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## Recent Developments in the Law of Comparative Advertising in Italy – Towards an Effective Enforcement of the Principles of Directive 97/55/EC Under the New Regime?

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*Irene Calboli\**

## Recent Developments in the Law of Comparative Advertising in Italy – Towards an Effective Enforcement of the Principles of Directive 97/55/EC Under the New Regime?

### *1. Introduction*

On 25 February 2000 the Italian Government adopted Legislative Decree No. 67, enacting Directive 97/55/EC amending Directive 84/450/EEC on misleading advertising, so as to include comparative advertising. According to the new law, whose provisions literally follow the wording of Directive 97/55/EC, comparative advertising is lawful whenever it satisfies established conditions, and “objectively compares material, relevant, verifiable and representative features of goods and services, meeting the same needs or intended for the same purposes”.

Contrary to what one might have expected in a country which has traditionally banned comparison in advertisements, Italy was one of the first among the Member States to implement Directive 97/55/EC. As has been pointed out by those who favour the use of comparative references, this may create a new competitive pattern by permitting communicative dynamics so far “unknown” in the market. Possibly, it will also intensify the use of comparative advertisements between competitors and eventually assist customers in their buying choices.

In order to ensure consistent enforcement practices, the adoption of the new law must be followed by a profound change in the way both Italian case law and Italian legal literature have evaluated this issue in the past. The question which this study addresses is: can comparative advertising, whenever it is truthful and fair, be finally declared admissible under Italian law according to the provisions of Legislative Decree 67/2000 – that is to say: will the criterion that has distinguished the issue in the past, according to which comparative advertising inevitably appeared to discredit competitors, continue to undermine, in practice, its declared principle of lawfulness?

In the following, I will first give a description of the traditional approach to the issue under Italian law. Next, I will examine the way in which the Italian Government implemented Directive 97/55/EC. For this purpose, I will focus on the analysis of the conditions for lawfulness in comparative advertising under the new regime and on the heated debate against the choice of the Italian Government to appoint the Italian Competition Authority as the

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body required to enforce the new provisions. Finally, I will briefly refer to the first decisions adopted under the new law in order to draw some conclusions as to whether consistent enforcement practices will now be possible in Italy. Considering the traditional importance of the Italian self-regulatory system, I will also refer, whenever necessary, to the relevant provisions of the Italian Code of Self-Regulation.

## 2. *The Issue of Lawfulness of Comparative Advertising Under Italian Law*

The admissibility of comparative advertising in a juridical system results from the choice made by the legislature between protecting competitors' interests and safeguarding consumers' interests in information.<sup>1</sup> Manufacturers have always avoided encouraging the use of this technique as it is an aggressive way to attack and cause damage to competitors on the market. On the basis of the experience of other countries, such as the United States and the United Kingdom (where criticism towards competitors was permitted, while it remained unacceptable to fake circumstances and events), the theories on consumer protection have repeatedly proved that advertising that shows the characteristics of each product, when compared to other similar products available on the market, can increase market transparency and consumers' knowledge of the market itself.<sup>2</sup>

Comparative advertising could represent, however, a misleading kind of advertisement whenever it is based on false elements. Consequently, a real evaluation of its lawfulness can only be carried out when the advertising is considered true. Indeed, if such a comparison happens to be based on misleading elements, the message is necessarily unlawful, both because it constitutes an act contrary to honest practices in competition and because of the deception caused to consumers, who are negatively influenced in their buying choices.<sup>3</sup> Therefore, both Italian legal literature and Italian case law focused on the identification, whether unlawful or not, of truthful compara-

1 The literature on the topic is considerable. Cf. SCIRÈ, "La concorrenza sleale nella giurisprudenza" 342 (2nd ed., Vol. III, Milan, Giuffrè, 1989); SPOLIDORO, "Réclame comparative: una sentenza del tribunale di Milano", case note to Milan District Court, 16 September 1982, 1983 *Resp.civ.prev.* 804; SILVETTI, "Pubblicità comparativa e provvedimenti d'urgenza", 1982 *Temi* 246; FUSI, "Sul problema della pubblicità comparativa", 1980 *Riv.dir.ind.* I, 105; *Idem*, "La comunicazione pubblicitaria nei suoi aspetti giuridici" 87 (Milan, Giuffrè, 1970); GHIDINI, "Introduzione allo studio della pubblicità commerciale" 144 (Milan, Giuffrè, 1968); PESCE, "Pubblicità superlativa e limiti dell'exceptio veritatis", 1967 *Foro pad.* I, 131; FRANCESCHELLI, "Notizie ed apprezzamenti notori, pubblicità redazionale e concorrenza sleale", 1964 *Riv.dir.ind.* II, 24.

2 Cf. M. BRICOLA, "Comparazione pubblicitaria e suggestione: il caso Italia e l'esperienza nel diritto anglosassone", case note to *Giuri*, 18 May 1993, 1994 *Dir.informaz.informatica* 352.

3 Cf. PICCININO-SIMONI, "Pubblicità comparativa ingannevole", 1996 *Rass.dir.tecnica alimentaz.* 505; GRILLO, "Pubblicità comparativa ed aggettivazioni ingannevoli", 1992 *Rass. dir. tecnica alimentaz.* 253.

tive advertising, which was considered as an exception to the generally discreditable nature of commercial comparison.<sup>4</sup>

In Italy, as in the majority of civil law countries, due to the lack of appropriate law, the issue of lawfulness of comparative advertising has traditionally been evaluated in relation to the law of unfair competition.<sup>5</sup> Historically, this evaluation went through various phases. Under the Italian Commercial Code 1865, which did not provide specific rules on unfair competition, any criticism directed at a competitor was considered lawful as long as it was based upon true facts.<sup>6</sup> This changed dramatically in 1942, after the Italian Civil Code became effective. The new principle set down in Art. 2598, No. 2, according to which the diffusion of "indications and allegations on the product and activities of a competitor of such nature as to involve their discredit" constitutes an act of unfair competition, blurred, at least in principle, any distinction between true or false information by always considering them unlawful.<sup>7</sup> The comparison's "intrinsic tendentiousness", a statement semantically ambiguous in itself, became the milestone for the general prohibition of comparative advertising. The attempt to stress the contrast to the provision of Art. 10<sup>bis</sup> of the Paris Convention, which as is generally known limits any unlawfulness to "*allégations fausses*", did not modify this interpretation.<sup>8</sup>

4 Cf. BALLARINI, "Comparazione denigratoria", case note to *Giuri*, 16 July 1993, 1994 *Dir. ind.* 180; NARDULLI, "Pubblicità comparativa veritiera e denigrazione: una incisiva applicazione della tutela d'urgenza", case note to Rome County Court, 28 November 1985, 1987 *Giur. merito* 664.

5 Cf. MELI, "La pubblicità comparativa tra vecchia e nuova disciplina", 1999 *Giur. comm.* I, 267.

6 Cf. AULETTA, "Giudizio sul prodotto altrui - Critica scientifica - Legittima difesa", 1948 *Foro it.* I, 508, case note to Supreme Court, 17 December 1947, No. 1698. For a detailed analysis, FLORIDIA, "Denigrazione commerciale ed exceptio veritatis: evoluzione di un istituto", 1970 *Riv. soc.* 122.

7 The unfairness of comparison has generally been assessed on the basis of two different elements: the competitor's identification and the potential of the allegations to discredit him. This principle has been constantly confirmed by Italian courts, e.g. Milan Court of Appeal, 26 November 1974, 1974 *G. A. D. I.* 1307; Milan Court of Appeal, 30 May 1972, 1972 *G. A. D. I.* 854; Milan District Court, 16 October 1972, 1972 *G. A. D. I.* 1370. Cf. TAVANI, "Pubblicità comparativa e disciplina codicistica", case note to Rome District Court, 11 July 1996, 1997 *Giust. civ.* I, 2011; MARTINI, "Rivendicazione di leadership e pubblicità comparativa", case note to Milan Court of Appeal, 16 March 1994, 1995 *Dir. ind.* 400; PERLETTI, "Pubblicità comparativa e denigrazione commerciale", case note to Milan Court of Appeal, 5 October 1993, 1994 *Dir. ind.* 373; ASCARELLI, "Teoria della concorrenza e dei beni immateriali" 241 (3rd ed., Milan, Giuffrè, 1960). For a general overview, FUSI, "Sul problema della pubblicità comparativa", 1980 *Riv. dir. ind.* I, 108.

8 Cf. AULETTA, *supra* note 6, at 506; ROTONDI, "Diritto industriale" 509 (5th ed., Padua, Cedam, 1955). On the non-binding nature of the Paris Convention's provision see AUTERI, "La concorrenza sleale", in: RESCIGNO (ed.), "Trattato di diritto privato" 383 (Padua, Cedam, 1983). On the conflict between the interpretation of Art. 10<sup>bis</sup> of the Paris Convention and Art. 2598 of the Italian Civil Code, see FLORIDIA, *supra* note 6, at 133. For an overview of European systems, VALCADA, "La pubblicità comparativa: dalla varietà dei sistemi nazionali a una disciplina comunitaria", 1997 *Dir. comun. e scambi internaz.* 769.

This position changed in the 1970s. Following a new cultural wave, questions were raised in part of the legal literature about the political grounds of unlawfulness in comparative advertisement.<sup>9</sup> The nature of the interests protected by unfair competition law started to be queried, and the interest in any safeguard proposal, whose inspiration was not necessarily corporate, became more and more apparent.<sup>10</sup> In this context, the ban on comparisons appeared to be a sign of the permanent attention paid to companies' interests rather than to those of consumers. A decisive role was also played by the valorisation of the constitutional principles on commercial activity according to Art. 41 of the Italian Constitution.

In the following years, the debate on the issue slowly lost importance, mainly because of the stabilising approach of Italian case law, which comprehensively banned comparison in advertisements. The controversy also lessened due to the "braking" action of the Italian self-regulatory system, which offered a compromise. While direct comparative advertisements were always prohibited, even when truthful, Art. 15 of the Code of Self-Regulation permitted indirect comparison "whenever this is useful to illustrate technical or economic advantages and characteristics of advertised goods and services which are truly relevant and verifiable". According to this provision, the lawfulness of indirect comparative advertising was extended beyond the "necessary comparison" or the "legitimate defence" accepted by Italian legal literature and Italian case law.<sup>11</sup>

The debate was rekindled in the late 1990s following the adoption of Directive 97/55/EC.<sup>12</sup> This resulted, on May 18, 1999, in the amendment of Art. 15 of the Code of Self-Regulation in order to extend the use of comparative advertising also to its direct form. In line with the wording of the Directive, the new version of the provision states that comparative references must be considered lawful whenever they "objectively compare material, relevant, verifiable and representative features of goods and services, meeting the same needs or intended for the same purposes", and are "fair, not misleading, do not create confusion, nor discredit or denigrate other prod-

9 Cf. AUTERI, *supra* note 8, at 387.

10 Cf. MENESINI, "La denigrazione. Un contributo alla teoria della concorrenza sleale" 73 (Milan, Giuffrè, 1970); SANTAGATA, "Concorrenza sleale e interessi protetti" 5 (Naples, Jovene, 1975). Critically, JAEGER, "Pubblicità e 'principio di verità'", 1971 Riv.dir.ind. I, 331, 347. For further analysis, CAFAGGI, "Pubblicità commerciale", in: "Digesto delle discipline privatistiche. Sezione commerciale" 492 *et seq.* (XI, Turin, Utet, 1995).

11 For a general overview, UBERTAZZI, "Giurisprudenza pubblicitaria", (Milan, Giuffrè, 1988-1999); ROSSOTTO, "La pubblicità comparativa davanti al Giuri", 1992 Foro pad. I, 289; MAMMONE, "L'autodisciplina pubblicitaria. La pubblicità comparativa", in: CORASANNITI-VASSALLI (ed.), "Il diritto della comunicazione pubblicitaria" 90 (Giappichelli, Turin, 1999).

12 As is generally known, the adoption of Directive 97/55/EC represented the second phase of the process of harmonisation which had started with the issue of Directive 84/450/EEC on misleading advertising.

ucts or services or take unjustified advantage of other products' notoriety". As may be expected, the impact of the new provision on the traditional approach towards the issue has been of utmost importance. From a legal standpoint, with no express legal ban provided by the national juridical system – the comprehensive prohibition of the issue arising merely from the "negative" interpretation adopted by Italian courts – the amendment of the Italian Code of Self-Regulation allowed competitors to use direct comparative advertisements with immediate effect.

Following the new change in attitude, supported by the national self-regulatory system, and in order to avoid inconsistency as to the substance of the issue, the lawfulness of comparative advertising in its direct and indirect form was eventually codified in the Italian juridical system through the adoption, on February 25, 2000, of Legislative Decree No. 67/2000, which has implemented Directive 97/55/EC into national law.

### 2.1. The Historical Debate on the "Intrinsically Tendentious" Nature of Comparative Advertising

In the debate over the lawfulness of comparative advertising as an act of competition, the juxtaposition between companies' and consumers' interests appears clear.<sup>13</sup> The repression of comparative advertising represents an expression of the prevalence of corporate interests. It also reflects the unwillingness to recognise the needs of the market. This can be shown in several ways: by the traditional set of laws, by self-regulatory provisions and their application, and especially by the strong opposition of enterprises' associations on any occasion they had to express their opinions about any proposal or plan concerning liberalisation.<sup>14</sup>

The legal literature which appeared to dominate in Italy, where historically the competitors' interests have been given greater consideration and consumers' interests have not been directly protected by Italian competition law, repeatedly stated that those acts "which determine the competitor's discredit" are to be considered denigratory "even though they contain truthful information".<sup>15</sup> Otherwise, "the entrepreneur whose judgement conceals a personal interest" would take the place of "the public in expressing those judgements that this latter should be able to make". Accordingly, because of its "intrinsically tendentious" nature, comparisons were considered as representing a threat to the freedom of economic choice granted by Art. 41(2) of the Italian Constitution, no matter how true they were. According to this position,

13 Cf. MARABINI, "Note sulla pubblicità comparativa", case note to Perugia Court of Appeal, 24 January 1994, 1994 *Rass.giur.umbra* 575; BERTI ARNOALDI, "Sulla pubblicità comparativa", case note to *Giuri*, 18 May 1993, 1994 *Riv.dir.ind.* II, 44; CASUCCI, "Osservazioni in tema di pubblicità comparativa", case note to Perugia Court of Appeal, 20 October 1990, 1991 *Riv.dir.ind.* II, 202; FLORIDIA, "Comparazione e informazione", 1985 *Riv.dir.ind.* I, 32.

14 Cf. MELI, *supra* note 5, at 270.

15 Cf. ASCARELLI, *supra* note 7, at 239.

comparative reference used by competitors offered to the public a unilateral and distorted image of the evaluation data, to the complete advantage of the advertised product.<sup>16</sup> As such, any comparative reference became a mere appreciation based on partial comparative elements, failing to be complete and unbiased.<sup>17</sup>

As exceptions to this rule, comparative advertising has generally been admitted whenever the appraisal of the other product was justified by: the attack coming from the competitor; the need to describe one's own products from the technical point of view; the necessity to clarify any misunderstanding amongst the public and, therefore, to answer queries coming from consumers and clients. Under those circumstances the denigratory attitude became "discriminated" by the need for "legitimate defence" according to Art. 2044 of the Italian Civil Code.<sup>18</sup>

Such a dominating setting was widely criticised by the advocates of consumer protection theories, which affirmed that the definition of acts contrary to honest practices in competition as per Art. 2598 of the Italian Civil Code applied exclusively to those allegations that have proven to be false. Whenever "it is a matter of making unbiased statements where, in order to show the quality and the abilities of one's own product, one happens to refer, in an honest and unbiased way, to the same kind of qualities which can be found in one similar product of a competitor",<sup>19</sup> it would then be possible to affirm the lawfulness of such behaviour. From this perspective, the use of advertising, even in a persuasive way in order to be effective, did not prevent the possibility of a correct and unbiased comparison. Indeed, when it is based on truthful observations, comparative advertising appears to meet the interests of the public, firstly because it helps to acquire a better knowledge of the market, thus enabling the customer to choose the most convenient product amongst similar ones, and secondly because it responds to that function of market transparency on which Art. 41 of the Italian Constitution is based.

It is on the basis of such considerations that the provisions introduced by Legislative Decree No. 67/2000 should be interpreted. The market transparency and social utility that comparative advertising could bring to both consumers and competition reflect the intent of the new Italian law, so that a real modification of the traditional approach to the issue can be made. As will be stressed in due course, contrary to what might have been feared, this

16 Supreme Court, 6 July 1966, No. 1733, 1962 Giust.civ. I, 1412; Milan Court of Appeal, 24 May 1960, 1961 Mon.trib. 110; Milan District Court, 21 September 1959, 1960 Foro pad. I, 489.

17 Cf. GHIDINI, "Note sulla réclame comparativa in Germania e nei paesi anglosassoni", 1966 Riv.dir.civ.II, 406.

18 Cf. MANTOVANI, "Le 'scriminanti' nella qualificazione dei comportamenti concorrenziali", 1978 Riv.trim.dir.proc.civ. 1085.

19 Cf. ROTONDI, *supra* note 8, at 509. Generally, on the positive aspects of comparative advertising, KAUFMANN, "Passing Off and Misappropriation" 31 (Vol. 9, IIC Studies, Weinheim, VCH, 1986).

seems to be the approach currently adopted by the Italian Competition Authority as the body charged with the supervision of the issue.

## 2.2. The Traditional Approach of Italian Case Law

Unlike the main legal literature, Italian case law apparently affirmed the lawfulness of comparative advertising provided that it was not "deceitful" or "tendentious". In particular, according to Italian case law, comparative advertising could be considered compatible with honest practices in competition, whenever it was truthful or verifiable and provided that it was expressed in an unbiased way, so as not to discredit competitors in the market.<sup>20</sup>

However, this general but abstract principle of lawfulness has traditionally been proved wrong by the events on which such lawfulness happened to be based. The admissibility of "true" allegations was generally rejected on the assumption that any kind of comparison was to be considered as having an impending "tendentious" quality and therefore to constitute a denigratory expression against competitors.<sup>21</sup> Considering that the lawful appraisal of one's own product "becomes unlawful when expressed through allusions or comparative references, whether implicit or explicit, in the devaluation and in the discredit of the activities or products of a competitor",<sup>22</sup> superfluous expressions and expressions *obiter dictum*<sup>23</sup> were also generally considered unlawful.

Comparative advertising was exceptionally admitted by Italian courts exclusively "when based on unbiased data", in relation to the need to "express the qualities of one's own product".<sup>24</sup> As stated in the legal literature, the law-

20 This principle was settled by the Italian Supreme Court, 3 May 1957, No. 1496, 1962 Riv.dir.ind. II, 262, and then repeatedly confirmed by Italian courts. E.g., Supreme Court, 29 May 1978, No. 2692, 1978 1 Giur.it. I, 2297; Supreme Court, 28 January 1970, No. 172, 1970 Riv.dir.comm. II,183; Supreme Court, 30 April 1969, No. 1397, 1969 Foro it.Rep. No. 63; Supreme Court, 10 August 1966, No. 2172, 1967 1 Giur.it. I, 173; Supreme Court, 15 July 1965, No. 1535, 1967 1 Giur.it I, 37; Supreme Court, 13 June 1962, No. 1477, 1964 Riv.dir.ind. II, 24; Milan Court of Appeal, 26 November 1974, 1974 G.A.D.I. 1307; Milan Court of Appeal, 12 May 1967, 1967 Rass.propr.ind. 190; Milan District Court, 16 September 1982, 1983 G.A.D.I. 286; Milan District Court, 3 April 1969, 1970 2 Giur. it. I, 432.

21 This was confirmed by the Italian Supreme Court, 27 June 1975, No. 2518, 1975 G.A.D.I. 78; 12 February 1973, No. 413, 1973 G.A.D.I. 42; 28 January 1970, No. 172, 1970 1 Giur.it. I, 857. See also Florence Court of Appeal, 22 June 1983, 1984 Arch.civ. 1325; Milan Court of Appeal, 15 March 1974, 1974 G.A.D.I. 478.

22 Supreme Court, 10 August 1966, No. 2172, 1968 1 Giur.it. I, 173.

23 Supreme Court, 15 July 1965, No. 1535, 1966 Foro it. I, 724. In Milan District Court, 23 September 1974, 1974 G.A.D.I. 1101 the court defined comparison "as unfair regardless of its malice or deceptive character". The same definition was restated by the Court of Appeal of Milan in its judgement on the same case (23 March 1976, 1976 G.A.D.I. 382).

24 Cf. SCHRICKER, "La repressione della concorrenza sleale negli Stati membri dell CEE" 216 (Vol. V, Milan, Giuffrè, 1968). Cf. Rome District Court, 27 October 1994, 1995 Foro it. I, 2596; Milan District Court, 7 January 1992, 1993 G.A.D.I. 123.

fulness of comparison was also accepted whenever it constituted a "legitimate defence" to the competitors' attack,<sup>25</sup> or a means to "highlight the unbiased superiority of one's own product" ("necessary comparison") according to Art. 41 of the Italian Constitution.<sup>26</sup>

Since the 1970s, in light of the criticism expressed towards this traditional approach,<sup>27</sup> some courts attempted to revise the traditional concept of "tendentiousness",<sup>28</sup> which had led to a comprehensive ban on all comparative advertising. In this respect, the Milan District Court stated, in the leading case *Peroni v. Prinz Bräu*, that

it seems necessary to give that "tendentiousness" a meaning which does not endanger the same finalities which order the recognised lawfulness of the truthful comparative advertising; finalities aiming at . . . enabling the entrepreneurs to offer to the customers an informative service which is complete, by means of a fair and truthful criticism.

According to the court, "that law and that doctrine, which confer to the idea of tendentiousness the meaning of influence, partiality and so on, since these characteristics are typical of any kind of advertising, should not be taken into account."<sup>29</sup> This line of reasoning was confirmed by the Turin District Court in *Biomedica v. Shiley Sales*. Here the court ruled that

the constitutional grounds of any form of competition done through "unbiased" advertising lie in that principle according to which the economic initiative is free as long as it is compatible with social utility and human safety and dignity (Art. 41 of the Italian Constitution). Therefore, competition is lawful and not denigratory even if it appears as a comparison between similar products.<sup>30</sup>

Although they represented a positive advance in the interpretation of comparative advertising, these cases remained isolated in the scenario of Italian case law. They also did not represent the attempt to revise the issue that was

- 25 On the exceptional lawfulness of comparative advertisements as "legitimate defence" *cf.* Milan Court of Appeal, 25 June 1965, 1966 2 *Giur.it.* I, 287; Milan Court of Appeal, 16 June 1959, 1959 *Riv.dir.ind.* II, 260.
- 26 The principle of "necessary comparison" was affirmed in Supreme Court, 14 March 1902, 1903 *Mon. trib.* 604 and then confirmed in Supreme Court, 17 December 1947, No. 1698, 1948 *Foro it.* I, 505. Recently, Supreme Court, 19 November 1994, No. 9827, 1994 *G.A.D.I.* 129; Rome Court of Appeal, 30 January 1995, 1995 *G.A.D.I.* 1825; Turin Court of Appeal, 28 March 1984, 1984 *Società* 1013.
- 27 In Milan District Court, 14 December 1967, 1967 *Temi* 179, the court defined an advertising campaign based on the comparison between the price list of different manufactures as "not tendentious nor contrary to honest practices in competition".
- 28 *Cf.* GHIDINI, "La tendenziosità della pubblicità comparativa", case note to Supreme Court, 10 August 1966, No. 2172, 1968 1 *Giur.it.* I, 385.
- 29 Milan District Court, 6 June 1968, 1968 II *Riv.dir.ind.* 69. *Cf.* FERRARA JR., "Sulla réclame della Prinz Bräu imperniata sullo slogan 'Sono la vera birra'", 1970 *Riv.dir.ind.* II, 331.
- 30 Turin District Court, 21 March 1983, 1983 2 *Giur. it.* I, 672. For the decision of the Turin Court of Appeal, *cf.* 28 March 1984, 1984 *Società* 1013.

originally expected. They undoubtedly criticised the previous trend, but otherwise failed to show a clear acknowledgement of the lawfulness of comparative references in their rulings. Indeed, while making some vague statements concerning "a liberalising legal policy (in the interest of consumers), they permitted comparative advertising only on the basis of its "discriminatory" content and not because it was "legal as such".

Obviously, as long as the lawfulness of comparative references was admitted as an exceptional measure, an effective and balanced evaluation of the issue was impossible. The problem of lawfulness of comparison continued to be eluded by the Italian courts. By using the technique to declare it legal in exceptional cases because of its "discriminatory content", a situation that initially appeared illegitimate was still affirmed as illegitimate a priori.<sup>31</sup> Thus, it was not surprising that Italian judges continued to consider potentially unlawful any reference that appeared to be openly comparative.<sup>32</sup> The criterion of "tendentiousness" continued to be the milestone for the comprehensive ban on the issue. The unlawfulness of comparative advertisements has since been affirmed through more sophisticated formulations, such as by referring to the "tendentiousness" of the advertisement because of its "incompleteness" or its "implicit denigratory content".<sup>33</sup>

### *3. The Implementation of Directive 97/55/EC into Italian Law – The Adoption of Legislative Decree 25 February 2000, No. 67*

Consistent with the solution adopted by the European legislature, the Italian Government implemented Directive 97/55/EC into national law by amending Legislative Decree 74/1992 on misleading advertising, which in turn enacted Directive 84/450/EEC. This provoked severe criticism in part of the Italian legal literature,<sup>34</sup> where it was argued that, although the provisions on comparative advertising, as well as those on misleading advertising, aim at protecting consumers' interests, they especially interfere with relationships among competitors. Therefore, they must be seen as an act of unfair competition. Accordingly, it would be better to implement Directive 97/55/EC through the amendment of Art. 2598 of the Italian Civil Code.

Some Law Proposals aiming at introducing the lawfulness of comparative advertising were presented in Italy even before the adoption of Directive 97/

31 Cf. Bologna Court of Appeal, 17 May 1997, 1998 *Dir. ind.* 159, commented by POLETINI, "Pubblicità comparativa: aspettando il nuovo regime."

32 Turin District Court, 24 July 1986, 1986 *G.A.D.I.* 626; Latina County Court, 27 April 1982, 1982 *Temi* 344.

33 Florence Court of Appeal, 22 June 1983, 1984 *Arch.civ.* 1323; Milan District Court, 16 September 1982 commented by SPOLIDORO, *supra* note 1, at 804.

34 Cf. MELI, *supra* note 5, at 289; AUTERI, "La pubblicità comparativa secondo la Direttiva 97/55/CE. Un primo commento", 1998 *Contratto e Impresa/Europa* 601; FLORIDIA, "Il controllo della pubblicità comparativa in Italia", 1998 *Dir.ind.* 165.

55/EC.<sup>35</sup> Despite their different political orientation, they generally agreed that “the ban on comparative advertising represents a limitation typical of entrepreneurial logic and is a form of protectionism that nowadays appears inappropriate”. They stressed that “comparative advertising, apart from being a precious instrument for consumers’ information, can also be an incentive to competitors, who will offer products that are more competitive in quality as well as in price”. They also underlined, however, that provisions on the issue should “protect not only the consumer, but also the compared goods and the enterprises in question”. Accordingly, in order to be declared lawful, “comparison should be fair, not misleading, it should not create confusion, or discredit or denigrate other products or services. It should not take unjustified advantage of other products’ notoriety”.<sup>36</sup>

As for the body appointed to supervise the issue, the above Proposal conferred competence for the assessment of comparative advertising on the Italian Competition Authority, which was already responsible for the supervision of misleading advertising. Italian legal experts and representatives of industry both immediately expressed their scepticism about this choice, which has eventually been confirmed by Legislative Decree 67/2000. They argued that the role of the Competition Authority should be limited to misleading comparative advertising and that other hypotheses, especially those endangering competitors’ interests, should be left to the jurisdiction of ordinary courts.<sup>37</sup> In order to fill a gap already acknowledged and criticised, the above Proposals also widened the intervention of the Authority by admitting it even *ex officio*.<sup>38</sup> Considering that the ordinary courts remained responsible for the aspects of the issue related to unfair competition law, these Proposals amended Art. 2598, No. 2, of the Italian Civil Code, so as to prohibit all “false or non-verifiable information on goods or activities of a competitor, of such a nature as to discredit competitors”.<sup>39</sup> Although none of the above Proposals was examined by Parliament, they have hugely influenced the final version of Legislative Decree 67/2000.

35 Cf. Law Proposals: No. 2207, 26 July 1996; No. 126, 9 May 1999; No. 393, 9 May 1996; No. 359, 26 April 1994; No. 1092; No. 2388, 11 March 1993. For comments, CARRASSI, “Le proposte di legge sulla pubblicità comparativa”, 2 *Econ. dir. del terziario* 911 (1995).

36 Article 3 of Law Proposal No. 2007; Art. 2 of Law Proposal No. 126; Art. 3 of Law Proposal No. 393; Art. 3 of Law Proposal No. 359; Art. 2 of Law Proposal No. 1092.

37 Cf. MELI, *supra* note 5, at 289; AUTERI, *supra* note 34, at 601; FLORIDIA, *supra* note 34, at 165. Also AUTORITÀ GARANTE DELLA CONCORRENZA E DEL MERCATO (Italian Competition Authority), “Relazione annuale per il 1998” (annual report) 253 (Rome 1999).

38 Cf. MELI, “La repressione della pubblicità ingannevole” 66 (Turin, Giappichelli, 1994); CAFAGGI, “Commentario al Decreto Legislativo 25 gennaio 1992, n. 74”, 1993 *Le nuove leggi civili comm.* 710.

39 Article 4 of Law Proposal No. 2007; Art. 3 of Law Proposal No. 126; Art. 3 of Law Proposal No. 1092.

In line with the Law of 5 February 1999, No. 25,<sup>40</sup> which delegated the Italian Government to implement Directive 97/55/EC, Legislative Decree 25 February 2000, No. 67, which amends Legislative Decree 25 January 1992, No. 74, and whose purpose is to "lay down the conditions under which comparative advertising is permitted", was eventually adopted.

According to the definition set by the Directive, Art. 2 of the Decree defines comparative advertising as "any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor". Article 3<sup>bis</sup>, which repeats the exact wording of Art. 1(1) and (2) of the Directive, establishes the conditions for lawfulness of the issue. Among these conditions, the provision set a new criterion that refers to the "objectivity" of the comparison. Interpretation of this criterion may easily produce ambiguous results. If it is considered that advertising represents an instrument aiming at convincing consumers, therefore being rarely "objective" and mostly "tendentious", such a criterion can easily create those interpretative difficulties that have distinguished Italian case law, thus undermining, or at least making difficult, the principle of lawfulness stated in the Directive.<sup>41</sup> Clearly aware of the problems which may arise from an excessively strict interpretation of the provision, the Italian Competition Authority has repeatedly stressed in its first rulings that the high communicative appeal, which characterises advertising itself, does not represent a sufficient ground to deny per se the legitimacy of comparative references.

Article 7(1) of Legislative Decree 74/1992, as amended by Legislative Decree 67/2000, confers on the Italian Competition Authority the power to enforce the new rules. Following a request of "competitors, consumers, their organisations and associations, the Ministry of Industry, and any other government or agency which is an interested party by virtue of their duties, also on the basis of complaint from the public", the Authority can prohibit the release and continuation of unlawful comparison, and eliminate its effects by taking relevant measures, such as ordering the publication of the definitive ruling or of a corrective statement. In urgent case, the Authority can also issue reasoned orders to suspend provisionally comparative advertisements that are deemed to be unlawful.<sup>42</sup> The new law does not confer to the Authority, however, the possibility to act *ex officio*. Thus, as it has been pointed out in the legal literature, the system set by the new regime is still far from being the awaited overall reform of the system and remains, rather, a random control device based on consumers' tendencies and, unfortunately, competitors' fighting.<sup>43</sup>

40 The "Community Law 1998", Italian Official Journal, 12 February 1999, No. 35, Suppl. Ord. No. 33.

41 Cf. VAHRENWALD, "The advertising law of the European Union", 1996 E.I.P.R. 284; KUR, "Die vergleichende Werbung in Europa: Kurz vor dem Pyrrhus-Sieg?", in: "Vennebog Til Mogens Koktvedgaard" 436 (Nerenius & Santerus, 1993).

42 For a general overview, cf. AUTORITÀ GARANTE DELLA CONCORRENZA E DEL MERCATO, "Relazione annuale" (Rome 1992-1998).

43 Cf. MELI, *supra* note 38, at 4.

When advertisements are or will be disseminated through periodicals or daily newspapers, radio or television or by any telecommunications medium, Art. 7(5) provides that, before issuing any measure, "the Authority shall seek the opinion of the Media Regulatory Authority", such advice being however (and fortunately) not binding on the Authority's decision.<sup>44</sup> Even though the two authorities have shown substantial agreement on their views on the law to be applied to misleading advertising, this has not always been the case with regard to the assessment of comparative advertising. Indeed, while the Competition Authority's approach seems to be characterised by the willingness consistently to apply the principles of Directive 97/55/EC, the Media Regulatory Authority's opinions have sometimes proved to be still anchored in the past, thus confirming that conflict in interpreting the new provisions may still arise.<sup>45</sup>

Definitive rulings issued by the Authority can be exclusively appealed to the Administrative Court (T.A.R., Lazio).<sup>46</sup> As for the aspects of the issue related to unfair competition law, Art. 7(13) provides that "the ordinary courts of law shall at all times retain jurisdiction over matters of unfair competition pursuant to Art. 2598 of the Civil Code". Unlike what had been stated in the previous Law Proposals, the Draft does not amend the text of Art. 2598 of the Italian Civil Code so as to include the conditions of lawfulness of comparative advertising as per the Directive.<sup>47</sup> Once again, diverging criteria for the evaluation of the issue could possibly jeopardise the ultimate goal of consistent interpretation as foreseen by Directive 97/55/EC.

In line with the 17th Recital of the Directive, and considering the substantial concurrence of the interests protected by national law and the self-regulatory system, Art. 8(1) also states that "the interested parties may request the prohibition of continued comparative advertising deemed to be unlawful" by appealing to the self-regulatory voluntary bodies established for the purpose. In particular, "once a case has been filed with a self-regulatory body, the parties may agree not to apply to the Authority until a final decision has been issued". In those cases where a complaint has already been filed with the Authority, "all the interested parties may request the Authority to suspend its proceeding until the self-regulatory body has issued its ruling". Accordingly, the Authority, "having examined all these circumstances, may order the proceeding to be suspended for not more than 30 days". Although the decision

44 Cf. AUTORITÀ GARANTE DELLA CONCORRENZA E DEL MERCATO, "Relazione annuale per il 1993" 205 (Rome 1994). Cf. also PI/3050, *Interoute Telecomunicazioni Italia*, 2001 Boll. No. 3; PI/9420, *Rivista costruire stampi*, 2001 Boll. No. 15.

45 Cf. *infra* note 86.

46 Cf. MELI, *supra* note 38, at 131; GAMBINO, CIAMPI, DOTTI, GUTIERREZ, MACALUSO & SCARPELLINI, "Pubblicità ingannevole", 2 *Concorrenza e Mercato* 371 (1994); FUSI, TESTA & COTTAFANI, "La pubblicità ingannevole. Commento al D. Lg. 25 gennaio 1992, n. 74" 306 (Milan, Giuffrè, 1993).

47 Cf. Supreme Court, 15 February 1986, No. 901, 1982 *Mass. Foro it.*; Supreme Court, 5 May 1982, 1982 *Mass. Foro it.* Cf. also AUTORITÀ GARANTE DELLA CONCORRENZA E DEL MERCATO, *supra* note 44, at 205.

of the self-regulatory board is not binding on the Authority's decision, it nevertheless represents a "qualified" opinion, and the Authority will have to bear this in mind when assessing the lawfulness of the comparative message.

In summary, the structure of Legislative Decree 67/2000 appears quite simple. It maintains the provision applying to misleading advertising and, following the exact wording of Directive 97/55/EC, simply adds the words "and comparative advertising" to the previous provisions. It also introduces Art. 3<sup>bis</sup> which contains the conditions of lawfulness of the issue in the original text of Legislative Decree 74/1992. Nonetheless, the problems in interpretation arising from this legislative measure may not be as simple, especially in consideration of the traditional dislike in Italian case law of comparative references, particularly in their direct form.

### 3.1. Conditions for Lawfulness Under the New Regime

Conditions for lawfulness of comparative advertisements are set down in Art. 3<sup>bis</sup> of Legislative Decree 74/1992, as amended by Legislative Decree 67/2000. Such terms, which represent the exact transposition into national law of the provisions of Directive 97/55/EC, which in turn derived from the lobbying that accompanied its adoption, clearly seem to confirm the prevailing trend in civil law countries. Comparative advertising is admitted within strict limits only, the most important innovation being the lawfulness of direct comparison.<sup>48</sup>

As for the conditions stipulated in the provision, Art. 3<sup>bis</sup>(a) states that comparison shall not, first of all, be "misleading as defined by the Decree". Comparative reference shall not "in any way whatsoever, including its presentation, mislead or be likely to mislead any natural or legal person to which it is directed or which it reaches, and be capable of adversely affecting their economic behaviour". This condition, which focuses on the protection of consumers,<sup>49</sup> raises the question of the standard for the evaluation of misleading comparative advertising.<sup>50</sup> If it is considered that Directive 84/450/EEC on misleading advertising allows Member States "to retain or adopt provisions with a view to ensuring more extensive protection" the approximation of laws as in Directive 97/55/EC could be jeopardised by the different ways in which Member States can assess such misleading nature. This could eventually reflect divergent standards in admitting comparative advertising, even though Art. 1(9)(2) of Directive 97/55/EC expressly denies such freedom to Member States. Accordingly, criteria for the evaluation of the misleading nature of comparative references should rather be drawn from the Directive and cannot be extended by Member States.<sup>51</sup>

48 Cf. recitals 11 and 18 and Art. 1(9) of Directive 97/55/EC.

49 Cf. CAFAGGI, *supra* note 10, at 493.

50 VALCADA, *supra* note 8, at 800.

51 In Italy, the Competition Authority has often evaluated the misleading nature of comparative advertisements. E.g., PI/2486, *Iaber caldaie Beretta*, 1999 Boll. No. 26; PI/2122, (Contd. on page 428)

Article 3<sup>bis</sup>(b) limits the sphere of comparative advertising to “goods or services meeting the same needs or intended for the same purpose”. Following the 9th recital of the Directive, this condition aims at preventing comparative advertising from “being used in an anti-competitive and unfair manner”. The rule, in the interest of consumers and eventually also market transparency, is intended to allow only the kind of comparison that enables consumers to choose between similar products by prohibiting any unnecessary reference to other products or other enterprises’ activities.<sup>52</sup>

According to Art. 3<sup>bis</sup>(c) comparative advertising is admissible only when it “objectively compares one or more material, relevant, verifiable and representative features of those goods or services, which may include price”. If this condition bases lawfulness on a neutral enumeration of all advantages and disadvantages of the two products in question, as has traditionally been the case under Italian law, this would make any comparison impossible in practice.<sup>53</sup> In line with the aim of the Directive, the requisite “objectivity” must instead be based on the true nature of the data used for the comparison in question, as long as they appear “verifiable and not only as a suggestion about the nature of the product itself.”<sup>54</sup> Furthermore, since the comparison can also refer to some of the product’s features (“one or more features”), and not the product as a whole, the declaration of lawfulness and the use of comparative advertising appear to be strongly encouraged. Some doubts may arise, however, from the concept of “objectivity”, which as noted before, due to its intrinsically ambiguous nature, could lead to a strict interpretation of the issue and eventually bring about a comprehensive ban, as has happened in the past.

The ban on creating confusion in the marketplace by using comparative advertising, as stated in Art. 3<sup>bis</sup>(d), responds to a principle generally applied in unfair competition law, and which is included in the ban on misleading advertising.<sup>55</sup> According to the provision, comparison shall not “create confusion in the marketplace between the advertiser and competitors, or between their respective trademark, trade names or distinctive signs, or be-

(Contd. from page 427)

*Zucchetti*, 1998 Boll. No. 52; *PI/1986. Tim costa meno*, 1998 Boll. No. 39; *PI/1613, Frutta Viva Zuegg*, 1998 Boll. No. 6; *PI/1524, AEM-Corriere della Sera*, 1998 Boll. No. 3; *PI/1489, Steam Gun-Multivapor*, 1997 Boll. No. 4; *PI/770, Omnitel Pronto Italia*, 1996 Boll. No. 19; *PI/558, Skipper Zuegg*, 1996 Boll. No. 6; *PI/2252, Antifurto Bullock*, 1995 Boll. No. 17.

52 Cf. LIBERTINI, “Art. 2595–2601” in: “Commentario al Codice Civile” 1543 (Turin, Utet, 1992). Also, Supreme Court, 20 May 1997, No. 4458, 1997 *Dir.ind.* 668.

53 On the difference between “informative” and “suggestive” aspects of the issue, VANZETTI, “La repressione della pubblicità menzognera”, 1964 *Riv.dir.civ.* 589.

54 Cf. SCHRICKER, “Die Bekämpfung der irreführenden Werbung in den Mitgliedstaaten der EG”, 1990 *GRUR Int.* 113.

55 Cf. the decisions of the Italian Competition Authority in the cases *PI/1355, Onoranze funebri Liuzzi*, 1997 Boll. No. 21; *PI/794, Toni Ponzi*, 1996 Boll. No. 21; *PI/812 Trasmondi Antonio*, 1996 Boll. No. 48, quoted also by MELI, *supra* note 5, at 287, note 57.

tween their goods or services". By referring to another general principle under unfair competition law, Art. 3<sup>bis</sup>(e) establishes that comparative advertising does not have to "discredit or denigrate the trademark, other distinguishing marks, goods, services, activities or circumstances of a competitor". As has been confirmed by the Italian Competition Authority in its first rulings, this does not mean that any comparison that emphasises the disadvantages and the negative aspects of the competing product is prohibited. Should this be the case, any kind of comparative advertising would be forbidden. The rule, like Art. 15 of the Italian Code of Self-Regulation, only aims at excluding any appraisal of negative value, which is not justified by the characteristics of the compared products, while stressing the advantages of the product that is being advertised.

While Art. 3<sup>bis</sup>(f) does not include the designation of origin in any opportunity for comparison, Art. 3<sup>bis</sup>(g) states that comparative advertising must not take "unfair advantage of the reputation of a trademark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products". As has been pointed out, *inter alia*, by the Italian Competition Authority, this requirement does not aim at excluding the lawfulness of comparison whenever it gives an advantage to the advertiser, for this would mean a constant ban on nominal comparison. It is simply intended to ban the kind of comparative advertising that is not justified by the necessity or utility of making known the features of the product in question. Finally, Art. 3<sup>bis</sup>(h) provides that comparison is not permitted should it present "goods or services as imitations or replicas of goods or services bearing a protected trademark or trade name".<sup>56</sup>

As has been stressed in the legal literature, the limitations imposed by the new law on the use of comparative advertising appear to be tight, undoubtedly much tighter than, for example, those of the US legal system. They represent, however, a radical change towards an effective use of comparative advertisements in Italy. It will be interesting to assess to what extent the adoption of Legislative Decree 67/2000 constitutes the much awaited "turning point" in the interpretation of the issue. On the other hand, one should not forget that comparative references will still be evaluated, *inter alia* by the same courts that have constantly denied their lawfulness because of their "tendentious" nature. Where will the boundary therefore be between "discredit" and "objective allegation" according to the principles of the new regime? In order to affirm the lawfulness of comparative advertising as a feature of the Italian legal system in practice, and not merely as a theoretical hypothesis, a huge change in Italian legal culture is required. As will be emphasised in the following paragraphs, even though conflicts in interpretation are still highly likely, the first rulings by the national bodies that are required to supervise the issue seem to show, so far, a concrete advancement towards the principles set by the Directive.

<sup>56</sup> Cf. MELI, *supra* note 5, at 288.

### 3.2. The Debate on the "Supervision" of the Issue

The months preceding the adoption of Legislative Decree 67/2000 were characterised by the heated debate on determining which national bodies to appoint to supervise comparative advertising.<sup>57</sup> As previously hinted, most legal literature, backed by representatives of the industry, was clearly against conferring the supervision of comparative advertising to the Italian Competition Authority rather than to the ordinary courts. This was on the basis that, although comparative advertising aims to protect consumers' interests and, more generally, the public interest, it especially interferes with relations amongst competitors, and therefore must be seen as an act of unfair competition and thus be submitted to the ordinary courts.<sup>58</sup> In this view, conferring supervision of the issue on the Competition Authority would have the effect of moving such action away from its natural seat, the ordinary courts, to an administrative body that, because of its administrative nature, appeared difficult to trust with the correct handling of the debate and impartiality of the decision. Furthermore, it was argued, the Authority cannot even decide about compensation, but can only dispose over the publication of its ruling or of a corrective statement.<sup>59</sup>

In addition, this would duplicate the forums at which to apply for such protection. According to Art. 2598 of the Italian Civil Code, the ordinary courts would continue to be responsible for the aspects of the law relating to unfair competition. In order to avoid this duplication and the possibility that the same issue be judged in different ways, the supervision of comparative advertising should therefore be conferred exclusively on the ordinary courts. Indeed, while such duplication could be allowed in the case of misleading advertising, a jurisdictional conflict being improbable because of the different interests protected by the Authority and the ordinary courts, in the case of comparative advertising the two bodies would have to judge exactly the same issues.<sup>60</sup> This would obviously involve the risk of taking decisions opposed to and irreconcilable with one another.

According to the legal literature, the implementation of the Directive should rather be effected by the amendment of Art. 2598, No. 2, of the Italian Civil Code, so as to include the conditions of lawfulness of comparative advertis-

57 While Directive 97/55/EC did not leave any freedom to Member States about the substance of the provisions, it left national legislators free to choose the form and appropriate method by which to attain its objectives.

58 Cf. MELI, *supra* note 5, at 290; AUTERI, *supra* note 34, at 601; FLORIDIA, *supra* note 34, at 165.

59 Cf. MELI, *supra* note 5, at 290. Cf. also VANZETTI & DI CATALDO, "Manuale di diritto industriale" 118 (Milan, Giuffrè, 1996). One should not forget, however, that the Competition Authority's decisions are binding and their non-enforcement can call for criminal action as per Art. 7(9) of the Legislative Decree 74/1992, as amended.

60 Cf. MELI, *supra* note 5, at 290. Also Rome District Court, 29 September 1993, 1993 Riv. dir.ind. II, 382; Bologna County Court, 8 April 1997, 1997 Foro it. I, 3064. On the protection of consumers' interests, see also Directive 98/27/EC, 1998 OJ EC L 116.

ing as stated in the Directive.<sup>61</sup> This would not imply, as happened in the past, the exclusive protection of competitors' interests. In L. 281/98<sup>62</sup> the Italian legislature also recognised the right of consumers' associations to bring an action for unfair competition, thus modifying the approach in favour of competitors that has traditionally characterised Italian law. The Competition Authority would obviously remain responsible for any instance concerning misleading comparative advertising.<sup>63</sup>

By stressing that the new rules aim, above all, at guaranteeing the enhancement of consumers' information and stimulating the market, the Italian Competition Authority argued in turn that "a double jurisdictional system already exists and it is difficult to modify", and that such duplication would not be an obstacle to its eventual role as supervisor. Moreover, the Authority underlined its traditional role in guaranteeing the public interest in relation to advertising and especially to comparative advertising. To this end, it pointed out the rapidity of its proceedings (compared to the length of ordinary justice) and the system of co-ordination with the self-regulatory system set up by the Draft of Legislative Decree presented by the Ministry of Industry in Spring 1999. The Authority also objected that, according to the Italian system, the same body, the self-regulation board, is appointed to control both misleading and comparative advertising. Thus, the same situation would be perfectly permissible in respect of the application of the national law.

These arguments were certainly valid and the problems stressed in the legal literature were also of great importance. The Italian Competition Authority, because of its institutional nature, did not represent the most appropriate body for the application of the law on comparative advertising. Because of the length of ordinary justice and because of the latent aversion of judiciary bodies towards the issue in view of its "intrinsically tendentious" nature, even the ordinary courts did not represent a much better choice, especially when it was considered that the new law did not amend Art. 2598, No. 2, of the Italian Civil Code. If it remained true that incorrect application of the provisions on comparative advertising could call for a preliminary ruling on the interpretation of Community law as per Art. 234 (ex 177) of the EC Treaty, it was also true that the principles formed in Italian case law while applying the law of unfair competition were a burden that would be difficult to remove.

Because of the factual difference between the interests involved in comparative advertising and misleading advertising, it was argued in part of the legal literature that the choice of the Competition Authority as the body ap-

61 MELI, *supra* note 5, at 290; AUTERI, *supra* note 34, at 601; FLORIDIA, *supra* note 34, at 165.

62 AUTORITÀ GARANTE DELLA CONCORRENZA E DEL MERCATO, *supra* note 37, at 251.

63 Cf. *supra* note 51 for the decisions adopted before the entrance into force of the new regime. As for the decisions issued under the new law, see: PI/2822, *Tageszeitung Spezial*, 2000 Boll. No. 13-14; PI/2972, *Multiossigen ozono terapia*, 2000 Boll. No. 41; PI/2753, *Stampanti Hewlett Packard*, 2000 Boll. No. 23.

pointed to supervise comparative advertising should be followed by the issue of a new Regulation on the proceedings so as to reform the Regulation currently in force for proceedings against misleading advertisements.<sup>64</sup> According to the legal literature, legitimacy to bring action against comparative advertising should be limited to competitors, while consumers should continue to appeal against misleading comparative references. This could represent a way to avoid, or at least reduce, the risk arising from the above-mentioned "double jurisdictional system and, as a consequence, any conflict with the ordinary courts. This position, however, appears difficult to apply in practice. Consumers cannot always distinguish a priori misleading comparative advertising from unfair comparative references. What should then be the position of the Authority towards consumers' appeals against misleading comparative advertisements that are eventually found to be unfair and not misleading? Should it take these appeals into consideration, or dismiss them or, even, act *ex officio* against them? The answer to these questions is not simple, and may be easily contradicted by possible changes in the approach towards the issue taken by the Authority.

This being the present situation, a practical solution on the matter might rather be found in defining the duties of the Authority when it acts as the supervisory body for comparative advertising. For this purpose, the Authority could be asked to issue express guidelines on the criteria to be followed when assessing comparative references, including the opportunity to dismiss consumers' appeals against comparative advertisements that are found to be unfair but not misleading. As stressed in the legal literature, and as announced for the end of the year 2001, a new Regulation for the proceedings on misleading and comparative advertising should also follow the adoption of Legislative Decree 67/2000. In order to represent an effective tool for consistent enforcement of the new law, such interpretative instruments should not merely concern the procedural aspects of the issue, but also focus on its substantive aspects.

In spite of all legitimate doubts about an efficient enforcement of the new principles, what has been outlined seems to be the position eventually adopted by the Italian Competition Authority. During the first year of adoption of the new regime, the Authority has indeed shown its willingness to set common criteria when applying the provisions on comparative advertising. While waiting for an appropriate Regulation to be presented, the decisions issued during its first year of activity immediately indicate that the Competition Authority has made a veritable, and apparently successful, effort to follow the principles of Directive 97/55/EC consistently.

#### *4. Towards an Effective Enforcement of the New Law?*

Although the implementation of Directive 97/55/EC reached its final stage in March 2000, various elements seemed initially to justify legitimate doubts

<sup>64</sup> Adopted by the D.P.R., 10 October 1996, No. 627. Cf. MELI, *supra* note 5, at 291.

about its effective enforcement in the national legal system. What created some perplexity was, above all, the difficulty of the Italian legal world about how to interpret the issue correctly, especially with respect to direct comparison.<sup>65</sup> This emerged quite clearly from the fact that the debate carried out in the legal literature focused on which bodies should have supervision, instead of stressing the substantial aspects of the law itself.

The difficulties of the Italian legal world in accepting and understanding an issue that did not apply to civil law countries arose primarily from the approach of the legal literature to advertising functions.<sup>66</sup> The fact that today's advertising aims at influencing consumers psychologically has traditionally established a clear predominance of the persuasive function of advertising over its original informative function.<sup>67</sup> By emphasising the importance of the persuasive function, it was observed in part of the Italian legal literature that the new regime would tighten the use of the legislation on comparative advertising instead of favouring it. While stating that in Italy the opportunity to use comparative advertising, although in an indirect form, was already possible under the old regime, in such legal literature it was argued that, according to the conditions stated by the new law, comparison and suggestion are unlikely to co-exist in advertisements, and this would be an obstacle rather than an incentive to advertisers.<sup>68</sup>

Although it cannot be excluded that, on the basis of the new rules, some advertisements which were previously permitted in Italy will now be banned, this argument was based on a wrong assumption – that is, the necessity or possibility for comparison and suggestion to co-exist, when these two concepts are blatantly different from each other. Such a position corresponded, however, with the traditional idea of comparison in Italian legal literature, which identified “comparative advertising” with indirect comparative references, which, far from being based on verifiable and objective elements, used a suggestive technique by describing the advertised goods or services as being superior to the others available on the market.<sup>69</sup>

What failed to be observed in the Italian legal literature, but what the Italian Competition Authority seems instead to see clearly, is that the suggestive technique is itself incompatible with the concept of direct comparative advertising. Despite the “biased” character which qualifies the advertising

65 Cf. MELI, *supra* note 5, at 290; AUTERI, *supra* note 34, at 601; FLORIDIA, *supra* note 34, at 165.

66 On the different advertising functions, cf. FUSI, “La comunicazione pubblicitaria nei suoi aspetti giuridici” (Milan, Giuffrè, 1970); GHIDINI, *supra* note 1; ANGEHRN, “Kritik an der Werbung”, 1963 *Der Markenartikel* 226; HARRIS-SELDON, “Advertising and the public” (London 1962); WRIGHT-WARNER, “Advertising” (London 1962) (“the information given by advertisements is generally only incidental to their main purpose, which is persuasion”).

67 Cf. VANZETTI, “La repressione della pubblicità menzognera”, 1964 *Riv.dir.civ.* 589, note 12.

68 Cf. AUTERI, *supra* note 34, at 601.

69 Cf. MELI, *supra* note 5, at 290. Generally, *Giuri*, 13 July 1999, No. 214, *Polaroid Italia v. Fuji Film Italia*, 2000 *Dir.ind.* 59, commented by FLORIDIA, “La comparazione suggestiva”.

itself, the latter is instead based on “verifiable” and “objective elements”, and does not aim at influencing the consumer, at least in the traditional “suggestive” sense. It rather wants the consumer to think about the product or service in question and especially to think about the possible advantages in terms of price, quality, etc., that this product or service can provide compared to similar products or services available on the market. By affirming that a product or service is better than another, because it is cheaper, more effective, etc., such advertising gives the consumer some objective evidence that can help him to make a better choice or at least to know that, in respect to that product or service, he has “a choice”!<sup>70</sup>

The difficulties experienced by Italian legal experts in interpreting the issue were also shown by the statement that, all in all, any message which is directly comparative constitutes a kind of “boring” advertisement which will hardly be used by advertisers.<sup>71</sup> While this appeared to be wrong given the experience of common law countries, such as the United Kingdom<sup>72</sup> and the U.S.,<sup>73</sup> such an attitude clearly showed the difficulties within the national legal culture that needed to be overcome in order to achieve an effective implementation of Directive 97/55/EC.

Thus, giving the Competition Authority full supervision of comparative advertising did not seem completely wrong but appeared, instead, to be the most reasonable choice for a “fresh start” and also perhaps for consistent enforcement of the new regime. The fact that the Authority, which is characterised by an approach more in accordance with market trends, would be responsible for controlling comparative advertising could represent, and has indeed represented, the much awaited “turning point” for a rational application of Community law. So far, on the basis of the first decisions issued by the Authority, this choice has apparently proved to be the right one.

#### 4.1. The Position of the Italian Competition Authority

As previously hinted, the first year of activity of the Italian Competition Authority as the body charged with the supervision of comparative advertising has been characterised by a surprising change in attitude as to the interpretation of the issue, which has proved to be consistent with the principles set by Directive 97/55/EC. Contrary to the traditional approach adopted by

70 Cf. recitals 1 and 2 of Directive 97/55/EC.

71 Cf. MELI, *supra* note 5, at 290; AUTERI, *supra* note 34, at 601; FLORIDIA, *supra* note 34, at 165.

72 Cf. FITZGERALD, “Comparative advertising in the United Kingdom”, 1997 E.I.P.R. 709; *Idem*, “Self-regulation of comparative advertising in the United Kingdom”, 1997 Ent. Law Rev. 250; SALZMAN-ALLGROVE, “United Kingdom law on comparative advertising following the Orange case”, 1997 Ent. Law Rev. 11.

73 WILKIE-FARRIS, “Comparison advertising: problems and potential”, 1975 39 Journal of Marketing 7. E.g. the decisions on the cases: *Castrol v. Penzoi*, 1993 25 U.S.P.Q. 2nd 1666; *McNeil-PCC v. Bristol-Meyers Squibb*, 1991 19 U.S.P.Q. 2nd 1525; *Tyco Industries v. Lego Systems*, 1987 5 U.S.P.Q. 2nd 1023.

Italian courts, the Authority has indeed demonstrated a favourable, or at least objective, approach towards comparative references. According to its first rulings, the concept of intrinsic "tendentiousness" of comparison, which had led to the comprehensive ban in the past, has eventually been declared as an insufficient ground to preclude per se the lawfulness of comparative references whenever they appear to be truthful and fair.<sup>74</sup>

As for the interpretative criteria to be adopted in assessing comparative references, the Italian Competition Authority has pointed out the need to evaluate, first of all, whether or not the advertisements at issue comply with the definition provided by Art. 2 of Legislative Decree 74/1992, as amended.<sup>75</sup> Should the advertisement represent a kind of comparative advertising according to the new regime, the Authority has then focused its analysis on the conditions set by Art. 3<sup>bis</sup> of the Decree. To this end, the Authority has made it clear that, for comparative references to be admitted, the conditions for lawfulness should be cumulative and respected in their entirety.<sup>76</sup> In particular, the fact that comparative advertisements are found to be misleading, do not compare goods or services meeting the same needs or are not based on relevant and verifiable data, thus infringing one of the conditions set by Art. 3<sup>bis</sup>(a), (b) or (c), immediately denies the lawfulness of the advertising and any further analysis therefore becomes superfluous.<sup>77</sup>

In its first rulings, the Authority has especially emphasised the need that the advertisements at issue must comply with the conditions set down in Art. 3<sup>bis</sup>(c) and accordingly refer to "one or more material, relevant, verifiable and representative features" of the advertised goods or services.<sup>78</sup> On the basis of the consideration that the rationale of the provision has to be found in the need to avoid distortion of competition, which can be detrimental to competitors and have an adverse effect on consumer choices,<sup>79</sup> the Authority has repeatedly stressed that vague and generic comparisons cannot be considered lawful under the new regime. In order to assist consumers effectively in their buying choices, data used by manufactures in comparative advertisements should rather bring relevant and verifiable information while underlining differences in terms of the price, quality or features of the advertised products or services. In particular, with regard to the requirement of verifiability referred to in the provision, the Authority has underlined that

74 Cf. the decision of the Italian Competition Authority in the cases: PI/3160, *Rivista Costruire Stampi*, 2001 Boll. No. 15; PI/9143, *Tele + Abbonamenti a D +*, 2001 Boll. No. 4; PI/3050, *Interoute Telecomunicazioni Italia*, 2001 Boll. No. 3; PI/8886, *Morsettiere Conchiglia*, 2000 Boll. No. 45; *Kaercher-Pulicar*, 2000 Boll. No. 42. See also AUTORITÀ GARANTE DELLA CONCORRENZA E DEL MERCATO, "Relazione annuale per il 2000" (Rome 2001).

75 Cf. PI/3160, *Rivista Costruire Stampi*, *supra* note 74.

76 Cf. recital 11 of Directive 97/55/EC.

77 Cf. PI/9143, *Tele + Abbonamenti a D +*, *supra* note 74; PI/3050, *Interoute Telecomunicazioni Italia*, *ibid.*

78 *Ibid.*

79 Cf. recital 7 of Directive 97/55/EC.

comparisons should be declared lawful whenever, according to Art. 3<sup>bis</sup>, No. 2, "the data given to illustrate the features of the goods or services advertised could be demonstrated".<sup>80</sup>

The Authority's willingness to overcome the traditional dislike of the issue emerges quite clearly from the way it has interpreted the provision of Art. 3<sup>bis</sup>(e) of the Decree so far. In line with the position adopted by the self-regulatory board after the amendment of Art. 15 of the Code of Self-Regulation, the Authority has repeatedly affirmed that this requirement should not be interpreted so that any comparison that enhances the disadvantages of competing products or services will eventually discredit or denigrate competitors.<sup>81</sup> Should this be the case, the provision will prove to be as "useless" as the criterion of lawfulness of "no tendentious" comparison happened to be under the old regime.<sup>82</sup> According to the Authority, the rule should rather be interpreted so that comparative advertisements must be declared unlawful only when, taking into account the context of the advertising and the way in which competing products have been depicted, they appear to be disproportionate and are not justified by the characteristics or features of the compared goods or services.<sup>83</sup> Whenever they appear to be based on truthful and verifiable data, comparative references should instead be considered lawful, even if they use a "biased and sarcastic" tone when comparing products or services, since a highly communicative "appeal" is part of advertising technique itself.<sup>84</sup>

Following the above change in attitude based on a more effective market approach, the Authority has also clarified that the use of competitors' trade marks or names, while comparing goods or services in advertisements, must not be assessed as an infringement of Art. 3<sup>bis</sup>(g), even if the trade marks or names are famous or enjoy a high reputation on the market. To this end, the Authority has underlined that it is indispensable, in order to make comparative advertising effective, to identify the goods or services of competitors, making reference to their trade marks or names, since the intention is solely to distinguish between the advertised products and those of competitors and to highlight their different features.<sup>85</sup> Accordingly, the indication of the famous or well-known trade marks or names of competitors in comparative advertisements should not be seen as taking unfair advantage of the good reputation of the marks or names in question, but rather as corresponding to

80 In the cases PI/9143, *Tele + Abbonamenti a D +*, *supra* note 74, concerning cable television services, and PI/3050, *Interoute Telecomunicazioni Italia*, *ibid.*, the Authority specifically declared lawful the advertisements at issue on the ground that they were based on numerical and factual data.

81 This has been underlined by the Authority in the cases PI/8886, *Morsettiere Conchiglia*, *supra* note 74.

82 Cf. MELI, *supra* note 5, at 288.

83 Cf. cases PI/8886, *Morsettiere Conchiglia*, *supra* note 74; PI/3006, *Kaercher-Pulicar*, *ibid.*

84 Cf. case PI/9143, *Tele + Abbonamenti a D +*, *supra* note 74.

85 Cf. recitals 14 and 15 of Directive 97/55/EC.

the needs of new producers to enter the market by comparing his commercial image with that of competitors.<sup>86</sup>

In summary, contrary to what one would have expected, the rulings that the Italian Competition Authority has issued so far show a profound change in what had previously been the approach towards the issue. Comparative advertising is no longer declared unlawful per se on the basis of its "tendentious" nature, but is considered lawful as long as it complies with the conditions set by the new regime. The assessment of comparative references appears to be based on more reasonable and objective criteria, which correspond to the real needs of the market and consumers, and to the criteria provided by Directive 97/55/EC. While no decisions on comparative advertisements have recently been issued by ordinary courts, such a general advancement in attitude also seems to be confirmed by the rulings issued so far by the Italian self-regulatory board,<sup>87</sup> whose criteria in assessing comparative advertisements basically reflect those adopted by the Competition Authority. Whether the use of comparative advertisements will eventually increase in Italy because of the new rules and new attitude towards the issue will be confirmed in the next few years. As for now, as can be observed from the rulings of the Authority, the use of this technique seems to prevail in the market for services, with special emphasis on sectors such as telephone or television services, newspapers and airline fares, where the differences between products are mainly based on price differentials.

## 5. Conclusion

In conclusion, almost two years after the implementation of Directive 97/55/EC into the Italian legal system, an analysis of the decisions adopted according to the new regime seems to show, if not a veritable revolution, a concrete evolution of Italian "legal culture" towards an assessment of the lawfulness of the issue in line with the principles of the Directive. This is quite surprising for a country where both legal literature and case law, anchored in a system that favoured competitors' interests, have traditionally been characterised by a latent dislike for the phenomenon of comparison in advertising, especially in its direct form.

As has been stressed, any regime on comparative advertising should take into consideration two different kind of interest: the entrepreneurs' interest

<sup>86</sup> Cf. PI/3050, *Interoute Telecomunicazioni Italia*, supra note 74. It should however be noted that, while giving its opinion as per Art. 7(5), the Media Regulatory Authority instead declared that the advertisement at issue infringed Art. 3<sup>bis</sup>(g). As this opinion was not binding, the Competition Authority preferred to take a rather more modern approach, which appears to be consistent with an effective enforcement of the new law.

<sup>87</sup> See the decisions of the board (available on the web site <http://www.iap.it>) on cases: No. 3/2001, *Telecom Italia S. p. A. v. Tele2 Italia S. p. A.*; No. 148/2000, *Infostrada S. p. A. v. Interoute Telecomunicazioni S. p. A.*; No. 2/2000, *Birra Peroni Industriale S. p. A. v. Bavaria Italiana S. p. A.*, *Biscaldi Luigi S. r. l.*; No. 224/1999, *Italjet S. p. A. v. Cesare Rizzato S. p. A.*; No. 214/1999, *Polaroid Italia S. p. A. v. Fuji Film Italia S. p. A.*, *Onceas S. p. A.*

in comparing their products with those of competitors, and the consumers' interest in a wider knowledge of the characteristics of products available on the market. In order to protect such interests, which are different in origin but closely linked to one another, the European legislature, and in turn Legislative Decree 67/2000, has subordinated the admissibility of comparison to the fact that, apart from being neither misleading nor unfair, it is objective, based on verifiable elements and enhances characteristics which are essential, pertinent, verifiable and representative of the product. As a consequence, comparisons cannot be based exclusively on suggestive or gratuitous elements, especially when they are direct, but must give valuable information on the advertised product.

It is precisely this prevalence of the informative function, which distinguishes comparative advertising from other kinds of advertising, that Italian legal experts found difficult to accept. In particular, what they found hard to understand was that advertising that directly compares two or more products, enhancing their respective virtues, can be as effective as traditionally persuasive advertising without necessarily being either boring or useless, or, as long as it respects some conditions, of such a nature as to discredit competitors. This attitude was due to the belief that comparison seems not to comply with the content of traditional advertising and, furthermore, with the fact that it makes "the consumer think", which is feared by many Italian entrepreneurs.

Marketing experts have repeatedly stressed that comparative advertising is particularly advantageous to new enterprises that are just entering the market. The owners of famous brands seem to avoid using this technique, *inter alia* because they fear that it may leave the name or marks of competitors impressed in the consumer's mind. Another significant risk, much feared by enterprises, is that comparative advertising may generate expensive legal disputes. Indeed, the use of direct comparative advertising in Italy may be slowed down by the advertisers' fear of losing the benefits obtained through it, should they be held responsible for compensation to the attacked competitors.

However, little doubt exists that comparative advertising represents an effective advantage for both consumers and the market itself, because of the transparency and competition that it entails. Despite some legitimate doubts about effective enforcement of the new regime in Italy, such awareness seems eventually to have found some place in today's Italian legal culture. A rational use of the new provision indeed seems to be possible and, consequently, the new rules could even create the much awaited competitive arena that had originally been foreseen by the European legislature. Even though conflicts in interpretation cannot be excluded so far, the rulings of the Italian Competition Authority undoubtedly represent a remarkable advance towards effective protection of consumers' interests and the smooth running of the internal market.