

## ITALY



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<b>1. Legislation</b>	
<b>Topic:</b>	Products' Safety: stricter control.
<b>Who:</b>	Italian Government
<b>When:</b>	July 2004
<b>Where:</b>	Italy
<b>What Happened:</b>	<p>On May 21<sup>st</sup>, 2004, the EU Directive no. 2001/95 (concerning "<i>General Product Safety</i>") and amending the previous Directive no. 92/59) was been implemented in Italy through Law by Decree no. 172, dated May 21<sup>st</sup>, 2004 (in force since July 31<sup>st</sup>, 2004).</p> <p>The new provisions apply to any kind of products (except for foodstuff falling under special provisions), "<i>irrespective of the selling techniques, including distance and electronic selling</i>", and concern:</p> <p>- <u>Producers' and distributors' obligations:</u></p> <p><b>a) Producers must:</b></p> <p><b>a.1)</b> provide consumers with all the relevant information enabling them to assess and to prevent the risks inherent in a product throughout the normal - or reasonably foreseeable - period of use, where such risks are not immediately obvious without adequate warnings and to take precautions against those risks.</p> <p><b>a.2)</b> adopt measures commensurate with the characteristics of their products, enabling consumers to be informed of risks which these products might pose and to take appropriate action to avoid such risks including <u>withdrawal</u> from the market, the <u>recall</u> from consumers and the adequate and effective consumer warnings.</p> <p><b>b) Distributors must act must properly cooperate in order to ensure compliance with the applicable safety requirements; in particular, they must:</b></p> <p>b.1) not supply products which risks they know or should have presumed on the basis of the information in their possession; b.2) participate in monitoring the safety of products placed on the market by passing on to producers information on products' risks and by keeping and providing the documentation necessary for tracing the origin of products for a period of ten years from when they have been sold to the final consumers.</p> <p>- <u>Control procedures</u></p> <p>The most significant provision set by the EU Directive is the introduction of the Community Rapid Information System (RAPEX) among Member States, aimed at granting a rapid exchange of information in case of products with serious risks marketed in the Community, in compliance with the guidelines set by the Annex II of the Directive.</p>

	<p>According to the RAPEX any action or initiative adopted by a Member State to prevent, restrict or impose specific conditions on the possible marketing or use within its territory of products by reason of a serious risk, shall be notified to the Commission.</p> <p>The implementing Italian law states that Local Public Administrations jointly with the Departments for Production, Health, Labour and Social Policy, Interior, Economics and Finances are competent on supervising and controlling of the safety of products placed on the market. Their activities are coordinated with those of the others Member States through the RAPEX system.</p> <p style="text-align: center;"><u>Sanctions</u></p> <p>Producers placing on the market dangerous product shall be punished, if the case does not result in a more serious crime, by imprisonment up to a year and with a fine ranging up from Euro 10.000 to Euro 50.000.</p> <p>Producers or distributors not cooperating with the competent Authorities as to the performing of control procedures shall be punished with a fine ranging from Euro 2.500 up to Euro 25.000.</p>
<b>Comments:</b>	<p>The new provisions intend to extend the liability for dangerous products to all subjects involved in the production and distribution process. Such involvement together with the RAPEX system should significantly improve the early risk acknowledgement and the preventive measures with respect to products placed on the Community market.</p>

<b>2. Self-Regulation</b>	
<b>Topic:</b>	Cosmetics
<b>Who:</b>	Review Board and Jury of the Institute for Advertising Self -Regulation
<b>When:</b>	July 2004
<b>Where:</b>	Italy
<b>What Happened:</b>	<p>The Review Board stopped a commercial of a famous cosmetic producer promoting an anti-cellulite treatment, as infringing Sections nos. 2 (misleading advertising), 9 (Violence Vulgarity), 23 (Cosmetics for Personal Health) of the CAP (= Code of Advertising Self- Regulation).</p> <p>In its injunction the Review Board stated that the advertising message about the promised anti-cellulite effects of the product, was greatly deceiving for consumers with respect to the real results achievable by using the promoted treatment. In particular, the ad was clearly suggesting that the product could deeply act below the skin's surface, whereas such effect cannot be achieved through the mere use of a cosmetic.</p> <p>The ad showed the legs of a woman stripped of a thick layer of fat and the script presented the product as the first Adrenalyse treatment against the "installed cellulite". "Efficacy granted to be achieved by one month, action anti-relapse clinically tested".</p> <p>The Review Board found that the image, showing the woman while attacking herself, was negative and shocking, as allusive of the woman's intolerance towards her body.</p>

	<p>The case was brought in front of the Jury., which found (see adjudication no. 126 of July 23<sup>rd</sup>, 2004) that:</p> <ul style="list-style-type: none"> <li>- the advertised product belonged to the so-called “<i>cosmeceutici</i>”, a special category of products, considered on the borderline among cosmetics and pharmaceuticals, which besides to cosmetic properties may have some therapeutic effects,</li> <li>- the marketing of “<i>cosmeceutici</i>” does not require the manufacturer to perform clinical test before placing the products on the market,</li> <li>- such circumstance doesn’t imply that the any form of generic and approximate presentation of these products is acceptable,</li> <li>- the specific promotion presented the product, claiming an anti-relapse efficacy, which was assumed as ‘clinically tested’ (while in the course of the proceeding no substantiation was provided as to such tests; the producer, on request of the Jury, could only file documents referring to the product’s patent and give evidence that the claimed effects of the product’s active principle had been tested in vitro, but not clinically),</li> <li>- the questioned commercial had to be considered as misleading and infringing Sections 2 and 23 of the CAP with respect to the statements claiming not-existing clinical tests and promising effects not achievable by using this kind of product,</li> <li>- the used image, even if it was likely to have a huge emotional impact, it has not to be considered repugnant and therefore the ad was not infringing Section no. 9 of the CAP.</li> </ul> <p>Therefore the Jury ordered to cease any further diffusion of the claimed ad.</p>
<b>Comments:</b>	<p>The Industry Self Regulation is particularly sensitive towards claims that promise the achievement of extraordinary results and grant the efficacy of a product with reference to clinical tests. This considering the huge psychological impact that a suggestive and miraculous promise of success against anti-cellulite damages, may have on women’s willing to eliminate such unaesthetic signs.</p>

<b>3. Case Report:</b>	
<b>Topic:</b>	Comparative Advertising – Outdoor ads – TV Commercials
<b>Who:</b>	(i) Market and Competition Commissioner (ii) Jury of the Institute of Advertising for Self-Regulation
<b>When:</b>	July – September 2004
<b>Where:</b>	Italy
<b>What Happened:</b>	<p>(i) A famous shopping center chain (A) required action from the Market Competition Commissioner against a competitor’s (B) promotional campaign, aimed at high lightening – through price comparison – the cheapness of the products sold in its department stores.</p> <p>The ad displayed on advertising posters and banners diffused in Central Italy, showed a shopping trolley full of foodstuff and convenience goods. Only some of the several products inside the trolley were recognizable, whereas most of them were not perceivable as to their nature and label.</p> <p>The printed headline stated: “<i>Sample of shopping done on October 27<sup>th</sup>, 2003. Make the comparison and cut the inflation...the pleasure of each day</i>”. Near by the trolley three boxes of different colours indicated respectively each total amount of the same shopping done in three different shopping centers (A= Euro 102,84) (B= 99,52) and (C= 101,51). The lower price (the promoter’s one) was crossed in red</p>

and the message below the promoters' logo stated "*moreover by November 8<sup>th</sup>, till 30<sup>th</sup>, - 10% off on the whole shopping for fidelity card's holders*".

The claimant (A) argued that the comparison was unfair and misleading since consumers were erroneously induced to believe that any product purchased at B's shops was cheaper than the same sold by the others two competitors.

On the contrary, A had ascertained that on the basis of a different sample of shopping of 10 products purchased both at A and at B, nine products on ten were cheaper at A's than at B's store.

Moreover consumers were not able to check such claimed cheapness since the products of the shopping's sample were not identifiable.

The Commissioner opened an enquiring procedure and invited parties to file their additional memories and documents.

Company B defended its promotion arguing that the comparison was based on true and verifiable data: the same combination of products respectively purchased at the three compared shopping centers.

In addition, the ad would not mislead consumers with respect to the content of the shopping's samples compared. Consumers, in fact, would have been properly informed through the advertising leaflets, distributed, within the same promotional campaign, in B's stores and containing a detailed list of the 52 products included in the represented trolley.

The Commissioner found that the resulted in an unfair comparative advertising, likely to mislead the public as (see adjudication no. 13582 of September 9<sup>th</sup>, 2004):

- **1)** the message was based on a price comparison not verifiable, as it referred to products not exactly identified or identifiable with respect to their quantity or brand; fair comparative advertising must compare objectively verifiable and representative features of competing goods or services,
- **2)** the particular comparison appeared likely to induce consumers to believe that the shopping center B was always cheaper than the other two competitors; documents filed during the proceeding had given evidence that actually A's shops resulted to be cheaper than those run by B with respect to most of the products; furthermore, the Commissioner did not agree on the defendant's argument concerning the leaflet (containing a detailed list of the compared products) distributed in-shop; in the Commissioner's view, such leaflets, even if part of the same advertising campaign, couldn't be considered as part of the claimed message lacking any kind of reference to them on posters/banners. On this the Commissioner confirmed its consolidated opinion and stated that messages distributed in the context of a promotional campaign cannot supplement the eventual informative failures in the text of some of them, especially when reference is made to the content of the messages diffused in the same promotional campaign.

Subsequently the Commissioner ordered competitor B to stop immediately any further diffusion of the comparative advertising.

**(ii)** A worldwide famous company (K), producing home cleaning products, required action from the Jury of Self Regulation against two commercials of a

	<p>competitor (J), as infringing Sections no. 2 (Misleading Advertising) and no. 15 (Comparative Advertising) of the CAP.</p> <p>The two ads (similar except for their length) ended with the following statement: “xxx, no spot inside and outside. Quality J”</p> <p>The claimant K argued that the campaign resulted in illicit comparative advertising, since it compared J’s laundry detergent with those of competitors, included that of K, which - even if not explicitly mentioned - was easily recognizable by consumers.</p> <p>In particular the message was likely to mislead consumer with respect to the product’s characteristics and effects inducing the public to believe that the competitors’ products were not able to remove the spots on fabrics, while only the K detergent was apt to achieve such result.</p> <p>Company J argued in its defence that the ad was generically claiming his product’s excellence and therefore did not result misleading. Moreover the message contained only a positive statement without any deceptive intent.</p> <p>The Jury (see adjudication no. 62 of March 5<sup>th</sup>, 2004):</p> <ul style="list-style-type: none"> <li>- found that actually comparative advertising had been performed (between J’s product and the competing detergents, included that - not explicitly mentioned - of K),</li> <li>- stated that the comparison had to be considered unfair as K had failed to substantiate the statements claiming the promoted product’s specific effects and properties,</li> <li>- subsequently the ad was likely to mislead consumers with respect to the claimed special characteristics of the promoted product.</li> </ul> <p>A desist order was issued against K, prohibiting further diffusion of the ad.</p>
<b>Comments:</b>	<p>The two cases illustrate how thin the borderline among fair and unfair messages in comparative advertising sometimes results. Granting fair balance between freedom of competition (allowing the producer to claim the superiority of his product) and discrediting/denigrating effects towards competitors’ products and services is a task not easy to achieve.</p> <p>In Italy comparative campaigns quite frequently are challenged before the Industry Self-Regulation or the Market and Competition Commissioner, a reason that induces many local companies to restrain from performing comparative advertising.</p>

<b>4. Case Report:</b>	
<b>Topic:</b>	Copyright protection and downloading photos from the Internet
<b>Who:</b>	Civil Court Milan
<b>When:</b>	March 2004
<b>Where:</b>	Italy
<b>What Happened:</b>	<p>A famous French top model and actress (LC) summoned before the Civil Court of Milan some publishers of weekly gossip and fashion magazines, claiming compensation for the damages suffered as consequence of the unauthorized exploitation of her own imagine (published without seeking her consent).</p> <p>The actress performed as the host of a famous local singing festival.</p>

	<p>Immediately after such performance, several photos showing the actress were published on some magazines. The actress claimed that the photos were published without her prior consent and without paying any royalty for the copyright.</p> <p>The parties argued over “fair use” of the actress’ photos: the defendants assumed that (after the public performance at the local festival) the particular use had to be considered as covered by the generic right of press freedom, especially since the photos had been downloaded from LC’s official web site and therefore had been transferred into ‘public domain’.</p> <p>The Court in Milan found that:  using photos of the model, shot for commercial purposes under exclusivity right terms, was not covered by the extent of the freedom of press principle,  moreover in the specific case, no general interest (of informing the public) could be invoked in order to justify the photo’s use, since the pictures downloaded from the Internet were showing the actress in particular sittings (on a photo set) totally apart from any public and social event; subsequently Internet surfers could not pretend to download the photos on the website for commercial purposes.</p> <p>As to the claim for damages compensation, the judges awarded against the publishers a total amount of Euro 29.500,00 (a sum significantly lower than that the model usually charges for a photographic session). The Court has justified his verdict specifying that the plaintiff had not suffered any offence to her professional reputation and that substantially the claimed use consisted in a new unauthorized use of photos previously made by the actress, which were already used for commercial purposes with her prior consent.</p>
<p><b>Comments:</b></p>	<p>The principles stated by the Civil Court with respect to this case assume great relevance in determining the extent of the freedom of press principle, which cannot be confused with an unconditional right to make indistinct (and especially commercial) use of someone’s photos. Moreover the judges have clearly stressed that putting a work on the web site and allowing the users to freely downloading it, does not imply that the work automatically may be considered as fallen into public domain.</p> <p>In Italian jurisprudence precedents on this topic generally referred to software programs; through this verdict the principle appears to have been extended to traditional works like literary texts and photos.</p>

<p><b>5. Self Regulation:</b></p>	
<p><b>Topic:</b></p>	<p>Code of Advertising Self-Regulation – New provisions on Advertising to Children</p>
<p><b>Who:</b></p>	<p>The Institute for Advertising Self-Regulation (IAP)</p>
<p><b>When:</b></p>	<p>July 2004</p>
<p><b>Where:</b></p>	<p>Italy</p>
<p><b>What Happened:</b></p>	<p>On July 22<sup>nd</sup>, 2004, the IAP approved the 36<sup>th</sup> edition of the Code of Advertising Self-Regulation.</p> <p>The text of the new Code is substantially confirming the precedent edition with the sole amendment of Section no. 11 “<i>Children and Adolescents</i>”.</p>

	<p>The new Section introduces specific provisions aimed at strengthening minors' protection towards advertising that could affect their nutritional habits, stating that (in bold types the new version):</p> <p><i>“Particular care must be taken in advertising messages addressed to children and adolescents or which could be received by them.</i></p> <p><i>These messages must not contain anything, which might damage them psychologically, morally or physically and, further, should not take advantage of their natural credulity, inexperience or sense of loyalty.</i></p> <p><i>In particular, this advertising must not induce children and adolescents to:</i></p> <ul style="list-style-type: none"> <li>- <i>violate rules of generally established social behaviour;</i></li> <li>- <i>act dangerously or expose themselves to dangerous situations;</i></li> <li>- <i>believe that lack of ownership of the advertised product means either inferiority or parent's failure to fulfil their duties;</i></li> <li>- <b><i>diminish the role of parents and other educators in supplying healthy nutritional advice;</i></b></li> <li>- <b><i>adopt poor eating habits or neglect the need for a healthy lifestyle;</i></b></li> <li>- <i>solicit other people to purchase the advertised product.</i></li> </ul> <p><i>The use of children and adolescents in advertising messages must avoid the exploitation of adults natural sentiments regarding the young”.</i></p>
<b>Comments:</b>	<p>In compliance with its peculiar sensitiveness towards changing social habits and needs, the local Industry Self-Regulation system intends to offer a significant contribution to the fight against the obesity (considered as a serious nutritional pathology, currently intensely discussed in all industrialized countries).</p> <p>Therefore Italian Advertising Self-Regulation system puts itself in the frontline of the initiatives targeted to promoting nutritional habits agreeing with a healthy lifestyle. Such effort is also in line with the guidelines set by the European Advertising Standards Alliance European Advertising Standards Alliance in cooperation with the European Nutritional Confederation.</p>

<b>6. Case Report</b>	
<b>Topic:</b>	Ban of tobacco advertising - press ads
<b>Who:</b>	(a) Supreme Court (Corte di Cassazione), (b) Advertising Self-Regulation
<b>When:</b>	September / July 2004
<b>Where:</b>	Italy
<b>What Happened:</b>	<p>Recently indirect commercial promotion for tobacco products came under scrutiny, both from the Italian Civil Supreme Court as well as from the Advertising Self-Regulation system.</p> <p><b>(a)</b> The Supreme Court had to deal with a case originating from a number of press ads, published in local magazines in order to promote the rally event “Camel Trophy” and the watch “Merit Cup” and halted by desist orders, issued for infringement of the existing ban on advertising for tobacco products (Law. No. 52 of 1983, Section 8).</p> <p>The Court, through judgment no. 18431 dated September 14th, 2004, issued by the First Chamber:</p> <ul style="list-style-type: none"> <li>- disagreed with the publishing house's (the plaintiff's) argument, according to which the questioned ads did not directly promote tobacco products, but were actually aimed at drawing attention towards a car racing event (“Camel Trophy”) and towards a product (a watch, “Merit Cup”) having absolutely no connection with tobacco,</li> </ul>

	<ul style="list-style-type: none"> <li>- held that a trademark famous for tobacco products may be legitimately used for promoting different products only if it has become notorious in another sector to an extent that the autonomous promotional effect prevails - on the side of the general public - over any immediate association with the original notoriety (achieved for tobacco products),</li> <li>- stated that such new prevailing effect had to be properly substantiated (which the plaintiff had failed to do) and to be evaluated by the court not in abstract terms, but on a case-to-case basis,</li> <li>- concluded that in the submitted case, given the use of the “Camel” logo, the campaign for the “Camel Trophy” rally resulted actually in illicit advertising for a cigarette brand,</li> <li>- found that the mark on the promoted watch immediately evoked a specific association with the sports event “Merit Cup”, notoriously sponsored by a manufacturer of tobacco products, and established that subsequently clear - even if indirect - reference to products covered by the ban on tobacco advertising occurred.</li> </ul> <p><b>(b)</b> A few weeks earlier the Review Board of the Institute for Advertising Self-Regulation had objected to a press ad (for crash helmets) showing Motorbike GP driver and former world champion Max Biaggi on a racing bike, where the “Camel” logo could be seen. In the Board’s view such association implied violation of the CAP’s (= Code of Advertising Self-Regulation) provisions (Section 12) concerning advertising for dangerous products.</p> <p>Through decision no. 158 dated July 22nd, 2004 the Jury:</p> <ul style="list-style-type: none"> <li>- affirmed that it was not its task to enforce the ban on tobacco advertising set by statute law, but to focus on potential violations of the CAP,</li> <li>- found that the question at stake was to assess whether the provisions referring to advertising of dangerous products became relevant only when said product was the immediate and direct object of the promotion, or also in cases in which the particular product was just part of the context of the ad,</li> <li>- considered that in the specific case nothing in the ad appeared aimed at steering the purchase or consumption of tobacco products,</li> <li>- stated that that the CAP’s provisions, when referring to dangerous products (as contained in Section 12), were not intended to discourage the consumption of a certain product, but rather to provide consumers with proper instructions for a correct use,</li> <li>- therefore established that the ad questioned by the Review Board was not infringing the CAP’s criteria and guidelines.</li> </ul>
<b>Comments:</b>	As in most countries throughout Europe and in all those members of the EU, so in Italy tobacco advertising is currently living a tough and troubled season. Industry Self-Regulation still appears to adopt a more flexible approach, while Courts and Administrative Bodies follow stricter criteria.

<b>7. Case Report:</b>	
<b>Topic:</b>	TV commercials - Food products - Testimonials
<b>Who:</b>	Advertising Self-Regulation
<b>When:</b>	March / July 2004
<b>Where:</b>	Italy
<b>What Happened:</b>	<p>In year 2004 the local Institute for Advertising Self-Regulation delivered several adjudications with respect to advertising of food products.</p> <p><b>(a)</b> A commercial promoted a yoghurt drink, enriched with special milk</p>

enzymes (lactobacillus casei imunitas). To this purpose it presented a girl and her father, dressed like a doctor (with a white overall, an endoscopes, a typical doctor's case), while endorsing the consumption of such drink with claims suggesting that the consumption of the product 'every morning' would determine beneficial health effects by 'enforcing the girl's natural defences and fighting bad bacteria'.

While the Review Board did not question the beneficial effects of milk enzymes, it objected to the lack of indications about the quantity of enzymes necessary in order to achieve actual enforcement of natural defences. In addition the Board questioned the endorsement of the product through the use of a doctor figure as a testimonial, considering that the general public would easily associate the 'effectiveness' of the drink with that of a medicine.

The Jury shared the Board's views and stated (see adjudication no. 157 of July 22nd, 2004) that:

- a promotional message may be perceived differently by the targeted public according to the source which it originates from,
- reference to a doctor as a testimonial usually causes two distinct effects: on the one side, towards the consumer who's reading of the promotional message's content will be influenced by the testimonial's authoritativeness; on the other hand, with respect to the product, which is endorsed by a subject characterized by specific 'competence' and therefore will be associated with beneficial effects, that it does actually not have and that generally pertain to pharmaceuticals,
- the commercial had to be held as in breach of Section 2 of the CAP (which contains the provisions dealing with misleading advertising).

**(b)** A Haribo commercial for the Chupa Chups product 'Cremosa' was also questioned as misleading (by a competitor) and brought before the IAP's Jury.

The commercial showed a boy enjoying a Chupa Chups lollipop, while the mother at his side is eating strawberry ice cream. The boy dips the lollipop in his mother's ice cream and likes it even more. Now an ice cream vendor is shown, who draws a new kind of ice cream (strawberry mixed with cream) from a dispenser, and asked by the boy whether he could have another one, answers, "*Sure, it's without sugar*". The commercial ends with a close-up shot on the claim "*Without Sugar*", placed near the mark of the International Dental Health Foundation. In addition a voice states that the International Dental Health Foundation endorses the use of the product as apt to favour dental care.

The Jury considered the commercial as in breach of Section 2 of the CAP and issued a desist order (adjudication no. 44 of March 5th, 2004) on the following grounds:

- many food products distributed on the Italian market do not contain sugar; therefore, such characteristic had been improperly stressed as something new and as a sort of additional quality value, a 'suggestive effect' achieved through the endorsing statement and the visual presentation of the logo of the International Dental Health Foundation,
- the use of a quality/trust mark in association with the suggestion that the consumption of a food product could lead to beneficial effects, appeared sufficient to induce consumers to attribute to said product qualities and results similar to those deriving from medicines,

	<p>- such association resulted in violation of the provisions set by statute law for labelling and advertising of food products (the Jury made specific reference to Section 13 of Law no. 283 of 1962, Section 2 of Law by Decree no. 109 of 1992 and Section 2 of the EU Directive no 2000/13).</p>
<b>Comments:</b>	<p>Great caution is necessary when advertising campaigns intend to emphasize characteristics or nutritional qualities of foodstuff. Following a recent trend of contemporary society, Industry Self-Regulation feels that such campaigns should never try to over-impress the general public neither through authority or testimonial endorsement nor by inducing to associate benefits achievable through food consumption to effects usually pertaining to therapeutic or medical treatment.</p>