

# Unfair Practices and Consumer Rights. The cosmetic efficacy: myth or reality?

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## Summary

Tales about marvelous mysterious countries, that sometimes are only the result of imagination while sometimes do refer to existing places, all share the characteristic of being full of emphasized descriptions and extraordinary details. You can have a feeling similar to the one raised by such tales when exposed to advertising, whose task itself is to depict a given product or service in such a way as to lure consumers into buying it.

For cosmetics in particular this situation is magnified by the nature of the products, which is closely related to the improvement of the appearance of a person, both in the eyes of others and in the eyes of that very person.

The distinction between myth and reality is the main subject matter of the repression of misleading advertising. The relevant regulation in Europe has changed recently following the adoption of the Directive 2005/29/EC on Unfair Commercial Practices, which set new rules enhancing consumer rights. Among other things, the new legislation outlines "sharp practices" which are prohibited throughout the EU, such as misleading and aggressive practices. Enforcement of these rules is the task of national consumer protection authorities and courts.

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## Riassunto

I racconti di paesi misteriosi e meravigliosi, che a volte sono solo frutto di immaginazione e a volte si riferiscono a luoghi esistenti, condividono tutti la caratteristica di essere pervasi di descrizioni piene di enfasi e di dettagli straordinari. Si può avere una sensazione simile a quella provocata da

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questo tipo di racconti quando si viene esposti alla pubblicità, il cui compito è di per sé quello di rappresentare un determinato prodotto o servizio in modo tale da indurre i consumatori a comprarlo.

Per i cosmetici, in particolare, questa situazione è amplificata dalla natura dei prodotti, che è strettamente correlata al miglioramento della apparenza di una persona, sia agli occhi degli altri che agli occhi di quella stessa persona.

Ebbene, la distinzione tra mito e realtà è l'oggetto principale della repressione della pubblicità ingannevole. La relativa regolamentazione in Europa è cambiata di recente in seguito all'adozione della direttiva 2005/29/CE sulle pratiche commerciali scorrette, che ha fissato nuove regole che rafforzano i diritti dei consumatori. Tra le altre cose, la nuova normativa definisce pratiche particolarmente gravi, che sono vietate in tutta l'UE, come le pratiche ingannevoli e le pratiche aggressive. L'applicazione di queste norme è compito delle autorità nazionali di tutela dei consumatori e dei tribunali nazionali.

## INTRODUCTION

It is worthwhile considering how the recent change in consumer protection legislation produces an evolution in the assessment of marketing practices in general and in the cosmetics sector in particular. A few cases have already been decided by the Italian Competition Authority that supervises misleading and aggressive marketing in Italy, with rulings in which it is possible to see the continuity that exists with the consolidated jurisprudence in the field and elements introduced by the new regulation.

The *Autorità Garante della Concorrenza (the Italian Competition Authority)*, is in charge of the application and enforcement in Italy of the rules against so called “unfair commercial practices”. It is the same institution that enforces in Italy all aspects of competition law, assessing potentially anticompetitive agreements, abuses of dominant position and mergers above a given size threshold.

Our work concerning “unfair commercial practices” is well described by the title of this session, as it actually concerns the distinction between myth and reality.

The main subject matter of the repression of misleading commercial practices is investigating if there exists a difference, between what effects consumers may be induced to attach to a given product by its advertising and marketing, and what effects the use of that product can really have.

For cosmetics in particular this distinction is made more complex by the very nature of those products, which is closely related to the improvement of the appearance of a person, both in the eyes of others and in the eyes of that very person.

## UNFAIR PRACTICES...

Since 2004, when I had the pleasure to attend

another similar meeting also organized by the International Society of Cosmetic Dermatology, the regulation then in force concerning misleading and comparative advertising (legislative decree 74 of 25 January 1992) has been replaced in 2005 by the so called ‘Codice del Consumo’ (Code of Consume) (*set by legislative decree n. 206 of 6 September 2005*). More recently the regulation has been amended again in 2007 (*by Legislative decrees 145 and 146 of 2 August 2007*), extending the competence and powers of the Italian Competition Authority.

Comparative advertising is now regulated and encouraged so as to promote competition (*as per Legislative Decree 145/2007*), and the Italian Competition Authority is now competent to monitor and punish a set of so called “unfair commercial practices” (i.e. misleading commercial practices; aggressive commercial practices; unsolicited supply in distance contracts; unsolicited services in the commercialization of financial services) (*as per legislative decree 146/2007*).

These reforms were a consequence of an evolution in the relevant regulation in Europe, that took place with the adoption of the Directive 2005/29/EC on Unfair Commercial Practices, which set new rules enhancing consumer rights. It is this Directive that, among other things, outlined the “sharp practices” which are prohibited throughout the European Union, such as misleading marketing.

As a result of the rules now in force, the Italian Competition Authority is entitled to autonomously trigger investigations (i.e. without a third party complaint), it has full investigative powers, it can require any evidence necessary to its investigations, and can carry out inspections with the support of the *Guardia di Finanza (the Fiscal Police)*.

Another consequence of the most recent reform is also the increase of the fines that the Italian Competition Authority can inflict when asses-

sing the infringement of the rules against “unfair commercial practices”, so that now fines range from 5.000 up to 500.000 Euro. If an enquiry concerns a number of possible infractions, a fine will be inflicted for each one of the ascertained violations. On the other hand, it is now possible for the Italian Competition Authority to close a proceeding without ascertaining the violation, by accepting commitments by the firm to eliminate all unfair aspects of a commercial practice. What does this mean for firms, and in particular for firms of the cosmetic sector?

## ...AND COSMETIC PRODUCTS

After the recent changes in consumer protection legislation only a few cases concerning the cosmetics sector have been decided by the Italian Competition Authority.

In its rulings, though, it is possible to see the continuity with the consolidated jurisprudence that built up when the former regulation was in force, concerning only misleading advertising.

In general, claims must be true and verifiable, and they must accurately communicate product features, characteristics and performance. A rough list of some of the main principles stated in recent rulings so as in the past ones is the following:

- advertising may contain only claims regarding characteristics and effects for which there is a clear demonstration, and of these characteristics and effects must be given an intelligible description;
- a clear indication must also be given of the tests performed and of their exact nature;
- self-evaluation tests can not be used to ground statements about the effects of a product;
- in vitro studies alone are not sufficient to ground statements about the effects of a product;
- "in vivo" studies must be based on the compa-

ison with placebo or similar products;

- quantitative information must not only refer to maximum values of efficacy;
- stated characteristics and effects must be consistent with the nature of the product, be it a cosmetic or a supplement.

What has indeed changed with the introduction of the new regulation is the scope of proceedings. While under previous legislation the Italian Competition Authority could only look into possible misleading effects of single advertisements, the present object of investigation, “commercial practices”, enables it to carry out the evaluation of complex marketing strategies. So one investigation may for example concern together the printed or broadcast advertisement, the internet site and the package. On the other hand one investigation may concern the marketing of different products which are somehow connected in the firm's advertising strategy.

As a result of this wider scope of the investigations that the Italian Competition Authority can now carry out, the effectiveness of its rulings might be enhanced.

Meanwhile also international cooperation in the field of consumer protection has intensified, and in the European Union in particular it takes now place on a regular basis, through meetings among all Member States, a common data base fed by all Member States with the cases that may be of cross border meaning, and a series of common activities, the so called “sweep” actions, in which every year all Member States cooperate in an investigation on a given market.

It must anyway be remarked that, in the past, quite a few advertisements of cosmetic products have been reviewed by the Italian Competition Authority, and in many cases not only the firms that were affected by those rulings revised their marketing strategy, but also the majority of the other firms did the same, in order to abide to the principles stated in those rulings.

This makes a good starting point also for the

application of the new regulation now in force, the focus of which is no longer on single advertisements, but on the whole of the marketing strategy of a given product or line of products.

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