

Case Details

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National ID	Administrative case 9780/2015
Member State	Bulgaria
Common Name	link
Decision type	Supreme court decision
Decision date	10/12/2015
Court	Supreme Administrative Court
Subject	
Plaintiff	Bulgarian Commission on Protection of Competition
Defendant	Kaufland Bulgaria EOOD and Co KD
Keywords	accuracy of the claim, advertising, misleading advertising, price comparison

Directive Articles

Misleading and Comparative Advertising Directive, [link](#)

Headnote

The use of the advertising slogan “at the lowest prices” constitutes misleading advertising in cases where the price of the advertised goods offered by the trader is equal but not lower than the price offered for identical goods by other competitors.

Facts

The defendant launched an advertising campaign for promoting specific food products offered for sale in its supermarket chain in Bulgaria. The promotional campaign involved outdoor advertising, online advertising and distribution of printed materials under the slogan “lowest prices guaranteed”. The advertisement also announced that every customer who had purchased within the same day from competing retail chains an identical product at a lower price was entitled to receive the difference with the defendant’s own price.

The Commission on Protection of Competition (which is the regulatory body responsible for enforcement of the national provisions transposing Directive 2006/114/EC) initiated an investigation with regard to the above promotional activities. In the course of the investigation the authority established that when the defendant reacted to customers’ lower price notifications by decreasing its own price, its new price was not always below that of its competitors – in many cases the defendant was only matching their price. In view of that the Commission on Protection of Competition concluded that the advertising claim “lowest prices guaranteed” was misleading and issued a decision imposing a fine on the defendant in excess of BGN 542,000 (approx. EUR 277,000).

This decision of the Commission on Protection of Competition was overruled by the first instance court (the Supreme Administrative Court, panel of 3 judges). Based on linguistic and grammatical analysis of the advertisement slogan the court took the position that “the lowest price” claim could be interpreted in the context that no other competitor offers lower prices. In light of this interpretation the claim would be correct not only where the trader sells goods at prices below any other competitor, but also where the price is identical with the lowest price offered by a competitor. Consequently, the advertisement was deemed not to be misleading and the decision of the Commission on Protection of Competition was reversed.

The above decision of the first instance court was appealed by the plaintiff before the cassation instance- the Supreme Administrative Court, panel of 5 judges.

Legal issue

The Supreme Administrative Court, panel of 5 judges, did not share the conclusions of the lower court that the advertising claim was not misleading. Firstly, the court found that indeed "the lowest prices" claim could be interpreted in two different ways- on the one hand that all competitors offer higher prices (the interpretation applied by the plaintiff) and on the other hand that no other competitor offers lower prices (the interpretation applied by the first instance court). Accordingly, the court held that the mere fact that there are two possible ways for interpretation of a single claim and one of these interpretations could be deceptive to the average consumer is sufficient to support the conclusion that the claim is misleading. The court further stated that it is sufficient to have an objective possibility of confusion, without such a misleading to actually occur, therefore, it does not matter which version of interpretation or what possible conclusions the consumers would make when interpreting the advertising claim. The message misleads the consumer in both variants of its interpretation, because even when the trader offers a price equal to the price of other competitors, that offered price is not the lowest price available on the market, but is equal to the price offered by other competitors.

The court also rejected the conclusion of the lower court that the monitoring process carried out by the defendant as "preliminary, ongoing and follow-up control" ensures the claim for lowest price. It was found that the trader assigned to customers themselves to perform the task of a daily market research if they want to secure their so-called "lowest price guarantee" and the lack of any client's alerts did not result in reduction in the price of a product advertised as a product having the lowest price, even when it was sold by the defendant at a price higher than the price of a competitor.

Based on the above reasoning the court took the position that the advertising campaign at issue was in violation of the ban on misleading advertising.

Decision

Does the use of the advertising slogan "at the lowest prices" constitute misleading advertising in cases where the price of the advertised goods offered by the trader is equal but not lower than the price offered for identical goods by other competitors?

URL: <http://www.sac.government.bg/court22.nsf/d6397429a99ee2afc225661e00383a86/dd1b65572181e5b6c2257f06005d0364?OpenDocument>

Full text: [Full text](#)

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Legal Literature

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Result

The cassation court reversed the first instance court judgment and confirmed the decision of the Commission on Protection of Competition that the advertising campaign constitutes misleading advertising.