

# Food advertising claims: What are the differences between EU and US law?



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Advertising has always been a crucial marketing tool of the food industry. But while it can help to improve the reputation and sales of a product, it may also present challenges for the advertiser in case of non-compliant claims, as Katia Merten-Lentz, of international law firm Keller & Heckman, explains.

Although freedom of speech and expression is a right protected by the First Amendment of the US Constitution, commercial speech is only partially covered by this protection. In fact, various types of advertising may be prohibited or subject to restrictions in commercial speeches. On the contrary, in Europe, there are more specific provisions on advertising, such as the Directive on Unfair Commercial Practices or the Directive on Misleading Commercial Practices.

In the US, adverts must be truthful, not misleading, and when appropriate, backed by strong scientific evidence, which does not significantly differ from Europe's restrictions on claims. For instance, by claiming that a breakfast of Frosted Mini-Wheats cereal is clinically shown to improve children's attentiveness by nearly 20 percent, Kellogg's advertising was found false and misleading since according to the clinical study referred to, only about half the children who ate these cereals for breakfast showed any improvement in attentiveness, and only about one in nine improved by 20 percent or more.

The US concept of misleading or deceptive speech is very close to the EU one: the context of advertisement as a whole should not create, in a significant portion of the intended audience a mistaken understanding or impression. The material implication suggests that the deceptive aspect would likely motivate the advert's audience to purchase the advertised item or not purchase a competitive item and/or to recommend an item to a customer.

The fact that the advert was literally true or was not intended to be deceptive would be completely irrelevant. The ad may also be considered to be deceptive if it omits material facts. For instance, if the advertisement claims that a KFC chicken has less overall fat than a Burger King Whopper and does not specify that KFC chicken has about the same saturated fat content, a significantly higher content of trans fats, cholesterol, sodium and calories, such an advertisement would be seen as deceptive.

The advertising shall obviously not be false, either literally, that is by necessary implication, or as a result lack of substantiation.

However, the US so-called 'puffery' exception limits the prohibition of false advertising. which means that an exaggerated or absurd, highly subjective, vague or unverifiable assertion that the audience would not reasonably rely on to make a decision would not be prohibited.

"A claim of having "better ingredients" would not be exempted if it implies that rival products are of lower quality and thus causing damage to a competitor". In practical terms, it would mean that puffery that is often over-the-top exaggeration, like when it is claimed that the product has the best ingredients would be covered by the exemption.

However, a claim of having "better ingredients" would not be exempted if it implies that rival products are of lower quality and thus causing damage to a competitor. The latter would be a comparative claim, since it directly or indirectly identifies competing products or services in a superiority claim and to be allowed, it would need to be substantiated.

For instance, in case law *Pizza Hut, Inc. v. Papa John's*, United States Court of Appeals for the Fifth Circuit ruled that the slogan "Better Ingredients. Better Pizza" standing alone did not constitute a false or misleading statement. However, the same slogan, when appearing in the context of some comparative advertising, specifically the sauce and dough campaigns, was given objectifiable meaning and thus became misleading and actionable. The EU requirements in this respect follow the same logic.

Finally, in the US, the Federal Trade Commission (FTC) is the federal authority in charge of advertising regulation. When there is a violation of advertising requirements, a typical sanction would be to order the advertiser to stop its illegal acts, or to order the disclosure of additional information to avoid possible deception. To conclude it all, in both continents, companies may challenge competitors making false or deceptive advertising, to obtain damages.

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