted from the registration date stamp on the notice of commencement of proceedings and two hundred and ten days, pursuant to article 8 (6) of the Legislative Decree when it is necessary to request the opinion of the Communications Regulatory Authority.

4. The deadline may be extended with the reasoned measure adopted by the Board to meet particular requirements relating to the investigation by a maximum of thirty days or, in the event that the professional undertakes certain commitments, up to a maximum of sixty days.

5. In the event that, pursuant to article 20 of this Regulation, the Board decides to suspend the proceeding, the deadlines referred to in paragraph (1) above shall be suspended until the self-regulatory body issues its determination and at all events for a maximum period of thirty days that shall be established by the Board.

Art. 8

Undertakings

1. Within a maximum of thirty days from the date of service of the notice of commencement of proceedings, the professional may submit written undertakings to remove the unlawful aspects of the advertisement under review.

2. The Authority shall appraise the undertakings and:

- a) If it deems them adequate, it shall issue a measure accepting them and making them binding on the professional concerned, and closely case without investigating the offence;
- b) if it deems them to be partially adequate, it shall set a deadline by which the professional shall be required to supplement the undertakings;

3. In cases of in which the advertisement is seriously and manifestly misleading or unlawful pursuant to article 8 (7) of the Legislative Decree, or in the event that the undertakings are inadequate, the Authority shall reject them.

4. Following the decision to accept the undertakings, the procedure may nevertheless be reopened by the Authority exercising its powers, in the event that:

- a) the professional has failed to honour the commitments undertaken;
- b) the *de facto* situation has changed in respect of any one or more elements upon which the decision was based;
- c) the decision to accept the undertakings was based on information submitted by the parties subsequently shown to be incomplete, inaccurate or misleading.

Art. 9

Provisional suspension of the advertisement

1. Pursuant to article 8 (3) of the Legislative Decree, the Authority may, in particularly urgent cases, in the discretionary exercise of its authority, issue a reasoned measure, ordering the suspension of the advertisement deemed to be misleading or unlawful comparative advertisements.

2. The Case Officer shall give the parties a deadline of not less than five days to submit written statements and documents and exhibits. After the deadline, the Case Officer shall submit the case papers to the Board for its decision.

3. The Board may issue a reasoned measure ordering the provisional suspension of the advertisement even without waiting for the statements to be submitted by the parties when there are particular needs requiring action to be taken without delay. Within seven days of the date of service of the provisional injunctive measure, the professional concerned may submit written statements, documents and exhibits. After appraising the submissions made by the professional, the Board may confirm the provisional suspension of the advertisement.

4. The Case Officer shall notify the parties of the determinations of the Authority.

5. The Authority's decision to order the suspension of the advertisement deemed to be unfair or the unlawful comparative advertisement shall be implemented immediately by the professional on which it is served. Any appeal against the Authority's suspension order shall not suspend compliance with that order. The professional shall notify the Authority that the suspension order has been complied with within five days of service of notice of the order.

Art. 10

Participation in the investigation

1. Parties vested with public or private interests, or with diffuse interests and forming part of associations or committees damaged by the offences forming the subject matter of the investigation may intervene in the proceedings, filing signed submissions, containing the following:

- a) the applicant's name, surname, company name, registered office, residence or domicile;
- b) reference to the proceeding in which the applicant intends to participate;
- c) appropriate reasons to explaining their interest in participating.

2. After ascertaining the regularity and the completeness of the request to participate, the Case Officer shall notify the applicant that he/she is entitled to:

- a) be given access to the case papers, pursuant to the provisions of article 11 below;
- b) file written statements, documents, exhibits, submissions and opinions.

Art. 11

Access to documents and the confidentiality of information gathered

1. During the course of the investigation of a case, the parties served with notice of commencement of proceedings pursuant to article 6 (2), and any intervening parties provided by article 10, are entitled to access any documents produced or permanently held by the Authority.

2. In the event of the documents referred to in paragraph (1) contain confidential information of a personal, commercial, industrial or financial nature relating to individuals and professionals involved in the case, the right of access to all or part of any such documents is limited to what is necessary in order to comply with the *audi alteram partem* principle.

3. Any documents containing commercial secrets may not be accessed. In the event that such documents provide evidence of the commission of an offence or essential information required for the defence of the professional involved, the offices will permit access, limited to those elements alone.

4. When the offices permit access in the cases referred to in paragraphs (2) and (3) above and in compliance with the criteria indicated therein, they shall take all necessary precautions to take account of the concern of the individuals and professionals that no reserved information or commercial secrets be divulged to third parties.
5. Access may not be had to any notes, proposals or any other reports produced by the offices involved in studying and preparing the drafting of the case papers.
6. Access may be wholly or partially restricted to minutes of meetings of the Board and documents relating to relations between the Authority and the institutions of the European Union, and between the Authority and the organs of other States or other international organisation, whose disclosure has not been authorised.
7. Parties wishing to protect the confidentiality or secrecy of the information supplied must submit a specific request to this effect to the offices of the Authority indicating the documents or the parts of any such documents which they do not wish to be disclosed, giving the reasons for so requesting.
8. If the office considers that there are no grounds for requesting confidentiality or secrecy pursuant to paragraph (7) it shall issue a reasoned notice to this effect and serve it on the parties concerned.
9. The office may issue a reasoned order deferring access to documents until it has been ascertained that they are relevant for the purposes of providing evidence of violations, but not after the notice indicating the date on which the investigative phase is to be concluded pursuant to article 16
10. Right of access shall be exercised by submitting a written, reasoned, request for access, to which the Case Officer shall reply within thirty days.

Art. 12

Request for information and hearings

1. The Case Officer shall acquire all the information required to appraise the case, requesting any public or private party to submit information and documentation.
2. Where this is necessary for the purposes of gathering or appraising the findings of the investigation, or if it is requested by at least one of the parties, the Case Officer may require the parties to testify at hearings convened for the purpose, governed by the *audi alteram partem* principle, and laying down the nondeferrable deadline for the hearing to be held.
3. The hearings convened pursuant to paragraph (2) shall be chaired by the Case Officer. The parties may be represented by a defence counsel or by another person enjoying their trust, who shall exhibit the relevant powers of attorney to act in their stead.
4. The hearings shall be duly minuted, setting out the main state of mind made by the parties to the hearings. The minutes shall be signed at the end of the hearings by the Case Officer and the parties. If any party is unwilling or unable to sign the minutes, this fact shall be recorded in the minute, together with the reasons. At the end of the hearing copy of the minutes shall be given to each of the parties to the hearing, at their request.
5. For the sole purposes of drafting the minutes, the hearing may be recorded on an appropriate

medium.

Art. 13

Expert opinions, statistical and economic analyses and expert consultations

1. The Board shall authorise expert opinions, statistical and economic analyses and the consultation services of experts proposed by the offices, in relation to any matter of relevance to the investigation.
2. The experts and consultants selected by the Authority shall be members of Registers held by the courts, or shall be persons chosen by universities or research centres as being the most professionally competent to conduct the technical examination required.
3. In the event the Authority orders expert testimony or consultancy services the parties to the case shall be notified thereof.
4. The Case Officer shall serve notice on the parties of the experts' or consultants' findings.
5. The parties on whom notice of commencement of proceedings has been served, and any other parties intervening in the case pursuant to article 10, may point their own consultant, notifying the Case Officer, to attend the operations performed by the Authority's consultant and, within 10 days of service of the notice provided by paragraph (4) above, submit a written statement to documents containing observations on the findings of the technical investigations..

Art. 14

Inspections

1. The Board shall authorise the inspections proposed by the Case Officer on the premises of any party deemed to be in possession of company documents of relevance to the investigation. In the case of government departments and agencies, the disclosure of the documents shall be requested in advance.
2. Officials of the Authority responsible for conducting inspections shall exercise their powers upon presentation of a written document setting out the specific purpose of the inspection and the penalties for refusing, failing or holding back any information or documents requested in the course of the inspection, without good reason, and for supplying untruthful information or documents.
3. At all events, the following shall not be deemed to be good reasons for refusing or failing to provide such information or documents for the purposes of applying the penalties provided by article 8 (4) of the Legislative Decree:
 - a) the fact that company rules or internal instructions, written or verbal, impose confidentiality or require official authorisation;
 - a) the need to protect the company from the risk of fiscal or administrative penalties;
 - c) the need to protect corporate or industrial secrets, except in cases where the Authority acknowledges specific needs for protection.
4. The term “documents” shall mean any graphical, photographic, cinematographic, electromagnetic or any other kind of representation forming part of the case papers and evidence gathered, including internal and informal documents, formatted and used for the company's activities, regardless of the level of responsibility and representation of the author of any such documents, and any other document produced or stored on computer media.
5. The officials referred to in paragraph (2) are vested with the following powers:

- a) to gain access to all premises, lands or vehicles of the party under inspection, excluding places of residence or domicile which are extraneous to the company activities under investigation;
 - b) to inspect the documents referred to in paragraph (4) above;
 - c) to take copies of the documents referred to under subparagraph (b) above;
 - d) to request verbal information and explanations.
- 6) During the course of the inspections, the parties concerned may be assisted by their own consultants, it being understood that this facility does not entail suspending the inspection.
 - 7) All the work conducted in the course of the inspection, particularly with reference to any statements made and documents acquired shall be minuted.
 - 8) When conducting inspections, the Authority may be assisted by the Guardia di Finanza which, pursuant to article 8 (2) of the Legislative Decree, shall act in the exercise of their own powers to investigate value-added tax and income tax liability.

Art. 15

Burden of proof

1. In the event that the Case Officer, pursuant to article 8 (5) of the Legislative Decree, requires the professional to produce evidence of the accuracy of the factual data given in the advertisement, this request shall be served on the parties concerned, indicating the evidence being sought, the reason for the request, and the deadline for producing it.

Art. 16

Closure of the investigation and requests for an opinion of the Communications Regulatory Authority

- 1. When the Case Officer considers that the case has been sufficiently investigated notice shall be served on the parties of the closing date of the investigation and a deadline set, which shall not be less than ten days, by which they may submit concluding statements or documents. After the conclusion of the investigative phase, the Case Officer shall submit the case papers to the Board which shall issue the final determination.
- 2. In the circumstances provided by article 8 (6) of the Legislative Decree, before completing the formality pursuant to paragraph (2) of this article, the Case Officer may request the opinion of the Communications Regulatory Authority, to which the case papers shall be forwarded following the procedures indicated in article 19 (1). The Communications Regulatory Authority shall issue its opinion within 30 days of service of the request.
- 3. If the Communications Regulatory Authority fails to submit an opinion by the aforementioned deadline, or to indicate the need to defer its opinion for the purposes of investigating the case, the Competition Authority shall proceed independently of that opinion. In the event that the Communications Regulatory Authority requires time to perform further investigations, the deadline for concluding the investigation shall be suspended for a maximum period of thirty days from the date of receipt by the Communications Regulatory Authority of the requested information and documentation until the date on which the opinion is issued.

Art. 17

The Authority's decision

1. The Case Officer shall serve notice of the final measure adopted by the Authority on the parties to the case, and any other intervening parties, which are also be published in the Bulletin of the authority within twenty days of its adoption.
2. The Authority's final measure shall also indicate the deadline for filing an appeal and the authority to which to appeal.
3. In order to fully inform the public of its institutional operations, the Authority may also publish press releases of its decisions.

Art. 18

Publication of the measure or a statement of rectification

1. When the Authority declares the advertisement the misleading or a case of unlawful comparative advertising, pursuant to article 8 (8) of the Legislative Decree, it may order the professional to publish, at its own expense, the full text or parts thereof, of its final measure, or a statement of rectification. The Authority may also order the publication of the undertakings entered into by the professional pursuant to article 8 at the expense of the professional. In these cases the Authority shall determine the medium to be used, and the formalities and the deadline for compliance. A full copy of the measure whose publication has been ordered, or an extract thereof, or a statement of rectification, or a statement of the undertakings entered into, shall be forwarded to the proprietor of the medium used to publish them. The statement of rectification may take the form of a personal announcement, when the advertisement is personally intended for its addressees, and when the latter are identifiable.
2. Following the publication of the measure or statement of rectification all the commitments referred to in paragraph (1) above, the professional shall immediately notify the Authority by forwarding a copy of the notice published or the list of addressees to which the individual notice was addressed when, pursuant to (1) above, the notice must be addressed personally to the original addressees of the advertisement at issue.

Art. 19

Notices

1. All the notices provided by this Regulation shall be served by registered post with recorded delivery, delivered by hand against delivery receipt, or by certified email with a digital signature, and by fax. In the case of fax transmission, the date of service of the documents shall be deemed to be date on which they were sent, unless evidence to the contrary is provided.
2. The original complainant and any other parties intervening in the case shall be served notice at the address given in the original complaint. Notices shall also be served on the principal of the advertisement and, if known, its author, at their last-known residential address, domicile or registered office or as stated in public records. If the notices cannot served at these addresses, service shall be done by publishing a notice in the Bulletin of the Authority.

Art. 20

Self-regulation

1. Any parties which, pursuant to article 9 of the Legislative Decree, request the proceeding

before the Authority to be suspended, must submit a specific request to this effect providing evidence that the proceeding is currently being undertaken by their own self-regulating body, providing adequate information to identify that body and the subject matter of the proceeding.

2. After receiving the request for suspension provided by paragraph (1) of this article, the Case Officer shall serve notice on the parties, setting a deadline by which to submit comments. The Case Officer shall notify the parties of the Board's determination regarding this request. The Case Officer shall also promptly notify the parties when the reason for suspension ceases.

Art. 21

Final provisions

1. This Regulation shall come into force on the day following its publication in the Official Gazette.

2. On the date of entry into force of this Regulation, the provisions of Decree of the President of the Republic No. 284 11 July 2003, containing the rules for the Authority's investigation of misleading and comparative advertising, shall be repealed.