A high water mark for comparative advertising

A recent decision in a dispute between Aldi and Dunnes Stores suggests that, despite the pointers from the CJEU, comparative advertising is a dangerous game to play in Ireland. Alistair Payne explains.

Comparative advertising law seeks to balance competing marketplace interests so as to encourage healthy competition while ensuring that consumers are not misled. However, the Gordian knot of a European Directive, implementing national legislation and a conservative black letter law approach to judicial interpretation can strangle even the most laudable of policy intentions. Based on the approach adopted by the Irish High Court in Aldi Stores (Ireland) Limited and Aldi GMBH and Co v Dunnes Stores (2013 No 13177 P – decision of Mr Justice Cregan, June 9 2015), comparative advertising in Ireland becomes a bit like a game of Russian roulette, other than in the most straightforward and transparent circumstances.

The comparative advertising campaign

Dunnes undertook a comparative advertising campaign by displaying shelf-edge labels that compared their products with each of a number of products sold by Aldi. First, Aldi complained that either the two products were not comparable or that the labels failed to compare the products properly. Second, Aldi alleged that Dunnes used banners in its supermarkets that contained the Aldi trade mark and in particular, the words “lower price guarantee” and “guaranteed lower prices on all your family essentials every week” and the words “Aldi match.” The third category of complaint related to other shelf edge labels which compared Aldi’s products to Dunnes’ products and which contained the words “lower price guarantee” and “always better value.” Aldi maintained that these labels represented that Dunnes’ products were cheaper than Aldi’s when this was not the case. In addition and based on
The 2007 Regulations

The key provisions relevant to comparative advertising are set out in the Regulation and at Section 2(1) a "comparative marketing communication" is defined as "...any form of representation made by a trader that explicitly or by implication identifies a competitor of the trader or a product offered by such a competitor".

Regulation 4(2) provides that:
A comparative marketing communication is prohibited if as regards the comparison –
1) it is misleading under Regulation 3,
2) it is a misleading commercial practice under any of sections 43 to 46 of the Consumer Protection Act 2007 (No 19 of 2007),
3) it does not compare products meeting the same needs or intended for the same purpose,
4) It does not objectively compare one or more material, relevant, verifiable, and representative features of those products, which may include price,
5) it discredits or denigrates the trade marks, trade names, other distinguishing marks, products, activities, or circumstances of a competitor,
6) for products with designation of origin, it does not relate in each case to products with the same designation,
7) it takes unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products,
8) it presents goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name, or
9) it creates confusion among traders:
(i) between the trader who made the comparative marketing communication and a competitor, or
(ii) between the trade marks, trade names, other distinguishing marks, goods or services of the trader who made the comparative marketing communication and those of a competitor.

Regulation 3(1) provides:
"A trader shall not engage in a misleading marketing communication" and Regulation 3(2) provides that "A marketing communication is misleading if –
1) in any way (including its presentation), it deceives or is likely to deceive in relation to any matter set out in paragraph (4) the trader to whom it is addressed or whom it reaches, and
2) (i) by reason of its deceptive nature, it is likely to affect the trader's economic behaviour, or
(ii) for any reason specified in this paragraph, it injures or is likely to injure a competitor."

Dunnes' unauthorised use of the Aldi trade mark in the course of these advertisements, Aldi alleged trade mark infringement.

The law in Ireland

Council Directive 2006/114/EC (the Comparative Advertising Directive) has been implemented in Ireland by the European Communities (Misleading and Comparative Marketing Communications) Regulations 2007 (SI 774/2007) and by The Consumer Protection Act 2007 (CPA) which prohibits misleading commercial practices and misleading comparative advertising that does not comply with specified conditions as transposed from the Directive. The fundamental difference between the two pieces of legislation is that the Regulation gives traders a right of private action to bring down misleading advertising by other traders, while the Consumer Protection Act provides similar safeguards to consumers, including a right to make a complaint to a statutory enforcement agency.

In the course of reviewing the principles emerging from numerous CJEU cases and in particular LIDL SNC v Verizon Distribution SA (Case C-159/09 [2010]), the High Court acknowledged that although compared food products should be at base substitutable for each other, they need not be identical to be comparable. It noted the CJEU's direction that to require identically between two food products would effectively rule out any possibility of traders being able to undertake comparative advertising and reiterated the CJEU's assessment that to do so would run counter to the CJEU's settled case law that the conditions required of comparative advertising under the Comparative Advertising Directive must be interpreted in the sense most favourable to it. In spite of its recognition of these interpretative principles, in practice the Court's product assessment ended up being rather more narrow.

Were the 15 products in the first category of complaint comparable?

In undertaking its comparison of the comparability of products the Court elected to adopt the approach to comparative analysis advocated by Aldi's experts. This was to compare the five key criteria of quantity, provenance, nature, substance and quality, rather than to focus on nutritional composition as espoused by Dunnes' experts and which the Court considered to be too generic in approach.

Applying these criteria in a thorough comparison of 15 own-brand products based on the evidence presented by a whole range of experts, the Court did not identify one single product as being comparable, although it did consider one product to be "borderline". The products compared were all own-label products of a range of basic items that weekly shoppers might purchase and for the most part were in identical volumes, for example, 100g of tomato sauce, 400g of turkey breast mince, 2 litres of sparkling orange drink, 500g of strawberry yoghurt, 400g of tinned chicken dog food. The differences identified by the Court mainly related to quality or provenance, for example, that the Aldi tomato sauce contained nearly twice as many tomatoes, that Aldi's turkey breast mince was endorsed by the Irish food agency, Bord Bia, whereas the Dunnes product was not; that Aldi strawberry yoghurt contained 13% more strawberries; that Aldi sparkling orange product had almost four times more orange content and the tinned chicken dog food offered by Aldi contained 4% carrot whereas the Dunnes product contained no carrot.

Were the advertisements in breach of the Regulations?

The Court's comparison of these products was made in the context of the requirements of section 4(2)(d) of the Regu-
tion which it interpreted as having regard to whether the advertisement failed on an objective basis to compare “…one or more material, relevant, verifiable and representative features…” of the respective products and of section 4(2)(c) of the Regulation which requires that a comparative advertisement compares products “meeting the same needs or intended for the same purpose”. It also considered the 15 products in relation to the test in section 4(2)(b) of the Regulation which proscribes any breach of sections 43-46 of the CPA. Essentially these provisions prohibit misleading or deceptive representations, the provision of false information, or the omission or concealment of material information, where it would result in an average consumer making a purchase that they would not otherwise make. In a very detailed analysis the Court found that all of the banner advertisements and shelf edge labels in relation to the 15 products breached sections(4)(2)(c) and 4(2)(d ) and that 14 of them breached section 4(2)(b).

The CJEU’s principles and application across the water

Although the Court acknowledged the principles for comparative advertising stated by the CJEU, its application of them to the assessment of each product in this case was at best extremely narrow. In LIDL the CJEU confirmed that nothing in the Directive requires food products to be identical before comparative advertising will be permitted as this would obviously rule out any real prospect of comparative advertising being used at all in this sector. It stated that Article 4 (b) should be interpreted as meaning that the fact alone that food products differed in terms of the extent to which consumers might like to eat them, or their ingredients or the conditions or their place of production or who produced them could not preclude the possibility that the products demonstrated the requisite degree of interchangeability for comparative advertising purposes. The CJEU further noted that it was for the national court to take into account the perception of the average consumer who is reasonably well informed and reasonably observant and circumspect and whether in the circumstances and bearing in mind the consumer audience, the comparative advertisement was misleading.

These principles were recently applied by the English High Court in R (Sainsbury’s Supermarkets Limited) v The Independent Review of Advertising Standards Authority Adjudications ([2014] EWHC 3680), which case was noted in the Irish High Court judgment. In the Sainsbury’s case the English High Court reviewed a determination of the Independent Reviewer of a decision by the Advertising Standards Authority concerning Tesco’s own brand comparative advertisements. The ASA’s decision confirmed that it considered products such as eggs, fish and chicken curry meal products to be comparable for comparative advertising purposes even where the competitor’s products had a different certification or provenance. The ra-
Banners and lower price guarantee shelf edge labels

Rather less surprisingly, the Court found that the Dunnes’ banners containing the words “lower price guarantee” and “guaranteed lower prices on all your family essentials every week” and the words “Aldi match” were so vague that they did not make a proper comparison and in the circumstances were misleading.

The Court also found that the shelf edge labels which compared the price of individual products sold by Dunnes to unspecified Aldi products, but using the Aldi mark and which contained the words “lower price guarantee” and “always better value” were not objective comparisons in relation to products meeting the same needs and for the same purposes and were also misleading by omission. Both of these findings seem in the factual circumstances to be reasonable and uncontroversial.

As a consequence of the unauthorised uses made by Dunnes of the Aldi trade mark and of the Court’s finding of breaches of the Regulations implementing the Comparative Advertising Directive, it found that Dunnes had taken unfair advantage of the Aldi trade mark in a manner that was detrimental to that mark and which was not in accordance with honest practices and as a result amounted to trade mark infringement.

Where next for comparative advertising in Ireland?

Pending the outcome of any decision on appeal in the Dunnes Stores case, it will be difficult to advise clients that comparative advertisements in Ireland, in all but the most straightforward cases, will not risk breaching the Regulations or the CPA and will not give rise to trade mark infringement, at least in circumstances that a competitor might bring an application for interim injunctive relief. If the Irish courts continue to take such a narrow approach in determining the interchangeability of products then it is likely that most traders will consider that comparative advertising is a game that is too dangerous to play in the Irish market.

This is an unfortunate outcome for consumers in a small market that has limited competition in many sectors. Even if only on a temporary basis, this decision has a chilling effect on comparative advertising and means that such campaigns whether planned locally, or for example in the United Kingdom with the intention of extension to Ireland, will need to be considered very carefully indeed if they are not to fall foul of Irish comparative advertising law.

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Do dogs really prefer carrots in their chicken dinner?

The difficulty in making a thorough but nevertheless black letter law type analysis and application of the Regulation is that this approach tends to lose sight of the ultimate policy goal of the Directive, as interpreted by the CJEU, namely to encourage competition while protecting consumers’ and trade mark owners’ rights. It is a delicate and difficult balance to achieve but is unlikely to be arrived at unless the interpretation of the implementing legislation is firmly anchored in the context of the principles laid down by the CJEU and of the stated policy objective of the Directive.

Certainly as far as the comparative advertising of every day own-brand grocery items is concerned, the concepts of comparability and interchangeability should be reasonably straightforward. As set out in Article 4 of the Directive the key requirements making comparative advertising permissible are that the advertisement compares goods or services meeting the same needs or intended for the same purpose, that it objectively compares material, relevant, verifiable and representative features of the goods and is not misleading. It is hard to think of a more straightforward comparison than of the same sized portion of two supermarket’s own-brand basic food items such as tomato sauce, strawberry yoghurt, sparkling orange drink or tinned dog food. The representative samples of each item are clearly intended for the same purpose and provided that a compared product is not aimed at a special target market and therefore is not different in a respect material to target consumers (for example fat free yoghurt is probably not interchangeable with full fat yoghurt) then it should be comparable.

Obviously there could be a myriad of fine differences between the respective products, but what should matter in terms of comparability, as highlighted in the Sainsbury case, is the way in which the product manufacturer represents the product and what on an objective basis is likely to influence the customer to purchase the product. The fact that the products differ in some qualitative respect that will not be apparent or a key influencer for the purchasing customer, should not be relevant from an interchangeability perspective. For example, it is difficult to see how otherwise comparable own-brand chicken dinner products for dogs can be differentiated on the basis that one contains a 4% carrot content, which a purchasing customer would only become aware of if they read the list of ingredients in fine print on the can. One wonders how many Irish dog owners would stop to read this when shopping in a busy supermarket aisle? More particularly, how many might consider that their pooch should be pampered to the extent that they would be prepared to pay more for a product that was otherwise comparable purely on the basis that it contained 4% carrots? Is this difference really so material that it should prohibit comparative advertising?
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