

Comparative Advertising: A Quick Guide



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What is a comparative advertisement? The EU Misleading and Comparative Advertising Directive 2006 (the “**Directive**”) defines a comparative advertisement as an ad that explicitly or by implication identifies a competitor or goods or services offered by a competitor. It seems like an intuitive concept, but there are a whole host of legal requirements, which advertisers should bear in mind when considering a comparative advertising campaign.

Failure to comply with the various comparative ad rules and laws can ultimately lead to the ad being banned, damages being payable, and in the most serious cases, fines or imprisonment. Businesses considering running a comparative ad should not be put off however, the law actually encourages comparative advertising. For example, in the recitals to the Directive, EU legislators recognise the potential benefits of comparative ads in terms of stimulating competition between suppliers of goods and services. As such, when ruling on cases involving comparative ads, the Court of Justice of the European Union interprets the requirements for lawful comparative campaigns in the way most favourable to their publication. UK courts and regulators (such as trading standards, the Advertising Standards Authority and the Competition and Markets Authority) are required to take the same approach.

For many businesses, ads that compare their products with those of a competitor can be a useful means of distinguishing their offerings. Supermarkets often use

comparative ads to compare the price of a basket of goods in their stores against the price a consumer would pay in a rival supermarket. Comparative ads are also used to poke fun at a competitor, and, if executed successfully, can generate a social media buzz around the advertiser's brand. For example, the 'Mac versus PC' ad campaign helped to demonstrate the strengths of Apple computers relative to PCs in a playful yet memorable manner.

With these potential benefits in mind, advertisers should always obtain legal advice to assist with clearing their comparative campaigns. There are a number of key requirements that any comparative ad will need to meet in order to be lawful:

- **It must not be misleading.** There are various factors which need to be considered when assessing if an ad is misleading. For example, could the ad deceive the audience? This includes thinking about whether the presentation of the ad is misleading. Regulators and courts will consider this test from the consumer's point of view, and in particular from the perspective of any vulnerable groups to whom the ad is directed, such as children.
- **It must compare like-for-like products/services.** Advertisers must consider carefully if the products or services being compared are genuinely substitutable. Businesses seeking to make a complaint about a competitor's comparative ad should bear in mind that English courts have generally been reluctant to rule that products are not interchangeable purely on the grounds of quality.
- **It must objectively compare material, relevant, verifiable and representative features of the goods or services.** This can include a price comparison, provided, it is presented objectively. Advertisers should also ensure that they have robust evidence to back up the claims they make so that they can verify their claims, if required.
- **It must not denigrate the trade marks, trade names, goods, services or activities of a competitor.** An advertiser will not fall foul of this provision merely by making a comparison. UK regulators and courts have historically demonstrated quite a high tolerance for the use of derogatory terms in advertising, provided the underlying claim is correct.
- **It must not take unfair advantage of a trade mark, trade name or other distinguishing marks of a competitor.** This includes ads for imitations of a competitor's product where the connection with the competitor's product is made either explicitly or implicitly.

This list is not exhaustive and even compliance with these requirements may not shield an advertiser from all liabilities that could arise. For example, a comparative ad could constitute copyright infringement or passing-off; the risks will vary according to the content of the ad. As such, advertisers should ensure that they obtain legal advice in advance of commencing a comparative advertising campaign. One of the benefits of the Directive is that the comparative advertising legislative framework is identical in each of the 28 EU member states. That said, local variances and enforcement nuances do apply.

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